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Life After the Establishment Clause

Steven G. Gey
Florida State University College of Law

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INTRODUCTION

We have now completed the first full term of the Roberts Court. During this term the Court issued its first major Establishment Clause decision in Hein v. Freedom From Religion Foundation, Inc. In this case the Court restricted—although it did not eliminate altogether—the ability of plaintiffs to use their taxpayer status to obtain standing in federal court to challenge government financing of religious activity. Specifically, the Court refused to grant standing to taxpayer plaintiffs challenging executive branch decisions to fund religious activities. Thus, the Court chipped away at its traditional willingness to recognize the often highly-amorphous injuries of Establishment Clause plaintiffs and began integrating Establishment Clause challenges into the far more restrictive rules that have governed standing in federal court since Lujan v. Defenders of Wildlife. Hein may be the harbinger of further restrictions on standing in other

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1 127 S. Ct. 2553 (2007).
types of Establishment Clause cases, such as cases involving government endorsement of sectarian religious principles and symbols. We could be on the brink, in other words, of a substantial contraction in the number and nature of Establishment Clause claims that may be brought before the federal courts. In the absence of a plaintiff who has a very specific, tort-style injury—such as a child who is forced to pray in a public school classroom or a prisoner who is forced to engage in religious activity to obtain early-release credits—systematic Establishment Clause violations may effectively get lumped together with claims under the Statement and Account Clause as de facto political questions.

The possibility that the Court will impose significant new procedural limits on those seeking to bring Establishment Clause claims in federal court is not, however, the greatest cause for concern for the dwindling number of self-identified academic and judicial separationists. The greater concern for latter-day Madisonians and Jeffersonians is the far more ominous prospect that the new majority on the Supreme Court is about to embark on a wholesale reinterpretation of the entire constitutional approach toward the relationship between church and state. This new approach would abandon any pretense of church/state separation, in favor of an approach favoring some measure of integration of church and state.

There are many indications that the newly reconfigured Court is likely to take this step. Two longstanding members of the Court—Justice Scalia and Justice Thomas—have already described in detail their version of church/state integration. Prior to their elevation to the Supreme Court, the two newest members of the Court—Chief Justice Roberts and Justice Alito—also wrote favorably of this new approach. As usual, in recent analyses of these and other

3 See Hein, 127 S.Ct. at 2573 (Scalia, J., concurring) (arguing that “Psychic Injuries”—that is, injuries deriving from mental distress incurred because of exposure to constitutional violations—are insufficient to establish standing under Article III). This approach to the Article III case or controversy requirement would virtually eliminate standing to challenge government violations of the Establishment Clause in the absence of highly individualized religious coercion, which almost never occurs outside the public school context.

4 See United States v. Richardson, 418 U.S. 166, 179 (1974) (denying standing to challenge congressional violation of Statement and Account Clause, and analogizing the claim to a political question: “In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”).

5 See, e.g., Justice Scalia’s assertion (in a dissenting opinion joined by Justice Thomas) that the country’s political structure should reflect the religious views of the culture’s monotheistic majority. See infra notes 66-75 and accompanying text.

constitutional matters, the wild card is Justice Kennedy. Except in cases involving the religious coercion of public school children, in which he recoils from the logical implications of this new integrationist regime, Justice Kennedy votes consistently with the Court's new anti-separationist majority. At times, he has even added his own voice to the integrationist mantra that a consistent application of Madisonian separationist principles would be inherently hostile to religion, since it "would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." The separationists' hope to preserve the Madisonian legacy must therefore rest with a Justice who has announced forthrightly that the Establishment Clause does not require the government "to avoid any action that acknowledges or aids religion."8

This Article addresses the details and implications of the new integrationist approach to the Establishment Clause. The first section discusses the lingering effects of the Court's long but imperfect embrace of the theory of separation of church and state. The second section discusses the major components of the new integrationist paradigm of the Establishment Clause. The third section discusses what this new paradigm portends for the Establishment Clause doctrine that frames the innumerable cases involving clashes between politically powerful religious majorities and the various types of religious (and irreligious) dissenters. The fourth and final section suggests several caveats to the seeming triumph of the new integrationist model of the Establishment Clause.

I. THE LINGERING EFFECTS OF SEPARATIONISM

The constitutional theory of church and state has been remarkably consistent over the past half-century since the Supreme Court first began enforcing the First Amendment's Establishment Clause in Everson v. Board of Education.9 Justice Black's majority opinion in that case set the rhetorical agenda for almost all of the Court's subsequent missives on the subject of the First Amendment and the relationship of church and state. In Everson, the self-proclaimed First Amendment absolutist Justice Black10 set forth an appropriately unequivocal theory of the Establishment Clause. As with his approach toward the First

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8 Id.
Amendment's Speech Clauses, Justice Black's stated approach to the Establishment Clause seemed to take the First Amendment's "no law" directive literally.

Of course, neither Justice Black's nor the full Court's Establishment Clause practice has ever lived up to their strict separationist theory. In Everson itself, for example, Justice Black provided the fifth vote to uphold New Jersey's program providing state-financed transportation of students to religious schools. In later cases the Court approved other government taxing and financing schemes that benefited religion, along with various activities that had the effect of subtly communicating the government's endorsement of religion, while Justices insisted repeatedly that they were adhering to the Madisonian separationist ideal.

Id.

See Everson, 330 U.S. 1.

Id.


Justice O'Connor was often the worst offender in the effort to approve government activities that overtly embraced religion, while denying that any governmental endorsement was afoot. See, for example, her strained effort in Lynch v. Donnelly to explain how a city's decision to erect a display containing depictions of the baby Jesus in a manger were not intended to convey any endorsement of Christianity: "The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." Lynch, 465 U.S. at 691 (O'Connor, J., concurring). In O'Connor's view, the Christmas display merely "acknowledged" religion in the same fashion as a state legislature using government funds to hire a Christian chaplain to pray before every legislative session. Id. at 692-93 (referring to Marsh, 463 U.S. 783). The line between "acknowledgement" and "endorsement" is very subtle, and is likely to be seen most clearly by those belonging to the faith that the government is "acknowledging."
Despite the Court’s inconsistent application of its separationist ideals, the repeated avowals of adherence to the principle of separation of church and state are nevertheless significant. First, the Court’s articulation of separationist principles in its decisions permitting governmental financing or endorsement of religion has constrained the scope of the Court’s decisions, even when the Court’s actual holdings have sharply deviated from the separationist norm. The Court’s continued obeisance to separationist principles has limited the scope of the Court’s decisions, for example, by serving as the basis for the requirement that religious financing and endorsement must be subsumed within broad government programs that have a generally secular focus. Separationist principles have also limited the permissible justifications the Court has offered for other government programs benefiting religion in non-financial ways. The Court’s inclination to preserve the cloak of separationism has forced those seeking to justify instances of government favoritism toward religion to go through the torturous exercise of claiming that official government-sponsored prayers and other endorsements are not to be taken literally, but rather merely “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” More importantly, because of its separationist legacy, the Court has continued to prohibit the government from overtly endorsing a particular religion or religion in general, and from explicitly singling out religious individuals or groups for special preferences. In each instance in which the Court has upheld a program or activity that effectively benefits religion, in other words, the Court has been forced to disavow—however implausibly—that the program or benefit in question has the purpose or effect of favoring religion.

The second benefit that flows from even an imperfect application of separationist theory by the Supreme Court is that it limits the ability of lower courts to circumvent Establishment Clause rules with which some lower court judges strongly disagree. There are a notable number of lower court judges who

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17 See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding Cleveland school voucher program on the ground that the program was designed to be formally neutral among funding recipients, even though ninety-six percent of the voucher funds went to parents of children in religious schools); Mueller v. Allen, 463 U.S. 388 (1983) (emphasizing the breadth of the program in upholding a Minnesota tax program awarding tax deductions for educational expenses, even though ninety-six percent of the beneficiaries were parents of children in religious schools); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding extensive financial benefits to religious organizations under a broadly construed tax exemption program for nonprofit organizations).

18 Lynch, 465 U.S. at 693 (O’Connor, J., concurring).

19 See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989) (“[G]overnment . . . may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.”).

20 See cases cited supra note 17.
resist the notion that the government cannot endorse religion or single out religious groups for special benefits in government programs. One of the most notorious examples of this tendency is Fifth Circuit Court of Appeals Judge Edith Jones, who has complained that the courts have misread the Establishment Clause to "remake society in a secular image." Judge Jones goes on to complain that "[w]hen our cultural heritage and tradition, indeed the three-millennial history of the Western world threatens to be erased by three decades of federal court pronouncements, something is amiss." Although Judge Jones expresses this tendency more vociferously than most, her views are not idiosyncratic on the Fifth Circuit. In an opinion published just five months after the Supreme Court ruled in *Lee v. Weisman* that the inclusion of prayer at a public high school graduation ceremony violates the Establishment Clause, for example, a Fifth Circuit panel (which did not include Judge Jones) stubbornly upheld a graduation prayer policy at a public high school in the Houston, Texas suburbs. In its opinion the Fifth Circuit panel distinguished *Lee* on the basis of a tortured state action analysis. The court argued that the school board's decision to permit the students to vote on having prayer at their graduation insulated the prayer from *Lee* and the Establishment Clause by rendering the prayer a private action of the students rather than public action of the state. "The practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." The Fifth Circuit was not alone in engaging in a private action fandango to avoid the Supreme Court's Establishment Clause rulings that the lower courts regarded as too inhospitable to religion. The Eleventh Circuit engaged in exactly the same tactic to uphold a similar graduation prayer policy in Duval County, Florida.

In one sense the Fifth and Eleventh Circuits' school prayer decisions arguably undermine the thesis that the Supreme Court's overtures to separationism actually advance the cause of separating church and state. These decisions seem to indicate that even in the area in which the high Court has adhered most strongly to the separationist theory—cases involving prayer in public schools—hostile lower courts easily circumvented that theory and permitted the infusion of religion into the public schools. On the other hand, even in these cases it is

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22 Id.
25 Id.
26 Id. at 972.
27 Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001) (upholding school board's "Graduation Prayer" policy, which permitted graduating students to vote on whether to include prayers or other student messages at the beginning and closing of graduation ceremonies).
easy to see the constraining effects of separationism on the lower courts. First, to get around the Supreme Court’s school prayer decisions, both the Fifth and Eleventh Circuits had to engage in some doctrinal hair-splitting that did not pass muster even with some of the very conservative members of the lower courts themselves. Second, the deep inconsistencies between Jones and the Supreme Court’s separationist school prayer doctrine led subsequent Fifth Circuit panels essentially to quarantine the Jones decision by limiting the scope of the decision to its precise facts. Finally, the clear disjunction between the lower courts’ efforts to privatize Establishment Clause violations and the contrary thrust of many years of Supreme Court doctrine in the area rendered the lower courts’ logic an easy target once the Supreme Court considered the privatization argument in its most recent school prayer decision.

The third benefit that has flowed from the Supreme Court’s nods in the direction of separationism has been the educational value of those respectful references. However imperfectly the Court has enforced its separationist tendencies, the Court’s repeated avowal of separationist values has created a culture in which the separation of church and state has entered the popular consciousness as a defining ideal of American constitutionalism. Despite the fact that the Court has repeatedly recoiled from enforcing true separationism, the Court’s repetition of separationist values has apparently had a concrete effect on

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28 See id. at 1348 (Carnes, J., dissenting) (criticizing the Eleventh Circuit majority for reading the Supreme Court’s decision in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000), too narrowly and arguing that “we ought to spend less time comparing the factual and procedural details of the Santa Fe case to this one and more time considering the lessons that decision teaches”).

29 See Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006), reh’g en banc granted, 478 F.3d 679 (5th Cir. 2007) (striking down the practice of saying prayers at school board meetings, distinguishing Jones); Santa Fe, 168 F.3d at 806, aff’d, 530 U.S. 290 (2000) (striking down public school board policy permitting voluntary student prayer at football games, distinguishing Jones); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996) (striking down the Mississippi school prayer statute, distinguishing Jones); Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 412 (5th Cir. 1995) (striking down various school prayer activities, distinguishing Jones, and holding that the court’s ruling in Jones “was limited to very specific circumstances which are not present here”). This reversal in the Establishment Clause trend within the Fifth Circuit caused other Fifth Circuit judges to complain that “our court’s recent Establishment Clause jurisprudence is not only inconsistent with Supreme Court precedent, as well as ours, but is also so erroneous and unwarranted it will be understood by some as being nothing less than hostile toward religion.” Freiler v. Tangipahoa Parish Bd. of Educ., 201 F.3d 602, 603 (5th Cir. 2000) (Barkdalse, J., dissenting to the denial of petition for rehearing en banc).

30 See Santa Fe, 530 U.S. at 290 (striking down school board policy permitting students to vote on including prayer at public high school football games). Of course, a lower court that is truly dedicated to circumventing the Supreme Court’s precedents can still find room to maneuver. See Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001), cert. denied, 534 U.S. 1065 (2001) (upholding public school board policy permitting students to vote on including prayer at public high school graduation ceremonies); see Adler, 250 F.3d at 1348 (Carnes, J., dissenting) (“[W]e ought to spend less time comparing the factual and procedural details of the Santa Fe case to this one and more time considering the lessons that decision teaches. One of those lessons is that a school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do.”).

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public expectations about the proper relationship between church and state. Although it would be impossible empirically to verify the existence of this cause and effect, one piece of anecdotal evidence that lends credence to this theory is the fact that opponents of separationism seem driven to distraction by the Court's failure formally to abandon separationism. How else can one explain the bizarrely vociferous and persistent debate over the legitimacy of judicial references to Thomas Jefferson's use of the phrase "wall of separation between Church and State" in his famous Letter to the Danbury Baptists? 31 The opponents of separation are not overreacting; they accurately perceive that the Court's articulation of constitutional principle is often just as important as its decisions in the actual cases. Even if there has never been a truly impervious legal wall between church and state, the Court's separationist statements over the years have erected a psychological wall that may turn out to be almost as effective. This is why the opponents of separationism cannot be satisfied with winning cases; they must also rip the presumptions of separationism from constitutional theory and replace them with a completely different theory in which the church is recognized as the legitimate handmaiden of the state.

In sum, from a separationist perspective, even though the Court has been only imperfectly committed to the separationist ideal, we have continued to enjoy numerous benefits from the Court's pretense that it is fully committed to that ideal. Regardless of the extent to which we all agree with the goal of separating church and state, or the supposed benefits that separationists believe accompany that goal, we can all certainly agree that a majority of the Court is now poised to abandon altogether the separationist cause. The Court's new majority is prepared, in other words, to exchange the old separationist Establishment Clause paradigm for the new integrationist paradigm. The next section will describe the key features of that new paradigm.

II. THE THEORY OF THE INTEGRATION OF CHURCH AND STATE

The central themes of the separationist Establishment Clause paradigm are not difficult to identify. Most of these themes can be found in the two most important documentary backdrops of the separationist Establishment Clause, both produced during the fight over religious establishments in Virginia—James Madison's Memorial and Remonstrance Against Religious Establishments 32 and Thomas Jefferson's Bill for Establishing Religious Freedom. 33 Several members of the Court reiterated the central themes found in these documents (with-

out dissent) in the various opinions in *Everson*, and these themes have been repeated in countless subsequent decisions. There are five main themes in the separationist Establishment Clause paradigm. These themes are: (1) the Establishment Clause creates an American political structure that is essentially secular in nature; (2) the religious majority cannot use its political dominance to enlist the government to endorse or otherwise advance the majority's sectarian views; (3) a citizen's religious views (or lack of religious views) are irrelevant to that citizen's political status; (4) the rules regarding religious establishments are national rules, which prohibit overwhelmingly dominant local religious majorities from exercising their dominance over even extremely small and unpopular local religious minorities; and (5) the Establishment Clause is a subset of the unifying First Amendment premise that it is presumptively impermissible for the government to enforce any collective assertion of ultimate value.

The Court's new integrationist majority fundamentally disagrees with each of these themes, and various members of the new majority have specifically renounced these themes and the broader concepts of individual rights and limited governmental authority that these themes represent. Several members of the new integrationist majority have explicitly articulated counter-themes that form the core of the new integrationist Establishment Clause paradigm. These integrationist counter-themes include the following premises: (1) United States is a religious country, and the United States government is and always has been defined by and structured around the culture's religious principles and precepts; (2) in the American political system the religious majority should be allowed to exercise its political influence on the government; (3) religion is a relevant factor in political decision-making; (4) local religious majorities have a legitimate interest in infusing their community with the dominant religious perspective; and (5) moral and theological relativism is not a constitutional command, and in fact is deleterious to the commonweal; therefore, the government is not required to shy away from incorporating moral absolutes into its legal mandates.

The remainder of this section will discuss each of these themes and counter-themes, with an eye toward ascertaining what a newly theocratized Constitution portends for the government's relationship with an increasingly diverse American population.

**A. Theme One: American Political Culture is Defined by Religion**

The first and most important component of the separationist Establishment Clause paradigm is the proposition that the First Amendment mandates a secular government, which is independent of any church and free of religious control, religious tests, and other sectarian prerequisites for political participation. It has become axiomatic in the separationist era that:

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*Everson*, 330 U.S. at 1.
[N]either a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.\textsuperscript{35}

The Court was equally clear during its separationist era that powerful religious factions could not use their political clout to install their form of religious belief as the nation's preferred faith, or enforce their religious prerogatives and mandates on politically weaker citizens who do not share the majority's faith.\textsuperscript{36} Hence, for over thirty years discussions of whether legislation conforms to the Establishment Clause have been dominated by the notoriously separationist three-part \textit{Lemon} test. The \textit{Lemon} test mandates that "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"\textsuperscript{37} Thus, the \textit{Lemon} test prohibits not only laws that have a secular effect, but also facially neutral laws that were enacted with religious motives. The \textit{Lemon} test reinforces the separationist perspective that the government not only cannot tell a citizen which god to believe in, it also cannot tell a citizen which holy commands to obey. From this perspective, religion, its mandates, and its consequences are totally outside the realm of the government's competence and authority; in a separationist world these aspects of life are allocated entirely to the private sector for individuals to decide on their own, free of political coercion and influence.

This first theme of secular governance and the resulting privatization of religion represents the core of the entire separationist enterprise. At the end of the day, the single most important consequence of the separation principle is the creation of a secular government, free of religious dominance, control, or manipulation. The state is not beholden to religious authorities and is structurally independent from religious institutions. The paradox is that this actually benefits religion and religious practitioners. Contrary to the usual criticism of separation principle,\textsuperscript{38} the separation of church and state does not entail institutionalized governmental hostility to religion. The reality under a separationist Estab-


\textsuperscript{36} See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prohibiting public school authorities from allowing the majority of students to vote on including prayer at public school functions outside the classroom); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting the state of New York from injecting into public school classrooms a state authorized prayer); Torcaso, 367 U.S. at 488 (prohibiting the state of Maryland from requiring applicants for notary public commissions to declare a belief in God).


\textsuperscript{38} See, e.g., Justice Kennedy's comment at \textit{supra} note 7 and accompanying text.
LIFE AFTER THE ESTABLISHMENT CLAUSE

Establishment Clause is exactly the opposite of the picture usually painted by opponents of separationism: A separationist Establishment Clause works in conjunction with other parts of the First Amendment (including the Speech and the Free Exercise Clauses) to create a vibrant and dynamic private sector, in which religion is immunized from political interference or control. Religion becomes stronger under such a system because it does not have to defend itself constantly from the state.

The separationist view of the Establishment Clause embodies certain assumptions about both religion and politics. The underlying assumption about politics is that in a proper democracy, religion should be primarily a private phenomenon because religion and politics are simply incompatible. That is, the Madisonian governmental model assumes that religion is particularly ill-suited to the sorts of pressures and influences that define the political process. Combining the typical political phenomena of personal greed, self-aggrandizement, duplicity, log-rolling, dealmaking, and unprincipled compromise, with the typical religious phenomena of theological certainty, absolute moral dictates, and the threat of eternal damnation, creates an especially dangerous cocktail. The Madisonian governmental model embodies a complementary assumption about the nature of religion. The assumption with regard to religion is that it is no longer possible in the modern world to decide collectively matters that are by their nature nonrational, metaphysical, and impervious to both empirical analysis and logical proof or disproof. In a pluralistic society in which multiple factions believe absolutely in matters that none of them can prove, the separationist perspective is that it is best for society if everyone is permitted to follow their own faith where it leads, without having to worry about their safety in the company of others who are devoted to contradictory moral and theological absolutes.

These are the central Madisonian assumptions about religion and politics, which the Court’s new majority is apparently willing to reject in favor of a political model that recognizes the possibility of collective determinations of ultimate truths, and subjects those truths to the vicissitudes and distortions of political power. The Court’s new integrationist majority disagrees fundamentally with separationism’s central premise of secular governance, both on historical and theoretical grounds. The historical argument is that the United States has always been a religious culture, which the government’s actions have always reflected. The theoretical argument takes two different forms. The abstract form of the theoretical argument asserts that some mediating institution such as religion is necessary to imbue the proceduralist liberal state with value. The pragmatic form of the theoretical argument asserts that as a matter of First Amendment jurisprudence and democratic theory, religious perspectives cannot legitimately be distinguished from all other perspectives. Therefore, the integrationists assert, excluding religious perspectives from the government illegitimately discriminates against a major portion of the American electorate.

As for the historical argument, the new integrationists argue that history demonstrates that American political culture—and therefore the government
that arises from that culture—is, and always has been, defined by and infused with religion. Their general perspective is that (as the early integrationist Chief Justice Burger once summed up this stance), “Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.”\(^{39}\) In support of their view that the country has always accepted sectarian aspects to its political policies, integrationists often emphasize religious proclamations by Presidents, starting with President Washington,\(^{40}\) congressional decisions to hire legislative chaplains,\(^{41}\) and decisions by the federal government to finance religious schools on public lands during the early days of country’s existence.\(^{42}\) Justice Scalia has even asserted in the context of a dispute over public school prayer—perhaps the most controversial church/state issue—that officially sanctioned nondenominational prayers “are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.”\(^{43}\) The history and implications of the inclusion of religion into governmental affairs is actually far darker and more ambiguous than the integrationists acknowledge. This aspect of the history will be discussed briefly in Section IV.

But the point for present purposes is that the gist of the integrationist argument asserts that the integration of church and state is the norm in this country, and the separation of church and state is a recent deviation from that norm. Once a religious country, always a religious country; this is the integrationist credo.

The theoretical arguments in favor of integrating church and state complement the integrationists’ historical claims. The abstract form of the theoretical argument in favor of integrating church and state has been articulated most forcefully in the academic literature. Although there are important variations among each of these versions of the integrationist position, they each state some version of a principle once articulated by Congress in the Northwest Ordinance, a statement frequently cited by judicial proponents of the integrationist position: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”\(^{44}\)

The classic exposition of this position can be found in Michael McConnell’s 1985 defense of religious accommodations.\(^{45}\) In this article McConnell addresses the proper role of religion in the liberal democratic state. According to McConnell, the liberal state is a denuded proceduralist shell, which by its


\(^{42}\) Wallace, 472 U.S. at 100 (Rehnquist, J., dissenting).


\(^{44}\) See The Northwest Ordinance, 1 Stat. 50, 52 n. (a), ART. III quoted in Wallace, 472 U.S. at 100 (Rehnquist, J., dissenting).

very nature has no animating moral purpose. "[T]he liberal state itself cannot ultimately be the source . . . of the people's values."46 Within this context, religion is "special"47 because it is one of the primary means of providing the moral basis for social life and political policy, which liberal constitutionalism is unable to generate independently. McConnell argues that "republican self-government could not succeed unless religion continued to foster a moral sense in the people."48 Thus, liberal democracies require "mediating institutions" such as churches to provide a context in which "citizens in a liberal polity learn to transcend their individual interests and opinions and to develop civic responsibility."49 This acculturation function is what McConnell calls the "'political' effect[] of religion."50 According to this theory, the separation of church and state is actually deleterious to the long-term development of social norms necessary to make a democracy thrive. This approach challenges the desirability of attempting to build society on a foundation of value-neutral empiricism, rationalism, and scientism. These are the key components of the secular rationality at the heart of the separation principle, which McConnell and others, such as Professor Chip Lupu, have argued is not "particularly conducive to the life of the spirit, without which it may not be possible for a nation to thrive."51 At the end of the day, therefore, the integrationist position would require us to fundamentally recast our constitutional view of the state, and renounce once and for all the notion that church and state could (or should) be kept separate; "the state itself," McConnell argues, "is religiously pluralistic—not secular."52

The pragmatic version of the theoretical argument for an integrationist Establishment Clause takes a much more focused approach to the subject than the abstract version of the argument. The pragmatic claim is that a separationist interpretation of the Establishment Clause discriminates against religion and religious perspectives in a way that is contrary to the general theme of content and viewpoint neutrality that permeates the First Amendment. There are several subordinate themes to this argument.

The first subordinate theme of the antidiscrimination argument is that the government should treat religious perspectives on political matters the same as all other perspectives. In its purest form, this is a claim about expressive rights under the Speech Clauses of the First Amendment. As Justice Scalia has noted, "in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech

46 Id. at 16.
47 Id. at 18.
48 Id. at 19.
49 Id. at 17.
50 Id. at 19.
52 McConnell, supra note 45, at 41.
clause without religion would be Hamlet without the prince.” In contexts in which the religious speech is entirely private and could not be mistaken for speech by the government, few people would disagree with this proposition. Many classical free-speech cases involved religious speakers. The Jehovah’s Witnesses alone can take credit for establishing many of today’s most important First Amendment rights and doctrines. The key to these cases, however, is that the speech is entirely private. The case in which Justice Scalia made the comment quoted above, however, involved private speech that occurred in a context in which the private speech could be mistaken for speech by the government. Justice Scalia and other integrationists on the Court find this distinction irrelevant, which leads them to proffer the second subordinate theme of their antidiscrimination argument.

The second subordinate theme of the antidiscrimination argument is that precluding the government from advancing a religious cause presents the same constitutional problems as restricting speech on religious subjects or limiting gatherings for religious purposes in the private sector. The integrationists are not primarily concerned with protecting religious activity in the private sector. Rather, they are primarily concerned with injecting religion into government. Michael McConnell, for example, has argued that “the idea of ‘separation between church and state’ is either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic.” In the same vein, Justice Kennedy once asserted that imposing limits on the government’s ability to “acknowledge” the majority’s faith “would border on latent hostility to religion.” From the integrationist perspective, interpreting the Constitution to bar religious groups from capturing control of the government and adopting political policies that are consistent with their sectarian points of view would amount to “hostility” or discrimination toward those groups. The only way to avoid

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54 See, e.g., Watchtower Bible and Tract Soc’y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150 (2002) (striking down a broad city permit scheme that limited door-to-door advocacy); Wooley v. Maynard, 430 U.S. 705 (1977) (upholding the right of a Jehovah’s Witness to refuse to display an objectionable state motto on his license plate); Fowler v. Rhode Island, 345 U.S. 67 (1953) (upholding the right of a Jehovah’s Witness to preach in a public park); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (upholding the right of Jehovah’s Witness children to decline to recite the Pledge of Allegiance); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down an ordinance that imposed a flat fee on door-to-door solicitation); Cantwell v. Connecticut, 310 U.S. 296 (1940) (striking down a statute prohibiting solicitation for charitable activities without prior approval of the state).
55 See Pinette, 515 U.S. at 753 (upholding the right of private groups to place a large Roman cross in a park adjacent to state buildings).
57 County of Allegheny v. ACLU, 492 U.S. 573, 637 (Kennedy, J., concurring in the judgment in part and dissenting in part).
such discrimination, therefore, is to allow those religious groups to exercise their political power to impose their views on others through law.

The third subordinate theme of the antidiscrimination argument complements the second theme. The third subordinate theme is that by refusing to endorse religion or advance religious causes, the government is in effect endorsing secularism and advancing an anti-religious cause. Chip Lupu, for example, has observed that:

[S]trong separationism itself may well have favored irreligion, because it lined up state power with secular rationality. One of the powerful lessons of the past twenty years of American law and history is that an ideology of secular rationality is not objective or neutral but is partial to a particular set of institutions (most notably science and the markets). 58

At times, integrationists even seem to argue that enforcement of the constitutional principle of separation of church and state is part of the government’s surreptitious plan to eradicate religion, or at least neuter it. Stephen Carter, for example, once argued that separating church and state is part of the government’s effort to:

[E]nsure that intermediate institutions, such as the religions, do not get in the way of the government’s will. Perhaps, in short, it is a way of ensuring that only one vision of the meaning of reality—that of the powerful group of individuals called the state—is allowed a political role. 59

Assertions such as Professor Carter’s are very puzzling. Given a modern political context in which it is highly doubtful that an avowed atheist or agnostic could ever get elected to a major political office in vast portions of the country, the belief that a cabal of pagans in legal and political circles is hell-bent (so to speak) on using the First Amendment to annihilate the very institution of religion is simple fantasy. These assertions do not reflect the modern American cultural reality, although such statements do illustrate the extent to which the integrationist perspective on the Constitution reflects in legal terms the victimization and social ostracism felt by some religious persons. These statements also illustrate the extent to which disputes over the integration of religion into government have become intertwined with larger issues that are generally

58 Lupu, supra note 51, at 279.
lumped together under the term "the culture wars." Disputes about religion and sin lie just below the surface of many of the Court's most fractious recent decisions involving personal liberties, including those involving gay rights, sexual freedom, and abortion.

In light of the growing confluence of religion and politics, it is clear that at the most basic level, church/state integrationists disagree comprehensively with the separationist perspective that religion is at heart a private, individual matter that is best left to each individual believer and that person's faith community. In contrast to the separationist approach to religion as quintessentially a private matter, integrationists view religion as in many important respects a collective enterprise. To integrationists, religious faith can only be fully realized if it is celebrated and appreciated in public by groups of believers or, indeed, by society as a whole. As Justice Scalia once argued in the public school context:

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 privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."

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60 See Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins-and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").


62 See Lawrence v. Texas, 539 U.S. 558 (2003), overruling Bowers v. Hardwick, 478 U.S. 186 (1986). The religious nature of this dispute was made explicit in Chief Justice Burger's concurring opinion in Bowers, in which he noted: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." Bowers, 478 U.S. at 196 (Burger, C.J., concurring).

63 See Webster v. Reprod. Health Servs., 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) (arguing that abortion regulations predicated on state determinations that life begins at conception violate the Establishment Clause because such regulations have no secular purpose and represent "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths . . .").

64 Lee v. Weisman, 505 U.S. 577, 645 (Scalia, J., dissenting).
The melding of the immediate and temporal interests of politics and government with the eternal and celestial interests of the church is central to the integrationist enterprise. In the integrationist scheme of government, the political use of religion does not just help guide the country's leaders and provide a moral grounding for political action; religion is actually used to certify that the nation is carrying out God's will. The use of religion by government communicates the message that political decisions represent more than the crass self-interest of whatever set of political participants happen to rule the day. The political victors therefore represent more than just themselves; they—and the nation they govern—become part of God's plan. With regard to the battle over the inclusion of "under God" in the Pledge of Allegiance, therefore, it is totally in keeping with the integrationist perspective on the relationship between church and state that the White House bugler struck up the tune "Onward, Christian Soldiers!" at the ceremony at which President Eisenhower signed the statute integrating the political majority's most basic religious belief into the nation's Pledge.65

B. Theme Two: The Religious Perspective of the Government will be that of the Religious Majority

One advantage of the separationist perspective on the Establishment Clause is that it avoids the need to identify criteria for determining the extent to which any religious group has a compelling claim to exercise political power and incorporate its views into law. To a separationist, no religious group has a legitimate claim on political power; therefore, regardless of how much political might a particular religious faction might possess, that faction is not permitted to exercise its clout by imposing its sectarian views on others. To a church/state integrationist, on the other hand, identifying the appropriate religious faction to serve as the guiding sectarian influence on American government presents a significant problem. If, as posited by the abstract theoretical argument in favor of the integrationist paradigm, religious influence over government is necessary to provide the civic virtue that is required for enlightened governance, then some particular set of religious principles and precepts must be identified as giving substance to the concept of civic virtue.

65 See 100 CONG. REC. S8617 (1954):

On that June day, within a few minutes after the signature of the President had written "under God" in the Pledge of Allegiance, the bill that legalized it leaped to life in a scene silhouetted against the white dome of the Capitol. There stood Senator Homer Ferguson, who had sponsored the resolution in the Senate, and with him a group of legislative colleagues from both houses of Congress. As the radio carried their voices to listening thousands, together these lawmakers repeated the pledge which is now the Nation's. Then, appropriately, as the flag was raised a bugle rang out with the familiar strains of "Onward, Christian Soldiers!"
Integrationists often argue as if the religious principles that should be integrated into government policies are broad, universal, and incontestable, as when Justice Scalia argued in a school prayer case that religious believers should be allowed to "join . . . in prayer together, to the God whom they all worship and seek." The basic integrationist claim is that aside from a small handful of noisy kvetches, we "all" want to incorporate religion into government and can "all" agree on the details of what "religion" means. But the fact that Justice Scalia's statement was made in a case in which someone went so far as to bring a lawsuit to defend her right to avoid a prayer belies the notion that "all" believers seek to pray together in the same way and to the same God. Indeed, it seems self-evident from centuries of religious conflict that religious practitioners pursue their faiths in very different ways, and that religious principles are often inherently contentious and mutually exclusionary. This is precisely the integrationist's dilemma. Once we accept the claim that religion is necessary for good governance, we have to decide what we mean by "religion." So at some point, if the Court accepts the integrationist perspective on the Establishment Clause, it will have to set forth an analytical framework for separating the correct religious principles, which the government can integrate into its policies, from the incorrect religious principles, which the government may renounce.

The integrationists respond to the dilemma of having to distinguish good religion from bad by resorting to a ham-fisted majoritarianism, coupled with a disingenuous elision of the knotty issues that have forever divided religious factions competing for power in the political sphere. Justice Scalia has already written the schematic for this aspect of the integrationist agenda.

Step one in the integrationists' majoritarian schematic is to lump together the major mainstream faiths and to assert in the face of all historical evidence to the contrary that these faiths have exercised political power essentially in unison throughout the nation's history. In his opinion in the recent Ten Commandments decision, for example, Justice Scalia makes this point by asserting that the government should be allowed to endorse the existence of God and the overtly religious axioms embodied in the Ten Commandments because the Commandments are embraced by the "97.7% of all believers [who] are monotheistic." Thus, in one fell swoop, Scalia manages to avoid the uncomfortable political implications of the rather obvious theological conflicts among adherents of Islam, Judaism, and Christianity; suggest a reason to override society's resistance to religious establishments, which arises from the collective memory of multiple historical examples of anti-Semitic and anti-Catholic actions by government; and dilute the rich stew of centuries of religious belief into the bland, featureless, and nutritionally empty broth of "monotheism."

66 Lee, 505 U.S. at 646 (Scalia, J., dissenting).
67 See McCreary County v. ACLU, 545 U.S. 844, 885 (Scalia, J., dissenting).
68 Id. at 894.
The reduction of all major branches of Western religious thought into a generic brand of monotheism leads to step two of the integrationists' majoritarian schematic, which subtly adopts as the lodestar for Establishment Clause theory the proposition urged several decades earlier by then-Justice Rehnquist:

The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.69

In other words, the integrationists implicitly assert that as long as the government does not prefer one religious sect over another, the government is within its authority to favor religion in general over non-religion. According to Justice Scalia’s more recent rendition of this "nonpreferentialist" approach to the Establishment Clause, the religious principles and teachings of the Ten Commandments "are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint."70 Thus, Justice Scalia essentially asserts that the Decalogue’s command to observe the Sabbath and keep it holy,71 its prohibition of making idols,72 having "other gods before me,"73 or coveting thy neighbor’s wife74 have all become uncontroversially universal commands, which have been endorsed by the entire society—or, more precisely, the "97.7% of all believers [who are] monotheistic"75—through mutual (albeit silent) consent.

It is important to recognize what is omitted from the picture Justice Scalia paints of broad religious consensus. Most obviously, the "97.7%" figure he uses to describe society’s virtual unanimity on these matters is a wildly skewed and grossly inaccurate depiction of the religious landscape of the mod-

70 McCreary, 545 U.S. at 894 (Scalia, J., dissenting). See also Lee, 505 U.S. at 641 (Scalia, J., dissenting) (arguing in the context of a dispute over prayer at a public school graduation ceremony that the Establishment Clause prohibits officially sanctioned prayer "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)," but does not prohibit a nondenominational prayer sponsored by the state).
71 See Deuteronomy 5:12.
72 See Deuteronomy 5:8.
73 See Deuteronomy 5:7.
74 See Deuteronomy 5:18.
75 McCreary, 545 U.S. at 894 (Scalia, J., dissenting).
ern United States. Although he acknowledges omitting from his majoritarian mix Hindus, Buddhists, and other “believers in unconcerned deities,” Justice Scalia neglects to mention that he also omits from his snapshot of America the roughly twenty percent of the population that is agnostic, atheist, or avowedly nonreligious. He also neglects to mention that many members of the sects that he does include in the dominant religious faction definitively reject his view on the integration of religious principles into government. Traditional Roger Williams-style Baptists, Seventh-day Adventists, Jehovah’s Witnesses, most Jews, many Presbyterians, and other modern nonfundamentalist Protestants reject the notion that their religious views should be integrated into the government’s policies and symbols.

When all is said and done, Justice Scalia is articulating a position that does not represent the views of 97.7% of the country’s citizens; rather, under the most optimistic calculations, he is stating a position that may represent the views of only a bare majority of the citizenry. Section IV will deal with the political implications of attempting to exclude a large swath of the nation’s population from the group of citizens who are empowered to define the country’s moral core. But for the moment it should be noted that the exclusion of significant portions of the population is an inevitable feature of the integrationist position. The simple fact is that most religious groups disagree with each other about very basic theological issues. Any attempt to define the theological overlap between sects will either dilute religion to the point that it means nothing whatsoever or will exclude large groups of people due to disagreements about matters that go to the very heart of their religious faith. These are the only two options. Therefore, assuming that the new integrationist majority is not interested in diluting religion to the point of meaninglessness, theological exclusionism is the inevitable consequence of adopting their constitutional agenda.

If this description is accurate, then it highlights one of the most disturbing features of the integrationist assertion that the Establishment Clause should be interpreted to permit religion to be a central part of defining the civic virtue that guides the government: It seems inevitable that the integrationist paradigm will produce a system that is exclusionary, divisive, and inherently sectarian. Unless the term “religion” is defined in a way that encompasses literally every point of view (in which case the concept of civic virtue would lose all meaning), then the views of some non-virtuous persons and groups must be deemed contrary to the commonweal as defined by the religious beliefs favored by the political majority. If the purpose of the exercise is to provide a strong and virtuous moral foundation for government, then some attempt must be made to protect the government’s basic moral precepts from attack by those who are unfit to govern. Thus, the third and final step of the integrationists’ majoritarian schematic is to devalue the political standing of all those who do not fit within the

76 Id. at 893.
77 See infra notes 194-97 and accompanying text.
broad scope of the religious majority’s belief system. Thus, again in Justice Scalia’s phrasing of this point, “With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”78

The implications of this blunt statement should not be understated. It acknowledges forthrightly the political consequences of the integrationist approach to the Establishment Clause. The adoption of the integrationist approach to the Establishment Clause inevitably leads to the embrace of religious majoritarianism, which for these purposes is functionally identical to religious sectarianism. Embracing religious majoritarianism likewise leads the government not only to use religious symbols and principles for political purposes, but also to develop mechanisms for enforcing the population’s obeisance to the religious majority’s dominance in defining the civic virtue that guides the country’s political policies. Even in the upcoming integrationist era, it will not be possible to formalize these enforcement mechanisms as legal mandates; there is no indication that the integrationists would seek to rescind the “No Religious Test” Clause79 or overrule Torcaso v. Watkins.80 But as the Court permits the government greater leeway in aiding religious institutions through public financing and permits the government to explicitly endorse religious views through the incorporation of religious symbols and principles into official activities, the Court simultaneously provides the government with a subtle means of advancing the view that religious belief is an essential requisite for political activity.81 If the integrationists have their way, the religious phenomenon of excommunication will now have an informal but effective analog in the political realm.

C. Theme Three: The Political Majority can use the Government to Advance Specific Aspects of its Religious Agenda

Once the first and second themes of the new integrationist Establishment Clause theory are firmly ensconced in constitutional doctrine, the next three themes of the theory follow inexorably. The third theme of the new integrationist paradigm is that the political majority can use the government to advance specific components of its religious agenda. In other words, in addition to

78 McCreary, 545 U.S. at 893 (Scalia, J., dissenting).
79 U.S. CONST. art. VI, § 3.
80 See Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (“Neither [state nor federal governments] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”).
81 In one indication of how extensive the religious socialization of political participants has already become, note that Democratic Party presidential candidates now wear their religion on their sleeves just as ostentatiously as Republican Party candidates. See Patrick Healy and Michael Luo, Edwards, Clinton and Obama Described Journeys of Faith, N.Y. TIMES, June 5, 2007, at A20.
broadly endorsing generic religious concepts such as the notion that this is a
nation "under God," the government can also enforce through law specific poli-
cies that are explicitly predicated upon religious purposes and principles. As
discussed further in the next section, the "no secular purpose" mandate of the
three-part Lemon test that has governed Establishment Clause doctrine for over
thirty years will have no place in the new integrationist constitutional universe.

The notion that the government can enforce religiously-based com-
mands and objectives follows directly from the first integrationist theme that
religion provides a necessary moral foundation for governance. As noted
above, there are three aspects to the first theme of the integrationist paradigm.
The first is that God has always been part of America's political culture, and so
current governmental policies should reflect the country's traditional religiosity.
The second is that a religious basis for government is necessary to avoid having
politics collapse into a simple competition for power among unprincipled, self-
interested factions. The third is that religious individuals should be given full
access to political power in the same way that members of all other factions are
allowed to implement their ideological and moral objectives. In sum, since
government is comprised of many religious individuals, and since the develop-
ment of civic virtue largely depends on religious teachings, the content of which
go beyond the banal generalities involved in reciting "under God" in the Pledge
of Allegiance, then advancing the particular details of the government's reli-
gious agenda is even more important than having the government pay general
homage to the Almighty.

If the integrationists are correct that some external source of civic virtue
is necessary to sustain democratic government over time, and the concept of
civic virtue is construed as something more than platitudes, then the govern-
ment's political agenda and its religious agenda become inextricably inter-
twined. One can already see how these arguments get applied to specific Estab-
lishment Clause disputes in recent opinions by integrationist judges and Justices
in both the lower courts and on the Supreme Court. For example, in cases in-
volving disputes over religion in public schools, one can easily find examples of
the historical, abstract theoretical, and pragmatic theoretical arguments in favor
of the integration of church and state. An example of the historical argument
can be found in Justice Scalia's dissent in Lee v. Weisman, in which he argues
that the public high school graduation prayers at issue in that case were "so
characteristically American they could have come from the pen of George
Washington or Abraham Lincoln himself." As for the abstract theoretical ar-

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82 See supra notes 39-63 and accompanying text.
83 Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting). See also Engel v. Vitale,
370 U.S. 421, 450 (1962) (Stewart, J., dissenting) (arguing that when the State of New York com-
posed the Regents Prayer and required it to be recited in public school classrooms, "what [it] has
done has been to recognize and to follow the deeply entrenched and highly cherished spiritual
traditions of our Nation—traditions which come down to us from those who almost two hundred
years ago avowed their 'firm Reliance on the Protection of divine Providence' when they pro-
claimed the freedom and independence of this brave new world").
argument, integrationists have argued that the government should be allowed to incorporate religion in the public schools in order to build students' character and enhance their decisionmaking skills.\(^{84}\) The pragmatic theoretical argument—which asserts that church-state separation amounts to religious discrimination—was the focal point of lone dissenter Potter Stewart's opinion in the Supreme Court's very first school prayer decision. Stewart argued that prohibiting children from reciting the state prayer in that case would "deny the wish of these school children to join in reciting this prayer [and] deny them the opportunity of sharing in the spiritual heritage of our Nation."\(^{85}\)

Similar arguments appear in the religious endorsement cases outside the public school context. In those cases, church-state integrationists often refer to the country's religious heritage, and recite the same assorted examples of government endorsements of religion in both the early Republic and the modern era. These examples include congressional decisions to hire legislative chaplains,\(^{86}\) presidential Thanksgiving proclamations,\(^{87}\) Congressional declarations of religious holidays,\(^{88}\) official prescriptions of religious mottos such as "In God We Trust" and "One Nation under God,"\(^{89}\) and religious inscriptions on public buildings, including the Supreme Court.\(^{90}\)

The integrationists also recite their theoretical arguments in the non-school endorsement cases. They argue, for example, that the government should be allowed to acknowledge symbolically the common view that religious morality is the basis for good governance and the law itself. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."\(^{91}\)

Finally, the antidiscrimination argument is a persistent undercurrent of the often angry opinions by integrationists on the Court, who vociferously dispute the notion that the Constitution mandates a thoroughly secular government.

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\(^{84}\) See Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 965 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993): The Court has repeatedly held that the Establishment Clause forbids the imposition of religion through public education. That leads to difficulty because of public schools' responsibility to develop pupils' character and decisionmaking skills, a responsibility more important in a society suffering from parental failure. If religion be the foundation, or at least relevant to these functions and to the education of the young, as is widely believed, it follows that religious thought should not be excluded as irrelevant to public education.

\(^{85}\) Engel, 370 U.S. at 445 (Stewart, J., dissenting).


\(^{88}\) Id.

\(^{89}\) Id. at 676.

\(^{90}\) Id. at 676-77.

\(^{91}\) Id. at 675.
The pique evident in Justice Kennedy’s opinion in *County of Allegheny v. ACLU* is a prime example of this phenomenon. Justice Kennedy argues that using the First Amendment to rigorously enforce the separation of church and state “would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.” Along with the Court’s other integrationists, Justice Kennedy argues that “the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society,” and that denying government such latitude to embrace religion “would border on latent hostility toward religion.” Likewise, according to Justice Kennedy, requiring federal courts to become “jealous guardians of an absolute ‘wall of separation’” would send “a clear message of disapproval” of religion. In this context, as in others, there is no sense that the integrationists have ever considered the possibility that permitting the government to endorse religion (and therefore permitting the political majority to decide which religion to have the government endorse) might communicate an even clearer message of disapproval to those whose faith does not fit the majority’s sectarian template.

The final area of frequent Establishment Clause litigation involves disputes over government financing of religious institutions and activities. The same integrationist arguments that appear in the public school and general endorsement contexts also appear in slightly different forms in the government financing cases. In the financing cases, as in the endorsement cases, integrationists turn to the country’s early history, and can once again identify several instances of government programs funneling public money to religious institutions. These early financing programs were often part of the federal government’s effort to tame the country’s restive Native American population. The programs involved various social services, including education. Two favorite citations of the genre are to the Northwest Ordinance and several congressional actions in the early 19th century setting aside public land in the Northwest Territory for schools, many of which were both private and sectarian. Integrationists use these actions of the early Congresses as proof of a long national tradition of “allowing religious adherents to participate in evenhanded government programs.”

Integrationist opinions in cases involving public financing of religious activity also include versions of the theoretical arguments noted above. With

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93 Id. at 657.
94 Id.
95 Id.
96 See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.
98 Id.
regard to integrationist claims about the need to use religion to foster civic virtue in the ordinary activities of government, integrationists argue that it is both reasonable and constitutionally legitimate for government to organize its operations based on the assumption that the provision of social services by religious groups will often be more effective than the provision of similar services by the government itself or secular nonprofit groups. In one of the Court’s earliest integrationist opinions involving publicly financed religious social services programs, the Court held that there is nothing improper about Congress making the “judgment that religious organizations can help solve the problems to which the [statute] is addressed,” 99 or “recognizing the important part that religion or religious organizations may play in resolving certain secular problems.”100

The integrationists’ anti-discrimination argument also figures prominently in the public financing cases. Indeed, the version of the antidiscrimination argument used in the financing cases is often even more forceful than the version that appears in endorsement cases. Justice Thomas even authored a plurality opinion in one public financing case in which he suggested that it might violate the Free Exercise Clause if the government excluded religious institutions from an educational funding program that was otherwise directed at public schools.101 In the public financing cases, the anti-discrimination arguments are bolstered by the complementary claim that the provision of government money to religious institutions is necessary to provide consumers of public services with a full array of choices regarding the provider of those services. There are both secular and religious implications of this argument. The secular implication of this argument is the commonplace assertion that private groups often provide public services more effectively than the government itself.102 The religious implication of this argument is that there are some people who do not want to obtain services from a secular government, and that those people should be allowed to receive their public entitlements within a framework that is compatible with their religious views. Thus, integrationists argue that the Establishment Clause is not violated even where the government is providing a state employee to translate for a student the sectarian components of a religious school’s instruction. The Establishment Clause would be satisfied “even though [the state employee] would be a mouthpiece for religious instruction, because the [state program’s] neutral eligibility criteria ensured that the interpreter’s

100 Id. at 607.
102 See Zelman v. Simmons-Harris, 536 U.S. 639, 681 (2002) (Thomas, J., concurring) (arguing that religious private schools provide better educational results than public schools, and that government voucher programs that include religious schools “can in fact provide improved education to underprivileged urban children”).
presence in a sectarian school was a ‘result of the private decision of individual parents’ and ‘[could not] be attributed to state decision-making.’”

The logic of these anti-discrimination claims is quite expansive. The logic seemingly leads to the conclusion that to avoid discrimination in the provision of public services to devout religious practitioners, the government must fund religious institutions providing those services. If the integrationists see any irony in permitting expansive state financing of religion under a constitutional provision whose origins can be found in vociferous opposition to state financing of religion, they blame this result on the expansion of the modern welfare state.

In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

It would be difficult to overstate the radical implications of the integrationists’ attempt to use arguments renouncing discrimination against religion to justify their sweeping claim that the Constitution may actually require the government to fund religious activity. The integrationists are seeking to do nothing less than revamp the entire landscape of Establishment Clause doctrine applicable to the public financing of religious institutions.

Integrationists such as Justice Thomas, for example, have long crusaded to eliminate from Establishment Clause doctrine the concept of the “pervasively sectarian” institution, which in the separationist era was a term used to describe religious institutions that were totally barred from receiving government funds because any funds going to those institutions would inevitably be used for religious purposes (since by definition religion permeated the entire institution). Justice Thomas, on the other hand, argues that “the application of the ‘pervasively sectarian’ factor [to bar government aid to pervasively religious institutions] collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.” Leaving aside Justice Thomas’s dubious claim that modern opposition to government aid to pervasively sectarian institutions is nothing more than a residue of 19th century anti-Catholic animus, the implications of abandoning this concept are nothing short of revolutionary. If the integrationists

105 Mitchell, 530 U.S. at 828 (plurality opinion of Thomas, J.) (citing Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995)).
106 Id.
have their way, then the Establishment and Free Exercise Clauses not only would no longer prohibit the government from financing comprehensively religious institutions that are engaged in explicitly religious activity; in the new integrationist constitutional universe, the Religion Clauses would actually require the government to include pervasively sectarian institutions in any public benefits program that financed secular aspects of the same type of activity—regardless of the extent to which government funds are used to finance religious indoctrination. “If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.” One could not envision a more comprehensive renunciation of the Madisonian “three pence” principle.

The ways in which the new Supreme Court majority’s integrationist theory will be applied in the specific sorts of cases noted above are important in determining the practical implications of the Court’s new theory, but these applications are perhaps equally important in illustrating the radically different focus of the Court’s new Establishment Clause perspective. Under the Court’s traditional separationist perspective, government was prohibited from advancing particular religious beliefs or symbols, or paying for religious activity, because to do so would distort the culture in favor of the government’s preferred faith. The rules with regard to specific governmental actions were therefore always defined with an eye toward the effects those government actions had on religious dissenters. Thus, in school prayer cases, the Court always rejected the notion that the government could circumvent the Establishment Clause by drafting a prayer that appealed to virtually all of the students, and excluded only a few. In endorsement cases outside the school context, the Court focused on

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107 Id. at 809-10.


Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

109 See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) (rejecting the school board’s argument that the Establishment Clause was satisfied by the practice of holding an election to determine whether a prayer would be recited at football games: “while Santa Fe’s majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.”); Lee v. Weisman, 505 U.S. 577, 594 (1992) (“[T]he embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character . . . . That the intrusion was in the course of promulgating religion that sought to be civic or non-sectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.”).
the fear that religious ostracism would mutate into political ostracism. In the financing cases, the Court’s focus during the separationist era was on two different types of religious dissenters. First, the Court focused on the dissenting taxpayer, emphasizing that the religious dissenter should not be forced to pay for the religious exercises of groups with which that taxpayer fundamentally disagrees. Second, the Court also focused on religious dissenters more broadly, on the theory that the already dominant religious factions in society should not have their dominance reinforced and magnified by the use of government funds.

Under the Court’s new integrationist theory, the Court’s focus has shifted 180 degrees, turning from the protection of religious dissenters to the facilitation of the religious majority. The Court’s new majority rejects separationist theory precisely because that theory denies to the religious majority the ability to infuse their religious beliefs into the government that they control. The new integrationist model of society envisions religious devotion as the cultural norm and religious dissenters as little more than pesky spoilsports. From the integrationist point of view, religious dissenters are the Michael Newdows and Madalyn Murray O’Hairs of the culture, odd creatures attempting to im-


The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. . . . [Government endorsement of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

111 Flast v. Cohen, 392 U.S. 83, 103 (1968) (“Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.”); id. at 106 (“The taxpayer’s allegation [is] that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress. . . .”).


Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

113 Michael Newdow is an atheist who became infamous for challenging the constitutionality of including the phrase “under God” in the Pledge of Allegiance, which was recited every morning in the classroom of the public schools that his daughter attended. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004). Madalyn Murray O’Hair was the founder of the American Atheists, who became notorious both as a public spokesman for the atheist cause and for bringing high profile challenges to various alleged Establishment Clause violations. See, e.g., O’Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (challenging the use of the National Mall for an outdoor Mass conducted by the Pope); O’Hair v. Murray, 588 F.2d 1144 (5th Cir. 1979) (challenging the use of
pose their idiosyncratic, somewhat tiresome, and possibly dangerous viewpoints on a society overwhelmingly dominated by normal churchgoing folk.

Integrationists view the extraordinary attention paid to religious dissenters under separationist doctrine as having distorted the proper ordering of society and devalued the contributions and interests of society's most important members. As usual, Justice Scalia has articulated this point most forcefully. In his dissent in *Lee v. Weisman*—a school prayer case, in which religious coercion concerns are at their height—Justice Scalia complains that "[t]he reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential." 114 He goes on to describe the larger community's interest in celebrating its religion "as a people, and not just as individuals"; in other words (quoting George Washington's first Thanksgiving Proclamation), to celebrate God as the "Great Lord and Ruler of Nations." 115 As Justice Scalia sums up his view of the constitutional choice facing the Court:

The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution. As the age-old practices of our people show, the answer to that question is not at all in doubt. 116

In other words, in the integrationist world religious dissenters lose and religious majorities win. It is very much a "love it or leave it" message. No one will be put in jail because they do not adopt the majority's religious faith, and no one will be fined or otherwise sanctioned because they do not go to church on Sunday. But at every opportunity the government will be allowed to communicate to religious dissenters that their views are outside the mainstream and strongly disfavored, and that if they want to be full-fledged participants in the business of governing the country, they better accommodate themselves to what Scalia calls "the age-old practices of our people."

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114 *Lee*, 505 U.S. at 645.
115 *Id.*
116 *Id.* at 646.
D. Theme Four: Religious Establishment is a Local, Rather than a National Concern

Another consequence of the integrationist’s goal of returning control of the country’s religious affairs to the devout majority is the effective devolution of control over religious issues to local communities and their governments. This is another inevitable effect of loosening the constraints on religious favoritism by the government generally. If the basic integrationist principle is that the religious majority should be allowed to exercise its political clout by having the government endorse its religious views and finance its religious activities, then there is no logical reason why this theory should not be implemented both at the local level as well as the state and national levels. After all, it is at the local level that many of the religious activities emphasized in integrationist opinions occur—activities such as the recitation of prayer at school and social events, the placement of religious displays on public property, and the provision of educational and social services.

To a large extent, this decentralization is already built into Establishment Clause doctrine. This is the clear implication of the ostensibly disparate holdings in two recent Supreme Court decisions: *Zelman v. Simmons-Harris*¹¹⁷ and *Locke v. Davey.*¹¹⁸ At first glance there seems to be some tension between the holdings of these cases because they seem to point in opposite directions with regard to the rules governing public financing of religious activity. On the one hand, *Zelman* holds that the Constitution permits local school authorities to offer parents publicly financed vouchers to send their children to private religious schools.¹¹⁹ On the other hand, *Locke* holds that a state may deny scholarships to a university student seeking a devotional theology degree under a scholarship program that grants state-financed scholarships to all other students seeking all other types of degrees.¹²⁰ The seeming inconsistency between these two holdings is that *Zelman* seems to interpret the Constitution as requiring state educational programs to include religious individuals and institutions, whereas *Locke* seems to interpret the Constitution as permitting states to intentionally exclude religious individuals from otherwise all-inclusive public educational programs.

Despite the fact that these two decisions seem to point in opposite directions, in fact they are entirely consistent with the fourth theme of the integrationist paradigm. The common factor that reconciles these two holdings is the Court’s implicit determination that the level of government favoritism toward religion should not be governed by the Constitution at all. Instead of having the courts serve as umpires between various religious factions fighting for access to

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¹¹⁹ *Zelman*, 536 U.S. at 663.
¹²⁰ *Locke*, 540 U.S. at 725.
government resources or symbolic favoritism by the government, the integrationist paradigm would simply leave all of these issues to the political process. Religious factions would therefore have to battle among themselves to determine where to draw the line between permissible governmental accommodation of religion and impermissible government favoritism.

This decentralization of church-state disputes amounts to an effective deconstitutionalization of church-state disputes. In some respects, the decentralization and deconstitutionalization of church-state issues may be the partial salvation of the separation principle. Many states have substantial populations of secularists and members of religious groups that are traditionally hostile to government action advancing religious causes. As a result, many states have adopted local versions of the separation principle, which are often enshrined in state constitutions and vigorously enforced by state courts. Because of these state constitutional anti-establishment provisions, separationists are likely to win many of these local battles; nevertheless, separationists have no cause to celebrate. Because of the need to protect religious liberty nationally in an increasingly diverse culture, the decentralization of church-state disputes is a debacle. It is a debacle because the harshest effects of the decentralization of church-state disputes will be visited upon precisely those religious minorities who happen to live in communities in which religious minorities are least able to defend themselves. Local governments in large, diverse urban communities are unlikely to engage in the aggressive advancement of religion in general or any religious faction in particular, because religious minorities will have sufficient numbers to mount an effective opposition campaign in the political process. On the other hand, local governments in smaller, less diverse rural or suburban communities will have no such political impediments. Many of these governments will undoubtedly engage in precisely the sort of tactless and oppressive favoritism of locally dominant religious groups that has long been the hallmark of Establishment Clause litigation. The local response to objections from religious dissenters can be expected to reflect sentiments similar to those expressed by a Duncanville, Texas assistant school superintendent, who told a parent who objected to pressure placed on his daughter to pray in local junior high school that

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121 See, e.g., Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999), cert. denied sub nom., 528 U.S. 1066 (1999) (holding that the Vermont state constitution prohibits the state from offering tuition reimbursements to parents of children attending religious schools); Opinion of the Justices (Choice in Educ.), 616 A.2d 478, 480 (N.H. 1992) (citing the New Hampshire state constitution in striking down a state proposal to finance private schools, on the ground that "[n]o safeguards exist to prevent the application of public funds to sectarian uses"); Witters v. Wash. Dep't of Servs. for the Blind, 771 P.2d 1119 (Wash. 1989), cert. denied, 493 U.S. 850 (1989) (holding that the Washington state constitution prohibits the application of any public funds to religious instruction); Bush v. Holmes, 886 So.2d 340 (1st Fla. Dist. Ct. App. 2004), aff'd on other grounds, 919 So.2d 392 (Fla. 2006) (striking down a Florida school voucher program that benefited religious schools, on the ground that it violated the state constitution's "no aid to religion" clause).
"unless [the parent] had grandparents buried in the Duncanville Cemetery he
had no right to tell [the assistant superintendent] how to run his schools."\(^{122}\)

Similar parochial expressions of local religious dominance are likely to
be the most noticeable immediate effects of adopting the integrationist view of
the Establishment Clause. But as with other aspects of the integrationist theory,
the localization of disputes over religious liberty carries with it broader implica-
tions for constitutional rights generally. If it makes sense to decentralize the
protection of religious liberty, then why not decentralize the protection of other
important constitutional rights as well? The Court has attempted this sort of
thing before, but previously the Court has applied this localized approach only
to areas of relatively low-level constitutional rights. In fact, the nascent effort to
decentralize religious liberty most closely resembles the emphasis on local
community values that has long been part of the modern First Amendment ob-
scenity standard.\(^{123}\) We are now facing the prospect, therefore, of an increas-
ingly religiously diverse country being governed by a constitutional standard
that is predicated on the assumption that local communities may use their gov-
ernments to perpetuate religious parochialism. The integrationists’ stance may
be summarized by paraphrasing a statement Chief Justice Burger once made in
the obscenity context: It is neither realistic nor constitutionally sound to read
the First Amendment as requiring that the people of Maine or Mississippi re-
spect the legitimacy of religious groups and practices found tolerable in Las
Vegas or New York City.\(^{124}\)

E. Theme Five: Government is Allowed to Make and Enforce Determina-
tions of Ultimate Value

The final theme of the new integrationist interpretation of the Estab-
lishment Clause is also an unavoidable logical implication of the first theme. If,
as the first integrationist theme asserts, a proper democratic government should
be allowed to embrace and advance the cause of religion as the cornerstone of
society’s civic virtue, then the government should also be authorized to involve
itself in disputes over the ethereal details that are at the heart of religion and
religious disputes. It is very clear that a central integrationist goal is to permit
the government to make assertions on behalf of the entire society about the most
basic religious disputes, such as the existence and nature of a single omnipotent
God. Once the government is permitted to write laws underscoring society’s

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\(^{122}\) Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 162 n.1 (5th Cir. 1993).

\(^{123}\) See Miller v. California, 413 U.S. 15, 24 (1973) (describing the constitutional standard for
obscenity, which includes the consideration of “whether ‘the average person, applying contempo-
rary community standards’ would find that the work, taken as a whole, appeals to the prurient
interest” (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972))).

\(^{124}\) See Miller, 413 U.S. at 32 (“It is neither realistic nor constitutionally sound to read the First
Amendment as requiring that the people of Maine or Mississippi accept public depiction of con-
duct found tolerable in Las Vegas, or New York City.”).
collective determination that there is a God and that He guides our actions, then there is little left of Establishment Clause limitations on the government’s theological hubris.

If, to borrow Justice Douglas’s unfortunate phrase, “[w]e are a religious people whose institutions presuppose a Supreme Being,” then presumably our institutions could also presuppose a series of other fundamental matters that cannot be proven and may or may not be true. If our institutions can presuppose a Supreme Being, for example, nothing should prevent those same institutions from also presupposing that first trimester abortions, the use of contraception, premarital sex, and active homosexuality all represent legally cognizable evils. The morality of these activities is certainly open to debate, but the ethical assessment of each of these matters embodies a narrower range of contestable considerations than the proposition that an all-powerful God runs the universe. If the Constitution permits the government to answer this more comprehensive question, then it should also allow the government to determine the more discreet matters as well.

The problem with this conception of governmental authority is that it contradicts our routine assumption that the government should not be deciding matters of metaphysics, theology, or ultimate truths on behalf of the government’s own citizens. In our modern conception of the division of authority between citizens and their government, these sorts of matters are left up to individuals, not to the political collective. In part this conception arises out of respect for individual differences about the nature of right and wrong and good and evil, and in part it derives from a hard-won skepticism about the accuracy of collective determinations of ultimate truths. At least in our popular civic mythology, we have moved beyond Holmes’s notion that “truth” is simply the “majority vote of that nation that could lick all others,” and toward a recognition that “truth,” if such a thing exists in a definitive form, will not be discovered and disseminated through the exercise of raw political power.

126 See Roe v. Wade, 410 U.S. 113 (1973) (prohibiting most regulations of first trimester abortions).
129 See Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional a Texas statute that made it a crime for two people of the same sex to engage in intimate sexual conduct).
130 Oliver W. Holmes, Natural Law, 32 Harv. L. Rev. 40, 40 (1918).
The willingness to cede to political majorities the power to make metaphysical determinations of ultimate values is another illustration of how the integrationist majority's abandonment of the Court's traditional countermajoritarian focus in the Establishment Clause area has implications beyond the religion cases. As noted above, the Court's new integrationist Establishment Clause theory is predicated on a very different view of the government's authority over matters of metaphysics, ideology, and personal morality than has become familiar to readers of the Court's modern First Amendment and privacy decisions. Consider the range of matters over which the Court has prohibited the government from imposing the political majority's values on individuals within society who hold different moral views: contraception, abortion, possession of sexually explicit expressive materials, sexually provocative dancing, sodomy, homosexuality, and expressive materials advocating a range of antisocial behaviors. If the integrationists were to pursue the logic of their position to its conclusion, they would be forced to overrule what has become the central proposition of the First Amendment—and probably the modern Bill of Rights generally—as famously summarized by Justice Jackson in *West Virginia State Board of Education v. Barnett:* 

"[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The integrationist would trade our modernist skepticism about collective assertions of truth and value for the comforting Victorian certainties offered by civic religion and community morality. At least when the cynical Holmes

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131 See supra note 127.
132 See supra note 128.
133 See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (holding that states may not enforce regulations that impose an undue burden on the fundamental right to choose abortion).
134 See Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the constitutional protections of free speech and privacy include the right to possess in the home sexually explicit materials—including materials that are legally obscene).
135 See Erie v. Pap's A.M., 529 U.S. 277 (2000) (holding that erotic nude dancing is expressive conduct that is protected by the First Amendment).
136 See supra note 129.
138 See Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684, 689 (1959) (holding that the constitutional right of free speech "is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.").
139 319 U.S. 624 (1943).
140 Id. at 642.
equated truth and power, he did so to deflate the concept of truth, and thereby acknowledged the possibility of competing truths. Truth is nothing but a distorted reflection of power relationships, he seemed to say, so don’t let claims of truth fool you; think for yourselves. The integrationists are much more naïve than Holmes, and therefore much more dangerous. When they equate truth and power (by granting to those who have political power the authority to identify truth and incorporate those truths into law), the integrationists reveal their belief that those who have political power possess the ability accurately to recognize the eternal verities that should guide us all. This is, in contrast to the separationist theory that preceded it, a strikingly immodest conception of government. The separationist conception of government did not oblige politicians to be moral visionaries because their role in government was constitutionally limited to the mundane concerns of the temporal world. The integrationist conception of government, on the other hand, requires politicians to be moral visionaries because the government is invited to deliver us from sin. The integrationist conception will reassure those who admire the moral vision of the political animals who populate the corridors of government. It will unnerve those of us who tend to agree with Mark Twain that “[t]he political and commercial morals of the United States are not merely food for laughter, they are an entire banquet.”

III. ESTABLISHMENT CLAUSE DOCTRINE IN THE INTEGRATIONIST ERA

Perhaps the most effective way of illustrating the radical changes envisioned by proponents of the integrationist theory of the Establishment Clause is to describe how this new theory is likely to be implemented in the day-to-day world of constitutional litigation. One of the few positive aspects of the demise of the separationist Establishment Clause is that the new integrationist approach will clean up the constitutional doctrine that governs relations between church and state. Commentators and jurists on all sides of the debate about the proper scope of the Establishment Clause have long agreed that Establishment Clause doctrine is a chaotic and contradictory mess. The good news is that this doctrinal mess will finally get cleaned up. The bad news is that the Court will probably clean up the doctrine in a way that effectively eliminates any significant limit on government aid to religion. Which is, of course, the primary objective of the integrationist enterprise.

The hopeless disorder of Establishment Clause doctrine is easy to describe. Before the departures of Justice O'Connor and Chief Justice Rehnquist, one or more Justices had embraced no fewer than ten constitutional standards in enforcing the Establishment Clause. These tests include the notorious Lemon

141 MARK TWAIN, MARK TWAIN IN ERUPTION 81 (Bernard DeVoto ed., Harper and Brothers Publishers 1940).
test,¹⁴² an endorsement analysis,¹⁴³ a broad coercion analysis,¹⁴⁴ a narrow coercion analysis,¹⁴⁵ a formal neatrality standard,¹⁴⁶ a substantive neutrality standard,¹⁴⁷ a standard that would disincorporate the Establishment Clause from Fourteenth Amendment (thereby rendering it inapplicable to state and local governments),¹⁴⁸ a nonpreferentialist standard,¹⁴⁹ a divisiveness standard,¹⁵⁰ and an ad hoc analysis that would have the Court abandon its efforts to devise a uniform standard for church-state cases.¹⁵¹ Unfortunately, many of these standards were deeply inconsistent, a situation made even more untenable by the fact that

¹⁴² Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” (quoting Walz v. Tax Comm’n, 397 U.S. 664, 674 (1969))).

¹⁴³ See Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (modifying the first two prongs of the Lemon test to inquire “whether government’s actual purpose is to endorse or disapprove of religion [and] whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval”).

¹⁴⁴ See Lee v. Weisman, 505 U.S. 577, 593 (1992) (holding that public schools may be held accountable for creating situations in which social and peer group pressure is imposed on religious dissenters).

¹⁴⁵ See Lee, 505 U.S. at 640 (Scalia, J., dissenting) (arguing that the Establishment Clause prohibits only “coercion of religious orthodoxy and . . . financial support by force of law and threat of penalty”).

¹⁴⁶ See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (holding that the Establishment Clause permits the government to funnel money to religious institutions under any program that is “neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice”).

¹⁴⁷ See Mitchell v. Helms, 530 U.S. 793, 837 (O’Connor, J., concurring in the judgment) (embracing the notion of neutrality, but arguing that the plurality’s limited focus on formal neutrality did not provide the rigorous analysis of government aid to religion that is necessary under the Establishment Clause).

¹⁴⁸ See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) (arguing that the Establishment Clause should never have been incorporated into the Fourteenth Amendment).

¹⁴⁹ See Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting) (arguing that the Establishment Clause should permit the government to engage in any religious activity so long as the government does not prefer one specific religious sect over another).

¹⁵⁰ See Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) (voting to permit a Ten Commandments monument on the grounds of the Texas state legislature based on the observation that “as a practical matter of degree [the Texas] display is unlikely to prove divisive.”); Zelman, 536 U.S. at 725 (Breyer, J., dissenting) (“In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation’s minds and spirits.”).

¹⁵¹ Van Orden, 545 U.S. at 700 (Breyer, J., concurring in the result) (noting that “[w]hile the Court’s prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases”).

https://researchrepository.wvu.edu/wvlr/vol110/iss1/8
in different opinions some Justices endorsed more than one standard—including standards that contradicted each other.\textsuperscript{152} Other Justices would endorse a standard, but then recoil from embracing the logical implications of that standard.\textsuperscript{153} As the tenth standard on the list above indicates, still other Justices recoiled from the basic notion that there should even be an Establishment Clause standard, resorting instead to an ad hoc approach, deciding specific cases idiosyncratically, in a way that provided little or no guidance for adjudication of future controversies.\textsuperscript{154}

Once all is said and done, the Court’s new majority is likely to pare these standards down to two or three of the weakest measures for constitutional compliance. Some of the current standards certainly will not survive on a Court dominated by the integrationists. After many years of railing at the resilience of the \textit{Lemon} test,\textsuperscript{155} integrationists will finally inter it. Likewise, the endorsement standard, any standard based on true substantive neutrality, and any standard that focuses on religious divisiveness are also likely to be abandoned by the Court’s new majority. Like \textit{Lemon}, each of these standards are oriented toward achieving some level of separation between church and state, and are therefore incompatible with the new integrationist orientation of the Court.

\textsuperscript{152} For example, in cases involving religious endorsements in school, Justice Kennedy applies a very protective (and very separationist) psychological coercion analysis, which holds the government accountable for private coercion and social ostracism undertaken in circumstances where such private behavior is merely facilitated by the government. See \textit{Lee v. Weisman}, 505 U.S. 577, 593 (1992) (“The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”). In cases involving religious endorsements by the government outside the public school context, on the other hand, Justice Kennedy applies a much narrower legal coercion standard, which would allow the government to publicly endorse or embrace religion in any way that falls short of legally coercing religious activity by private citizens. See \textit{County of Allegheny v. ACLU}, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (“Our cases disclose two limiting principles [on government religious endorsements]: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact ‘establishes a [state] religion or religious faith, or tends to do so.’” (quoting \textit{Lynch v. Donnelly}, 465 U.S. 688, 678, (1984))).

\textsuperscript{153} See \textit{Mitchell v. Helms}, 530 U.S. 793, 837-38 (2000) (O’Connor, J., concurring in the judgment) (agreeing that neutrality “is an important reason for upholding government-aid programs against Establishment Clause challenges,” but disagreeing with the plurality that an aid program should be upheld solely because “the aid is offered on a neutral basis and the aid is secular in content”).


\textsuperscript{155} See, e.g., \textit{Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.}, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (comparing \textit{Lemon} to “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried”).
Of the remaining six standards, five of them share an integrationist orientation, and some combination of these standards could form the basis for the Court’s new approach. More likely, the Court will now focus on three different standards in the three main areas of Establishment Clause disputes. These three standards have already become the centerpieces of opinions by the integrationist Justices who served on the Court during the Rehnquist era. The only difference is that with the elevation of Chief Justice Roberts and Justice Alito, integrationists now have an effective majority on the Court and can convert the older integrationist dissents and pluralities into majority opinions.

In cases involving government financing of religious activity, including government financing of religious schools, the Court’s new majority will almost certainly adopt the formal neutrality analysis that an integrationist majority used in Zelman v. Simmons-Harris to approve all indirect financing to religious institutions, so long as secular organizations are formally capable of applying for the funds from the same government program. As a practical matter, this standard abolishes any effective limits on indirect government financing of religious activities. In Zelman itself, for example, virtually all the money in the relevant government program was funneled to religious organizations. The integrationist majority dismissed the relevance of the fact that 96% of the government money was used to aid religious groups, noting offhandedly that “we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools.”

In addition to approving virtually all indirect government grants to religious organizations, the new integrationist majority is also quite likely to approve direct government aid to religious organizations, even if the government aid is used to finance explicitly and exclusively religious activities. Four integrationist members of the Court have already stated precisely this conclusion in their plurality opinion in Mitchell v. Helms. The basic concept of this opinion is that once the government has granted aid to a private organization, that organization’s use of the aid is a purely private matter that is not subject to Establishment Clause restrictions.

So long as the governmental aid is not itself “unsuitable for use in the public schools because of religious content,” and eligibility for aid is determined in a constitutionally permissible manner [i.e., through a formally neutral framework], any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.

157 Id. at 658.
159 Id. at 820 (citations omitted) (citing Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 263, 245 (1968)).
The standard essentially privatizes Establishment Clause violations, which effectively means that there will be no more Establishment Clause violations.

The Court’s new integrationist majority is likely to use an equally lax standard in non-school endorsement cases. In those cases the Court is likely to use a standard akin to the narrow coercion analysis that Justice Scalia advocated in Lee v. Weisman.\footnote{See Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).} Ironically, the model of narrow coercion standard can be found in an opinion that was authored several years earlier by Justice Kennedy, who turned out to be Justice Scalia’s antagonist in Lee. In his opinion in County of Allegheny v. ACLU,\footnote{See County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).} Justice Kennedy articulated many of the themes that would become the heart of the integrationist approach to the Establishment Clause: the insistence that the Constitution should reflect the fact that the country is historically religious,\footnote{Id. at 657-58.} the argument that constitutionally mandating a secular government would express hostility to religion,\footnote{Id. at 659 (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963)).} and the claim that the Establishment Clause should not be used to separate church and state, but rather should be directed at preventing egregious violations of religious liberty, such as the direct governmental coercion of religious participation or the creation of a state church.\footnote{Id. at 659-60.} This last notion—that only direct coercion of religious participation should violate the Establishment Clause—is likely to be the primary focus of the integrationist approach to endorsement cases outside the public schools. As Justice Kennedy summarized this position in his Allegheny opinion, “Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.”\footnote{Id. at 662-63.} In other words, the government can erect any and all religious idols, so long as it does not force citizens to bow down to them. The fact that this action will implicitly communicate to religious dissenters the message that they are social and political outsiders\footnote{See Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (noting that government endorsement of religion is problematic because it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”).} is no longer constitutionally relevant.

The third area of frequent Establishment Clause litigation involves efforts to inject religion into public schools. This is the only major area of Establishment Clause jurisprudence that will remain in flux for the immediate future. There will be continued uncertainty in this area because Justice Kennedy abandons his integrationist colleagues when it comes to using the public schools to
foist religion on school children. Ever since *Lee v. Weisman*,\(^{167}\) in which Justice Kennedy wrote a strongly separationist majority opinion striking down a non-sectarian graduation prayer at a public high school, Justice Kennedy has consistently joined the remaining separationists in the school prayer cases. The standard he would apply in these cases would not merely prohibit the government from directly endorsing religious activity, but would also prohibit the government from doing anything to facilitate religious pressure or coercion by members of the religious majority who are not themselves government actors.\(^{168}\) For the time being, therefore, one of the most important components of separationist doctrine will remain, albeit by a slender five to four majority.

This brief rendering of the doctrinal changes in store in Establishment Clause cases should not be dismissed lightly. For many constitutional scholars and academics, a discussion of the constitutional standards applicable to Establishment Clause cases is far less important than discussions of a Grand Theory of church and state. To sophisticated academics, attempting to fit the deeper constitutional issues and principles into a formal (and formalistic) standard or test emits the down-market odor of black-letter law. And indeed, once a case reaches the Supreme Court, these tests and standards often get ignored by the Justices themselves, who often use the particular cases that come before them as vehicles in ongoing battles among themselves about larger philosophical and structural issues. But lower court judges, school board attorneys, and other government officials take very seriously the standards articulated by the Supreme Court to communicate in concrete form abstract constitutional theories. These standards structure official decisions on matters of church and state, and when these decisions get challenged in court, the same standards structure the attorneys’ attacks on a government action. So the Supreme Court’s adoption of one standard and the abandonment of another is not merely an academic exercise.

Like the separation principle itself, the Court’s persistent use of separationist language in its constitutional doctrine has significantly limited the extent to which lower courts and government officials could ignore the general thrust of the Supreme Court’s Establishment Clause decisions. Some of the Court’s standards have been quite rigorous, despite the fact that the Court itself has often honored those standards in the breach (much as it has the separation principle itself). The prime example of the rigorously worded standard is the much-maligned *Lemon* test. The *Lemon* test requires that “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’”\(^{169}\) If applied faithfully, the *Lemon* factors are quite exacting, and the lower courts often took these factors very seriously. Although academic critics of *Lemon* often tended


\(^{168}\) *See supra* note 152.

to disparage the notion that courts could ever effectively prevent the government from adopting religiously motivated legislation, in fact the lower courts have frequently and effectively proscribed surreptitiously sectarian government actions, especially in the schools. If evidence exists that a particular policy was adopted for religious motives—and such evidence is often not hard to find—then courts are quite willing to strike down that policy and award substantial attorneys’ fees to the successful plaintiffs who challenged the policy. A pattern of successes in a few high-profile cases such as these effectively communicates the message to government agencies that religion is off-limits, and communicates the even more effective message that if the government agencies intend to circumvent the constitutional rules in the future, they may find themselves writing the ACLU a hefty check.

In contrast to the clear warnings against religious favoritism communicated to government officials during the separationist era, the message sent by the standards likely to be adopted by the new integrationist majority in the Supreme Court will be quite different. The new standards will tend to send the message to government officials, agencies, and school boards that they can get away with pretty much any level of religious favoritism, so long as they engage in a few formal measures to cover their tracks. This result should not be surprising, since Court’s new integrationist majority has adopted standards that seem to have been designed to offer the government mechanisms to convey plausible deniability that religious establishment has occurred, rather than to provide a truly rigorous constitutional framework to limit the government from intruding into the religious lives of its citizens.

170 For example, in Michael Perry’s earlier work he acknowledged that the nonestablishment norm prohibited the government from relying on religious reasons for legislation, but conceded that this norm would be “underenforced” because the courts often would be unable to determine whether the norm had been violated. “If government based a political choice about the morality of human conduct at least partly on a plausible secular supporting argument, it would be extremely difficult for a court to discern whether government based the choice solely on the secular argument or, instead, partly on the secular argument and partly on the religious argument.” Michael J. Perry, Religion in Politics, 29 U.C. DAVIS L. REV. 729, 736-37 (1996).

171 The most prominent recent example of this phenomenon is Kitzmiller v. Dover Area School Dist., 400 F.Supp. 2d 707 (M.D. Pa. 2005), in which a District Court struck down a local school board’s policy of introducing religiously-based “Intelligent Design” materials to challenge the scientific theory of evolution. After a month-long trial, the court determined that the policy of challenging evolution was motivated by religious purpose, and the court sharply chided the school board officials who were responsible for the policy: “The citizens of the Dover area were poorly served by the members of the Board who voted for the [Intelligent Design] Policy. It is ironic that several of these individuals, who so staunchly and proudly touted their religious convictions in public, would time and again lie to cover their tracks and disguise the real purpose behind the [Intelligent Design] Policy.” Id. at 765. The attorneys for the plaintiffs in the Dover case were awarded more than $2 million in attorney’s fees, although they ultimately agreed to accept less than half that amount. Christina Kauffman, Dover Gets Million-Dollar Bill, YORK DISPATCH, Feb. 22, 2006, available at http://www.yorkdispatch.com/local/ci_3535139.
IV. THE INEVITABLE FAILURE OF THE INTEGRATIONIST ESTABLISHMENT CLAUSE PARADIGM

The title of this section may be somewhat overstated; it is at least possible that the Court’s new majority will succeed in recasting the Establishment Clause in the form of the integrationist paradigm. It is at least possible, in other words, that the country could embrace the fractiously religious new political culture described by Justice Scalia and his integrationist colleagues. If so, then citizens would have to accept certain fundamental changes in the nature of the American political system. Under the new regime, members of the religious majority could wield their political power to transform the culture by advancing their own religious views as central to the nation’s political ethos. Although members of the religious majority can be expected to take this new system to heart, the adoption of this approach will require the exercise of a certain religious and ideological hubris on their part. Adopting this system will require the religious majority to take the leap of faith that religious demographics during the next two centuries are going to continue to favor the same sects that have dominated the nation’s political culture during the first two hundred years. Given the demographic changes described below, adopting this system may be a major gamble. Nevertheless, the country could decide to go this route. The purpose of this section, however, is to suggest that there are several reasons to believe that the integrationist attempt to fundamentally revamp Establishment Clause jurisprudence will not succeed. There are several reasons to suggest that the principle of separation of church and state is deeply ingrained into the spirit of the country in ways that the Court’s new integrationist majority will have great difficulty overcoming. Four reasons, in particular, present major obstacles to the long-term success of the integrationist paradigm.

The first reason that the integration of church and state is likely to fail is that the integrationist approach is deeply inconsistent with the country’s basic history and traditions. The integrationists have been very adept recently at asserting the contrary. As noted above, proponent of the integrationist paradigm defend their position in large part by reference to the country’s religious history. Specifically, integrationist Justices recite a familiar list of instances in which the government has endorsed religion or agreed to finance religious enterprises; integrationist academic treatises defend the integrationist position by arguing that the Framers never intended the Establishment Clause to prevent the government from favoring religion generally, or by arguing that the principle of separation of church and state was largely a theoretical ploy devised by political forces that were not interested in advancing the cause of individual

172 See supra notes 39-43 and accompanying text.  
173 Id.  
174 See, e.g., Michael Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978); Robert Cord, Separation of Church and State: Historical Fact and Current Fiction (1982).
religious liberty, but rather were either anti-religious or anti-Catholic, and conservative politicians contribute to the popular perception of the country’s integrationist past by simply asserting as a matter of historical fact that this country is a “Christian nation.”

There are two main problems with these historical claims. The first problem is that these claims ignore, inaccurately downplay, or misconstrue the long history of separationist sentiment that stretches back to the founding of the country and beyond. This country’s separationist history is rich and diverse. It includes a range of examples, including Roger Williams and the separationist state of Rhode Island, Madison’s Memorial and Remonstrance, which led the state of Virginia’s to adopt Jefferson’s Bill for Religious Freedom, the broad popular antagonism to state financing of religious education in New York City in the early nineteenth century, the adoption of so-called “Little Blaine” amendments by states throughout the country during the late nineteenth century—many of which cannot be explained away as artifacts of anti-Catholicism, and the growth of separationist sentiment in the twentieth century, as evidenced by the Court’s Everson opinion and the extensive separationist Establishment Clause jurisprudence that developed subsequent to Everson. This is not to say that separationist sentiment has always dominated the country’s attitudes toward church-state relations, but it is clear that the principle of separation of church and state has roots just as deep in the country’s history as the notion that this is a pervasively religious, monotheistic, or Christian nation.

175 See Philip Hamburger, Separation of Church and State (2002).
176 In one notorious example, at a news conference concluding the 1992 Republican Governors Association meeting, Governor Kirk Fordice of Mississippi asserted that “The United States of America is a Christian nation, which does not in any way infer at any time that religious intolerance or any kind of particular dogma is being forced on anyone else. It just is a simple fact of life in the United States of America.” Richard L. Berke, With a Crackle, Religion Enters G.O.P. Meeting, N.Y. Times, Nov. 18, 1992, at A23. He went on to argue that “the less we emphasize the Christian religion the further we fall into the abyss of poor character and chaos in the United States of America.” Id.
177 See Edmund S. Morgan, Roger Williams: The Church and the State (1967) (discussing Williams’ separationism and the founding of the state of Rhode Island—the state with the deepest strain of separationist sentiment in the young nation).
178 See supra note 32.
179 See supra note 33.
180 See William Oland Bourne, History of the Public School Society of the City of New York (1870) (discussing the opposition to publicly funded religious education in New York City during the early 19th century); John Webb Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History (1967) (same).
181 See, e.g., Kotterman v. Killian, 972 P.2d 606, 624 (Ariz. 1999) (noting the absence of evidence linking the Arizona state constitutional disestablishment provision to the anti-Catholic bigotry that motivated the national Blaine Amendment).
183 See Section I supra.
When faced with two equally strong and mutually inconsistent traditions, it is impossible to rely on history alone to definitively settle current disputes about which tradition we should embrace as "our" tradition. In fact, both integrationist and separationist approaches to the Establishment Clause have deep roots in the nation's history. Deciding which tradition we should select to guide current Establishment Clause analysis requires us to answer the more subtle query of which tradition makes the most sense in light of the evolution of our constitutional landscape, modern social conditions, and a reasonable understanding of each tradition's contemporary implications. When approached from this perspective, the second problem with the integrationist perspective becomes evident: The second problem with the integrationists' historical claims is that they sanitize the nature of the country's integrationist past. It is certainly true that there are many instances in this country's history in which the religious majority has used the government for its own ends. But contrary to the benign description of those historical instances by proponents of the integrationist paradigm, a large number of these episodes represent modern-day embarrassments. It is impossible to take pride in famous examples of governmental religious favoritism such as John Jay's proposal that Catholics be excluded from New York;\(^{184}\) the requirements imposed by many states early in the country's history that those holding state office must express belief in Protestant Christianity;\(^{185}\) Protestant efforts during the nineteenth century to use the public school system to proselytize Catholics and other non-Protestants;\(^{186}\) Justice Story's blunt assertion that the First Amendment was not intended "to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among christian sects;"\(^{187}\) or the violent hostility expressed during the early twentieth century toward Jehovah's Witnesses who refused to salute the flag.\(^{188}\) It is equally difficult to find much to be proud of in the sorts of modern examples of government "acknowledgment" of religion that Justice Scalia so vigorously defends. A culture that would force a young girl to miss her own high school graduation to avoid participating in prayer,\(^{189}\) or which requires a court to enjoin school officials to prevent them from harassing, intimidating, or trying to identify students who had sued anonymously to pre-

\(^{184}\) See Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 162 (1986).
\(^{185}\) See Morton Borden, Jews, Turks, and Infidels (1984) (describing the various legal restrictions on Jews and other non-Christians during the country's early history).
\(^{186}\) See 1 Anson Phelps Stokes, Church and State in the United States 830-35 (1950).
\(^{187}\) 2 Joseph Story, Commentaries on the Constitution of the United States 594 (1851).
\(^{188}\) See Victor W. Rotnem & F. G. Folsom, Jr., Recent Restrictions Upon Religious Liberty, 36 Am. Pol. Sci. Rev. 1053, 1062 (1942) (describing "an uninterrupted record of violence and persecution of the Witnesses" in the wake of Supreme Court decisions regarding the flag salute and noting that "[a]lmost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts").
vent the school from violating the Establishment Clause,\textsuperscript{190} is not a culture that respects religious liberty. In short, the dynamic of history does not favor moving away from separationism and toward a renewed integration of church and state. Even if there is evidence that the country has engaged in integrationist behavior in its past, to modern eyes this behavior often appears downright un-American.

The second reason the integrationists will have trouble convincing the country to embrace the integrationist paradigm of the Establishment Clause is that the religious demographics of the United States is rapidly changing. For a growing portion of the country’s population, integrating church and state is directly contrary to both their own views on religion and their individual self-interest. Recall Justice Scalia’s recent effort to muster statistical support for his claim that virtually the entire country supports the symbolic integration of church and state.\textsuperscript{191} Recall that according to Justice Scalia, 97.7\% of the country is monotheistic, which Justice Scalia interprets as meaning that 97.7\% of the country would support efforts by the government to symbolically endorse a monotheistic notion of the Almighty.\textsuperscript{192} As noted above,\textsuperscript{193} this calculation not only expressly omits Hindus, Buddhists and what Justice Scalia calls other “believers in unconcerned deities,” but also blithely ignores adherents of monotheistic sects that are opposed to church-state integration and, most importantly, all varieties of secularists.

The reason the latter omission is so important is because secularists are the fastest growing component of the American religious demographic. As the authors of the American Religious Identification Survey noted in their most recent edition, one of the major changes between their 1990 and 2001 surveys was that

the greatest increase in absolute as well as percentage terms has been among those adults who do not subscribe to any religious identification; their number has more than doubled from 14.3 million in 1990 to 29.4 million in 2001; their proportion has grown from just eight percent of the total in 1990 to over fourteen percent in 2001.\textsuperscript{194}

\textsuperscript{190} See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 n.1 (2000) (quoting order issued by the district court noting that school officials and others seeking “overtly or covertly to ferret out the identities of the Plaintiffs in this cause . . . WILL FACE THE HARDEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY”) (emphasis in original).

\textsuperscript{191} See supra notes 68-81 and accompanying text.

\textsuperscript{192} Id.

\textsuperscript{193} Id.

Members of another growing portion of the population simply refuse to answer questions about their religious preferences. This group grew from two percent of the population in 1990 (4 million people) to five percent of the population in 2001 (11 million people). During the same period, "the proportion of the population that can be classified as Christian has declined from eighty-six [percent] in 1990 to seventy-seven percent in 2001." Members of non-Christian religious groups grew from 5.8 million to 7.7 million—from 3.3 percent to 3.7 percent.

The lesson to be drawn from these figures is that the United States is rapidly becoming both less religious and less Christian. This reality undermines Justice Scalia’s basic claim that the country is almost unanimously in favor of the integration of church and state. If the situation were as Justice Scalia inaccurately described it, with almost 97.7% of the population in agreement on these matters, it might be politically realistic to adopt the integrationist paradigm. In Justice Scalia’s nation, the religious majority would be happy to express their religious views through the government that they dominated, and the religious minority would be so small that they could do nothing about the matter. But that is not the nation we live in. In the real nation, roughly ten to twenty percent of the population is altogether nonreligious, and another substantial portion of the population either belongs to non-Christian sects, or to Christian sects that disagree with integrationist paradigm. In the real nation, therefore, the project of integrating church and state becomes immensely more politically problematic than in Justice Scalia’s homogeneous land. Perhaps simply as a matter of personal survival 2.3% of the population might sit still for having the government constantly tout the religious views of the other 97.7% of the population; it is much more unlikely that twenty, thirty, or forty percent of the population will be equally supine.

The third reason the integrationists may encounter strong opposition to their view of the Establishment Clause is related to the second reason. Just as the country’s religious demographics as a whole are rapidly changing, we can reasonably expect local demographics to follow this trend. Thus, while there may have been substantial grassroots support for the integration of church and state when many citizens lived in relatively isolated and religiously homogeneous areas of the country, those isolated pockets of religious homogeneity are shrinking as the country becomes more cosmopolitan and interconnected.

There are no good surveys of religious demography in the United States that are broken down by county. But one can infer from two basic facts that religious diversity is increasing throughout the country. The first basic fact is that the United States is characterized by an extraordinarily high level of geographic mobility. United States citizens exhibit almost twice the level of re-

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195 Id. at 11.
196 Id. at 10.
197 Id.
gional mobility as compared to citizens of the European Union, for example. According to the 2000 census, only sixty percent of United States residents reside in the state in which they were born. Mobility is a fact of life in the modern United States, and increased mobility is likely to be accompanied by the increased religious diversification of areas were previously isolated and demographically uniform.

The second basic fact is that comprehensive surveys of religious demography that are broken down by state show substantial populations of secularists and religious minorities even in the most religiously homogeneous states. In all but eight states, the percentage of people who classify themselves as having “no religion” is in the double digits. In four states, none of which are located in the highly urbanized (and presumptively highly secular) industrial northeast, “no religion” is now the largest “denomination.” Even states that are usually thought of as bastions of traditional religious faith have substantial secular populations. The second largest “denomination” in Utah, for example, is “no religion.”

The point here is not that sectarian domination of particular areas of the country is no longer a problem; indeed, many states continue to be dominated by a single Christian sect. The point, rather, is that even where a single sect dominates a state or locality, members of that dominant sect can no longer count on having only a small handful of opponents when they seek to exercise their political power by infusing the government with their religious views. Even outside the major urban centers, majoritarian religious establishments are likely to encounter serious opposition almost everywhere. Douglas Laycock once described the young United States as “overwhelmingly Protestant and hostile to other faiths.” The integrationists’ dilemma is that the modern United States is much less Protestant than in the past and members of the other faiths are now numerous enough to return the religious majority’s hostility in kind.

The fourth reason why the integrationist paradigm is unlikely to succeed is the radical and essentially unlimited nature of the power the new paradigm

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201 Id. (the states are Idaho, Oregon, Washington, and Wyoming).

202 Id.

203 Fifteen states have 35 percent or more of their populations identifying with one sect and have no other sect reporting identification rates within twenty percentage points of the dominant sect. Id.

would assign to the government. The integrationist paradigm effectively would abolish any structural limitation on the government’s ability to act on religious grounds or favor religious institutions and principles. Individual religious dissenters would retain protections from direct government coercion under the Free Exercise and Free Speech Clauses, but under an integrationist Establishment Clause dissenters would no longer be able to prevent members of the religious majority from using the government to symbolically and financially reinforce their spiritual hegemony.

Justice Scalia has tried to put a benign face on this pious new government by suggesting that there are still limits on how far down the road to theocracy the new government could go. He has suggested, for example, that the government still should not officially specify the “details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”

This concession perhaps explains his strained attempt to focus on monotheism rather than Christianity as the permissible form of American religious establishment. The problem with these attempts to assuage the fears of those who remain uncomfortable with the possibility of theocratic government, however, is that they are logically inconsistent with the arguments proffered by integrationists to explain their opposition to the separation of church and state.

Integrationists defend their new paradigm on the grounds that it reflects the religious history of the country better than separationism, and it provides a moral foundation for government that is absent from competing models of government that are defined by the principles of secular liberalism. But if these arguments are valid, they lead to the conclusion that the government should be allowed to advance real religion, not the sort of friendly, empty “religion lite” described by Justice Scalia. To the extent that the country’s history supports the integration of church and state, that history does not support the government’s endorsement of an insipid and featureless monotheism; rather, that unfortunate history supports the government’s endorsement of a robust brand of Protestant Christianity. If we decide to focus on the country’s integrationist history, then Justice Story describes that history more accurately than Justice Scalia.

Likewise, if the integrationist arguments about the emptiness of secular liberalism are valid, then this argument also supports the introduction of strong, definitive religious principles into government—precisely the sorts of principles “upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.”

Forcing the government to dilute religion into a bland, lowest-common-denominator ecumenism will contribute

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205 Lee v. Weisman, 505 U.S. 577, 641 (Scalia, J., dissenting).
206 See supra notes 68-81 and accompanying text.
207 See supra notes 43-52 and accompanying text.
208 See supra note 187 and accompanying text.
209 Lee, 505 U.S. at 641 (Scalia, J., dissenting).
nothing of value to society’s civic virtue and will do little to provide government with the strong, substantive moral grounding that integrationists argue a limited, secular government cannot supply. The integrationists cannot have it both ways: they cannot simultaneously argue on the one hand that religion principles supply an essential and highly substantive element of good government, and on the other hand that these principles are so benign and uncontroversial that they would offend only a small handful of inveterate cranks.

In truth, the integrationists cannot acknowledge the broad implications of their theory because to do so would reveal the radically undemocratic nature of church-state integration. Theories of church-state integration all rest on the unspoken premise that the celestial claims of religion are superior to the temporal concerns of mere mortals. The integrationist view of the relationship between church and state ultimately depends on the assumption of celestial dominance once expressed by Michael McConnell in the context of a Free Exercise Clause discussion:

[R]eligious claims—if true—are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by “God.” For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist.210

The problem for integrationists is that many Americans would be uncomfortable ceding to a group of politicians the responsibility of receiving from God particular instructions for how to live our lives on earth. So integrationists have a dilemma: Their first choice is to dilute the religious principles that the government is allowed to endorse, thereby robbing their theory of its central purpose of morally grounding the government. Alternatively, they could admit that under an integrationist regime the government would be permitted to advance through law the transcendent claims of a celestial authority that many citizens do not recognize, which is likely to remind those same citizens why Madison’s version of the Establishment Clause seemed so compelling in the first place. Either way, the integrationist paradigm is doomed to fail.

CONCLUSION

If the assumptions outlined here about the new majority of the Roberts Court are correct, we are about to witness a paradigm shift in the way the Supreme Court approaches the Establishment Clause of the First Amendment. On the other hand, if I have correctly assessed the country’s changing religious demography, social evolution, and shifting American attitudes toward religious liberty, this paradigm shift toward church-state integration will not take root.

We have been down this road before, in fact, several times. And every time particular religious factions have attempted to advance their own cause by circumventing our traditional national antipathy toward the joinder of church and state, the attempts have undermined religious liberty, increased the country’s political divisions along religious lines, and even led to sectarian violence. Fortunately for us all, the ultimate consequence of each episode has been a recommitment to the Madisonian vision of a secular government, coupled with a vigorous protection of private conscience and freely chosen religious faith. Perhaps separationists should take heart, therefore, despite their dwindling numbers on the Supreme Court. If our own history is any indication, it seems that nothing can rekindle the nation’s separationist resolve like a brief flirtation with the Bosnian alternative.