Vestiges of the Establishment Clause

Steven G. Gey

Follow this and additional works at: http://scholarship.law.unc.edu/falr

Part of the First Amendment Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/falr/vol5/iss1/2
VESTIGES OF THE ESTABLISHMENT CLAUSE

BY STEVEN G. GEY *

INTRODUCTION

With the confirmation of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court, there is a strong likelihood that we now have a Supreme Court comprised of five members who are deeply opposed to virtually everything the Supreme Court has said about the relationship between church and state since the Court first started rigorously enforcing the Establishment Clause in 1947. We may be on the cusp of a root-and-branch change in Establishment Clause jurisprudence, which will fundamentally alter the landscape of church/state relations and produce a constitutional regime that specifically permits the government to endorse the views of the religious majority and use government programs to advance the majority’s sectarian goals.

These assertions about the Court’s new path involve a certain amount of speculation about the views of the new Justices. Many will undoubtedly prefer to take a Panglossian view of the immediate future, or at least to wait and see how the new Justices perform on the Court before writing off sixty years of Establishment Clause jurisprudence. But even if previous generations of legal leopards occasionally have changed their spots once they arrived at the Supreme Court, neither of the new Justices are likely to fit that pattern. In our deeply politicized world, recent Republican administrations have steadfastly made ideology a central feature of their judicial appointments,¹ and issues of church and

---

* David and Deborah Fonvielle and Donald and Janet Hinkle Professor of Law, Florida State University College of Law. J.D., Columbia University, 1982; B.A., Eckerd University, 1978.

¹ For one description of the “constitution in exile” movement and its effect on judicial nominations in the Bush White House, see Jeffrey Rosen, The Unregulated Offensive, N.Y. TIMES MAGAZINE, Apr. 17, 2005, at 42, 43.
state have been at the forefront of this ideological agenda.\textsuperscript{2} The two
individuals chosen to replace Chief Justice Rehnquist and Justice O’Connor passed the administration’s ideological litmus test with flying
colors, especially with regard to issues of church and state. Both of the
new Justices worked for Republican administrations that were noted for
urging fundamental changes in the constitutional law regarding church
and state,\textsuperscript{3} and both of the new Justices are individually on record as
supporting such a change.\textsuperscript{4} In addition to his work for previous

\textsuperscript{2} See David D. Kirkpatrick, \textit{For Conservative Christians, Game Plan on the
Nominee}, N.Y. TIMES, Aug. 12, 2005, at A14 (describing, in conjunction with the
nomination of John Roberts, a “two-year-old campaign by conservative groups to
portray Democrats as anti-Catholic or even antireligious for questioning the personal
views of judicial nominees on abortion or other subjects of church teachings”).

\textsuperscript{3} Chief Justice John Roberts worked for the Reagan Administration as Special
Assistant to the Attorney General (from 1981–82), and as Associate Counsel to the
President in the Office of White House Counsel (from 1982-86). \textit{See United States
Supreme Court, The Justices of the Supreme Court}, available at
http://www.supremecourtus.gov/about/biographiescurrent.pdf. He then worked for
the first Bush Administration as Principal Deputy Solicitor General (from 1989-93).
Justice Alito also worked for the Reagan Administration as Assistant to the Solicitor
General (from 1981-85) and Deputy Assistant Attorney General (from 1985-87). \textit{Id}.

\textsuperscript{4} While serving in the Reagan Office of White House Counsel, Chief Justice
Roberts wrote a memorandum praising then-Justice Rehnquist’s dissenting opinion
concept of separation of church and state, and the entire tenor of modern
Establishment Clause jurisprudence. Roberts noted that Rehnquist “took a tenuous
five-person majority and tried to revolutionize Establishment Clause jurisprudence,
and ended up losing the majority.” Memorandum from John G. Roberts to Fred F.
Fielding, at 2 (June 4, 1985), available at http://www.washingtonpost.com/wp-
srv/nation/documents/roberts/Box48-JGR-SchoolPrayer1.pdf. Roberts then went on
to praise Rehnquist’s attempt to “revolutionize” the Establishment Clause
jurisprudence by adopting the theory that the government may endorse religion, so
long as it does not endorse a particular sect. “Which is not to say the effort was
misguided. In the larger scheme of things what is important is not whether this law
is upheld or struck down, but what test is applied.” \textit{Id}. Samuel Alito expressed
similar views when applying for a job as deputy assistant attorney general for the
Reagan Administration. In his application, Alito wrote that in college he “developed
a deep interest in constitutional law, motivated in large part by disagreement with
Warren Court decisions, particularly in the areas of criminal procedure, the
Establishment Clause, and reapportionment.” Samuel Alito’s PPO Non-Career
alitoDOJ.pdf. Nothing in their later judicial opinions or statements made at their
confirmation hearings indicate that either Roberts or Alito have changed their
narrow views of the protections offered by the Establishment Clause.
Republican administrations, Judge Alito also has a fairly extensive judicial record on the subject.\textsuperscript{5} There is nothing in the record of either new Justice that provides even the slightest solace to the latter day Dr. Panglosses regarding the sustainability of the Madisonian Establishment Clause. From all indications, both Justices are frankly hostile to the basic concept of separation of church and state, and will actively campaign on the Court to eradicate the principle altogether from the Court's Establishment Clause jurisprudence. In every type of Establishment Clause dispute they will be joined by Justices Scalia and Thomas, who have frequently expressed their hostility to the separationist view.\textsuperscript{6} They will also be joined by Justice Kennedy in all cases except those involving religion in the public schools, in which Kennedy continues to be troubled by the persistence of religious coercion of students.\textsuperscript{7}

The question, then, is what will be left of Establishment Clause jurisprudence once the newly reconfigured Court gets through rewriting

\textsuperscript{5} See Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004) (Judge Alito writing the majority opinion permitting the Child Evangelism Fellowship, a group dedicated to evangelizing children in fundamentalist Christianity, to have access to public school facilities, require public school teachers to distribute the group's religious materials to students in an elementary school, post religious materials in the school, participate in school-sponsored back-to-school nights, and distribute materials during the back-to-school nights); ACLU of N.J. v. Twp. of Wall, 246 F.3d 258 (3d Cir. 2001) (Judge Alito writing an opinion articulating a very narrow standard for standing to challenge religious displays on public property); C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting) (Judge Alito dissenting to an en banc ruling dismissing a complaint against a teacher who had been involved in the removal of a student's religious poster from the hallway of a public elementary school, arguing that "public school students have the right to express religious views in class discussion or in assigned work"); ACLU of N.J. ex rel. Lander v. Schundler, 168 F.3d 92 (3d Cir. 1999) (Judge Alito writing the majority opinion upholding the constitutionality of a modified Christmas display, an earlier version of which had been held unconstitutional by another Third Circuit panel); ACLU of N.J. v. Black Horse Pike Reg'1 Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (en banc) (Judge Alito joining the dissent in a 9-4 en banc ruling holding unconstitutional a public board of education policy permitting students of a high school senior class to vote on whether to include prayer in high school graduation ceremonies).

\textsuperscript{6} Justice Scalia's and Thomas's views are discussed in detail in Section II, infra.

\textsuperscript{7} On Justice Kennedy's views in the school cases, see infra notes 84-89 and accompanying text.
it? The premise of this Article is that the new Establishment Clause jurisprudence will bear little resemblance to its precursor. This will be true at the highest level of constitutional theory, as well as at the more mundane level of constitutional doctrine. At the theoretical level, the new Court will replace the existing separationist Establishment Clause paradigm with one that permits (and even encourages) the integration of church and state. At the doctrinal level, the new Court will permit the government to symbolically and verbally endorse the majority's religion, and will also permit the government to finance explicitly religious activities—including activities that involve the proselytizing of both adults and children.

After briefly reviewing the outgoing separationist paradigm in the first section, the second section of this Article will describe the new integrationist Establishment Clause paradigm. Under this new paradigm, the Court can be expected to abandon or severely dilute basic organizing concepts that have guided the Court for over a half century—concepts that have their origins in Madison’s and Jefferson’s fight for religious liberty in Virginia and the early Republic. The third section of the Article will then describe the doctrine through which the Court's new majority will communicate its integrationist theory of church/state relations. Finally, the fourth section will discuss what will remain of the protection of religious liberty under an integrationist Establishment Clause, with specific reference to the implications of renouncing the concept of church/state separation. Putting the same matter more bluntly, how will religious minorities and the large secular portion of the population tolerate life in a political structure in which the government increasingly will be permitted to act as an agent of the religious majority?

I. THE SEPARATIONIST PARADIGM

One of the few things constitutional scholars of every stripe seem to agree about is the proposition that the Court’s Establishment Clause jurisprudence is an incoherent mess. Simply cataloguing some of the Court’s rulings vividly underscores the source of the common discontent with the Court’s inability to provide consistent guidance on constitutional matters relating to church and state. From the very beginning of the modern era in Establishment Clause jurisprudence, for example, the Court could definitively assert that no tax money should
ever be used to support religious institutions,\textsuperscript{8} and yet in the same case uphold a state program transporting students to religious schools.\textsuperscript{9} During the six decades following this ruling, the Court produced a maze of government-financing decisions, in which many government programs directly financing religious activity were struck down, but other programs (often producing even larger effective subsidies) were upheld.\textsuperscript{10} In the endorsement area, the Court ruled that some officially sanctioned Christmas displays were permissible,\textsuperscript{11} while others were not.\textsuperscript{12} Most recently, a majority of the Court held that official displays of the Ten Commandments both were\textsuperscript{13} and were not constitutional.\textsuperscript{14} Making sense of all this was, to put the matter kindly, more an art than a science.

Despite these frustrating and often inexplicable holdings, the Court has been remarkably consistent about articulating a guiding principle for its Establishment Clause rulings. In short, the need to keep church and state separate has been a consistent theme that runs throughout the Court’s Establishment Clause jurisprudence since the

\begin{itemize}
\item \textsuperscript{8} Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
\item \textsuperscript{9} Id. at 17.
\item \textsuperscript{11} See Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding a holiday display that included a Nativity scene along with several secular holiday objects); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (upholding a holiday display that included an 18-foot menorah and a 45-foot Christmas tree).
\item \textsuperscript{12} See Allegheny, 492 U.S. 573 (striking down a nativity scene in a county courthouse).
\item \textsuperscript{13} See Van Orden v. Perry, 125 S. Ct. 2854 (2005) (upholding the constitutionality of a Ten Commandments display on the grounds of the Texas state legislature).
\item \textsuperscript{14} See McCreary County v. ACLU of Ky., 125 S. Ct. 2722 (2005) (holding unconstitutional a Ten Commandments display in a county courthouse).
\end{itemize}
Court first began routinely ruling on Establishment Clause matters in the *Everson* decision in 1947.\textsuperscript{15} One of the Court’s most famous Establishment Clause quotations from *Everson* is a virtual litany of separationist precepts:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.\textsuperscript{16}

Taken together, these broad statements form the core of what can be termed the separationist paradigm of the Establishment Clause. In almost every case since *Everson* there have been dissenters to the separationist paradigm, but a majority (and until very recently a large majority) of the Court’s members have supported the separationist paradigm in theory, even though they have been notoriously unsuccessful in consistently applying the paradigm to particular facts. They have been equally unsuccessful in incorporating the paradigm and its four main components into a standard that could be applied predictably by the lower courts—instead generating an unwieldy doctrinal matrix in which no fewer than ten different standards are used by various members of the Court to enforce the Establishment Clause.\textsuperscript{17} The modern Court has also fallen short in explaining its rationale for adopting the separation of church and state as a guiding principle, although James Madison’s arguments against religious establishments are implicit in every one of the Court’s modern decisions. Specifically, separation of church and state is necessary not just to protect individual religious liberty (although that is part of the project as well), but also to provide a structural barrier that keeps the church from corrupting the government and vice versa.\textsuperscript{18}

\textsuperscript{16} *Id.* at 15-16.
\textsuperscript{17} See *infra* Section III.
\textsuperscript{18} To Madison, the effect of religious establishments on religion has been “[m]ore or less in all places, pride and indolence in the Clergy; ignorance and
Although the broad theme of separation is implicit in almost everything the Court has said about the Establishment Clause in the last sixty years, in itself the separation principle tells lower courts and government officials little about the precise parameters of what is permitted and prohibited under the Establishment Clause. Despite its many problems in applying the separation principle consistently, it is possible to discern from the Court's rulings a few basic elements of separation that help to give more substance to the basic principle. Specifically, the Court has routinely referred to five separationist mandates that have guided its Establishment Clause jurisprudence since *Everson*. The first specific mandate of modern separationist theory is that government may neither reward nor punish religious belief. At its most basic, this means that religious practitioners cannot be sanctioned for attending a disfavored church, nor can they be denied the full benefits of citizenship—in particular, the right of political participation—because of their religious beliefs, or lack of them. But this first (and probably most important) mandate goes beyond merely prohibiting direct legal sanctions for unapproved beliefs. It also is the basis for the Court's holdings that public schools may not incorporate even diluted forms of religious endorsement into either curricular or extracurricular school services.

19. 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.”) (alteration added).

functions. It helps to explain the Court’s repeated (albeit inconsistently applied) assertion that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”22 In short, the first mandate requires actual—as opposed to formalistic—neutrality between church and state. In the mode of Philip Kurland’s traditional version of neutrality,23 the government is supposed to neither favor nor hinder religion, but rather allow religion to flourish or founder on its own.

The second separationist mandate is that religion is irrelevant to citizenship or political participation. This second mandate overlaps to some extent with the first, in the sense that individual citizens may not be prohibited from participating in governmental affairs or running for office because of their religious beliefs. But the second mandate goes further than the first in that it also prohibits government endorsements of religion that have the effect of skewing the political process in favor of believers or members of favored sects. This mandate was the basis for Justice O’Connor’s endorsement analysis, especially as it was applied to government use of religious symbols and principles in official settings or activities.24 She was even willing to apply this mandate where private religious speech occurred in a context in which it would be viewed by a reasonable observer as being too closely associated with the government.25 The key to this analysis was to prevent the government from communicating either overtly or sub rosa that religion could be the basis for identifying any citizens as political insiders or political outsiders. Under a proper separationist interpretation of the First Amendment, religion is simply irrelevant to one’s status in society.

of every school day in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting the inclusion of an official prayer at the beginning of every school day in public schools).


22. Everson, 330 U.S. at 16 (alteration added).


24. See infra note 72 and accompanying text.

The first two separationist mandates lead to a third, which is that in the American constitutional system religion is a private matter, not a collective matter subject to government influence or control. Opponents of the separation principle frequently criticized the privatization of religion as discriminatory, in that it denies to religious proponents who form a political majority the ability to write their views into law in the same fashion as other, nonreligious political factions are permitted to write their policy preferences into law. The answer to this criticism ultimately has to depend on the recognition of the broader policy choice of having an Establishment Clause in the Constitution at all. Whatever precise notions the founders had of the meaning of “establishment,” the undeniable fact is that they singled out religion for constitutional limitations of a sort that they applied to no other category of government action. The reason for this has been succinctly summarized by Kathleen Sullivan as the “social contract produced by religious truce.” Regardless of the accuracy of the historical judgment that religion poses special dangers for a stable democratic political system, it is clear that religious groups have gotten a great deal from the separationist bargain that denies them access to political power to impose their religious views on nonadherents. In exchange for giving up political power, religious practitioners have obtained the virtually unfettered freedom to practice their faith in ways that would be unimaginable in the absence of the Establishment Clause. Foregoing the need to constantly monitor the political status of one’s religious affiliation frees up substantial time and

26. See infra notes 61-62 and accompanying text.

[The exclusion of religion from public programs is not, as [Michael] McConnell would have it, an invidious “preference for the secular in public affairs.” Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all. From the perspective of the prepolitical war of all sects against all, the exclusion of any religion from public affairs looks like “discrimination.” But from the perspective of the settlement worked by the Establishment Clause, it looks like proper treatment.
resources that can be devoted to the primary spiritual objectives of the religious enterprise.

The fourth separationist mandate is also a logical corollary of the first two. The fourth mandate states that in addition to being prohibited from favoring a particular sect, the government is also prohibited from in any way favoring, privileging, or advancing religion in general. Among other things, this means (although the Court has always been reluctant to emphasize it) that atheism is a perfectly respectable "religious" perspective. The Constitution protects a person’s right to be an atheist, agnostic, or religiously indifferent to exactly the same extent as it protects a person’s right to join the Catholic or Methodist churches. If questions about a person’s lack of faith arise in a political or governmental context, the proper constitutional response is that the subject is none of the government’s (or the general public’s) business.  

The final separationist mandate is that limitations on government religious activity are largely a matter of national, rather than local concern. At first glance this is a commonplace implication of the incorporation of the Establishment Clause into the Fourteenth Amendment. But at least one member of the Supreme Court, and a new wave of revisionist academics, argue that the incorporation of the First Amendment should not be considered a foregone conclusion, but rather a fundamental misinterpretation of the Amendment itself. Under this interpretation, the First Amendment was really supposed to facilitate, rather than prevent state religious establishments.

There are several problems with this interpretation. First, as a matter of historical analysis it almost entirely devalues the evolution in

28. See Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (overturning a Maryland statute requiring notaries to profess a belief in the existence of God and concluding that "neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion" (citation omitted)).

29. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.").


31. See generally AMAR, supra note 30; SMITH, QUEST, supra note 30; SMITH, PRIDE OF REASON, supra note 30.
public perception of establishment reflected in the changes to the political structure wrought by the passage of the Fourteenth Amendment. Second, as a matter of constitutional theory and doctrine, this interpretation would threaten to undermine religious freedom in fully one-third of the states. Religious demographics are a key reason to fear the devolution to the states of the issue of religious establishment. In many ways this is the most religiously diverse country on earth. Religious diversity in the United States, however, is a phenomenon reflected primarily in the nation as a whole and in its major urban centers. But most people do not live in the nation as a whole or in New York City or Los Angeles. In this country, religion, like politics, is largely a local affair, and the simple fact is that on a local level most of the country is overwhelmingly dominated by one or a few sects.

Serious attacks on the liberty of religious minorities will inevitably ensue if the separationist principle is written out of Establishment Clause jurisprudence in favor of the integrationist system described below. Under this new system, local religious majorities may use local government to acknowledge their dominance in various ways, including


33. This conclusion is based on the statistics compiled in the recent American Religious Identification Survey. See Barry A. Kosmin, Egon Mayer, & Ariela Keysar, The Graduate Center of the City University of New York, American Religious Identification Survey at 38 (2001) [hereinafter ARIS 2001 Study], available at http://www.gc.cuny.edu/faculty/research_studies/aris.pdf. According to these statistics, fifteen states have thirty-five 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. See ARIS 2001 Study at 39-42 (compiling religious identification statistics for forty-eight mainland states and the District of Columbia). This view of religious domination takes into account only individual sects at the statewide level. Effective religious domination is undoubtedly greater than this due to the likelihood that in some areas similar sects who are counted separately in the ARIS survey (Southern Baptists, conservative Methodists, and Pentecostals, for example) will often act jointly in the political arena to pursue issues of common sectarian interest. It is also quite likely that large rural areas of many states will be dominated by one or a small number of sects, even if the varied religious demographics in those states' urban areas produce substantial religious diversity in the statewide statistics.
both government financing and symbolic endorsement of the majority's particular sectarian perspective. In such a system, religious minorities will be more vulnerable to subtle (and frankly not so subtle) religious coercion than they have been at any time in recent memory. The next section describes the details of this new church/state paradigm.

II. THE COURT'S NEW THEORY OF CHURCH/STATE INTEGRATION

Although the opponents of the Court's existing Establishment Clause jurisprudence have spent most of their energy critiquing the concept of separation of church and state, they have also provided a fairly detailed roadmap of the post-separationist constitutional landscape. What follows in this section is a nonexhaustive list of several propositions that will form the basis of the new paradigm of church/state integration. The next section will then discuss how these principles are likely to affect the Establishment Clause doctrine that lower courts will use to implement the new regime. The final section will discuss whether anything will be left of the Establishment Clause after the new theory is fully implemented.

A. American Political Values are Infused with and Defined by Religion

The most basic thesis supporting the new integrationist perspective on the Establishment Clause is that the political culture of the United States is both infused with and defined by religion. This proposition has two components, one historical and the other theoretical.

The historical variation on this theme is that the country's political culture has always been marked by specific references to religion. Proponents of the integrationist perspective never tire of pointing out the many ways in which the political branches endorsed or financed religion in the early days of the Republic. Instances of early religious endorsement by the government that are frequently cited by the Court's church/state integrationists include presidential declarations of thanksgiving and prayer, legislative prayers and government-financed 34
chaplains, John Marshall's decision to open Supreme Court sessions with the invocation "God save the United States and this Honorable Court," and government-financed programs providing sectarian education for children belonging to Native American tribes. These members of the Court also cite more recent evidence of sectarian influence over government, including the congressional authorization of National Days of Prayer and the addition of the words "under God" to the Pledge of Allegiance in 1954. These varied historical references are used to bolster the integrationists' main objective, which is to undermine the "demonstrably false principle that the government cannot favor religion over irreligion."

There are numerous problems with these historical accounts. One problem is Thomas Jefferson. Jefferson is problematic for the church/state integrationists for several reasons. First, Jefferson wrote the separationist Virginia Bill for Establishing Religious Freedom, in which he derided:

the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time . . . .

value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders") (alteration added).

35. See Lynch v. Donnelly, 465 U.S. 668, 674 (1984) ("It is clear that neither the seventeen draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries.").


37. See Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting).

38. Lynch, 465 U.S. at 677, n.5 (citing congressional proclamations).

39. Id. at 676.

40. McCreary County, 125 S. Ct. at 2752 (Scalia, J., dissenting).

Second, while serving as President, Jefferson refused to issue a religious Thanksgiving Proclamation, on the ground that “[e]very religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.”

Perhaps most importantly, however, President Jefferson authored the infamous Letter to the Danbury Baptists. In this letter Jefferson adapted to secular ends the “wall of separation” metaphor coined earlier by the founder of the first Baptist church in America, Roger Williams. Jefferson argued that in adopting the First Amendment the American people built “a wall of separation between Church and State.” The “wall of separation” metaphor has long generated the ire of church/state integrationists of all stripes, whose attitude toward the metaphor was summarized in the Alabama silent prayer case by then-Justice Rehnquist: “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.” The integrationists’ tack in explaining away the inconvenient views of one of the foremost thinkers on church and state in the early republic is first to diminish the importance of the documents themselves, and then to quietly erase Jefferson’s name from the list of Framers whose intent is relevant to determining the meaning of the First Amendment.

42. 11 THE WRITINGS OF THOMAS JEFFERSON 429 (Andrew A. Lipscomb ed., 1904) (alteration added).
43. See infra note 173.
46. Id. (“[Jefferson’s] letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress.”) (alteration added).
47. Id. (“Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. . . . He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.”)
But Jefferson is not the only Framer presenting problems for those trying to construct a historical justification for church/state integration. Another problem for the new church/state integrationists is the separationist views of the author of the First Amendment himself, James Madison. Madison was instrumental in erecting separationist legal barriers to religious establishments in Virginia, by shepherding Jefferson’s Bill for Religious Freedom through the Virginia legislature. In the context of that battle between separationists and integrationists, he wrote one of the most vociferous defenses of the separation of church and state in the Memorial and Remonstrance Against Religious Establishments.\textsuperscript{48} The Memorial is key because it goes beyond the precise legal details of the particular dispute over Virginia law to set forth most of the basic arguments in favor of separation of church and state in general. Many of Madison’s arguments harshly criticize the religious groups that have historically benefited from the integration of church and state.\textsuperscript{49} Madison’s tone is at times intemperate. It would be difficult to conceive of any modern political figure publishing these portions of the Memorial today for fear that they would be derided as insensitive and hostile to religion. Those who do not particularly care for Madison’s separationist views prefer to treat the Madison who wrote the Memorial as a different person than the Madison who wrote the First Amendment.\textsuperscript{50} But Madison himself wrote in his later life about these issues in a way that indicates clearly that his views on the separation of church and state did not change over time. It is simply implausible to claim, as Justice Thomas does,\textsuperscript{51} that the person who wrote that ecclesiastical establishments have a tendency to “erect a spiritual tyranny

\begin{itemize}
\item 49. See, e.g., infra note 183.
\item 50. See \textit{Wallace}, 472 U.S. at 97-98 (Rehnquist, J., dissenting) (“On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution.”). For a critique of Rehnquist’s historical discussion in \textit{Wallace}, see Douglas Laycock, \textit{“Nonpreferential” Aid to Religion: A False Claim About Original Intent}, 27 WM. & MARY L. REV. 875 (1985-86).
\item 51. See supra note 29.
\end{itemize}
on the ruins of Civil authority\textsuperscript{52} also intended the First Amendment to facilitate state establishments of religion.

On the other hand, if one ignores the views of the separationist Framers and focuses instead on historical circumstances supporting church/state integration, then the historical argument turns out to be equally problematic because it proves too much. The historical data that might support the claim that church/state integration was commonly accepted in the United States at the time of the framing does not support the kind of ecumenical, big-tent religious establishments favored by the modern integrationists on the Court. Rather, if read honestly, the thrust of the data indicating a close relationship between religion and politics in the early republic would support a highly sectarian Protestant establishment.\textsuperscript{53} In this, as in many other respects, the new church/state integrationists try to have it both ways. They cite history to support their attacks on separationist views of the Establishment Clause, but they then ignore the parts of this history that contradict their efforts to allay the fears that their alternative paradigm will produce discrimination, religious coercion, and social disruption along sectarian lines of a sort not seen in this country in decades.

Given the many problems with the historical support for a benign, ecumenical religious establishment, modern church/state integrationists usually bolster their historical arguments with theoretical claims. The theoretical argument is that the Framers frequently enlisted religion to bolster their political goals and aspirations because religion was (and is) an indispensable component of the country's basic political values. "Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."\textsuperscript{54} The academic version of this

\textsuperscript{52}. James Madison, \textit{Memorial and Remonstrance, reprinted in Everson}, 330 U.S. at 68.

\textsuperscript{53}. \textit{See infra} note 152 and accompanying text; \textit{see also} McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2745 (2005) ("[H]istory shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no member of this Court takes as a premise for construing the Religion Clauses. . . . The Framers would, therefore, almost certainly object to the dissent's unstated reasoning that because Christianity was a monotheistic "religion," monotheism with Mosaic antecedents should be a touchstone of establishment interpretation) (alteration added).

\textsuperscript{54}. \textit{McCreary County}, 125 S. Ct. at 2749 (Scalia, J., dissenting).
position has been articulated by Michael McConnell and others. The gist of this position is that without some external source of public value or civic virtue, all liberal democracies are little more than empty proceduralist shells, because they have no way of identifying or selecting among society’s larger social objectives. Thus, liberal democracies require “mediating institutions” such as churches to give society meaning and direction. Religion is the means “by which the citizens in a liberal polity learn to transcend their individual interests and opinions and . . . develop civic responsibility.” Along similar lines, Professor Chip Lupu has argued that the focus on rationality and analytic empiricism that is at the heart of the separationist Establishment Clause paradigm is not “particularly conducive to the life of the spirit, without which it may not be possible for a nation to thrive.”

Another variation on this theme is that all political policy determinations involve value choices, and prohibiting religious practitioners from basing political decisions on their religious values unfairly discriminates against religious practitioners and installs secularism as the defining national ideology. Justice Thomas has also claimed that discrimination against religious practitioners is behind the Court’s historic refusal to permit the government to finance pervasively sectarian institutions such as religious schools: “[T]he application of the ‘pervasively sectarian’ factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.” Surprisingly, the claim that separationist interpretations of the Establishment Clause discriminate against religion and religious practitioners does not only emanate from religious conservatives such as Judge McConnell and Justice Thomas. Some politically progressive academics have made

56. Id. at 17.
57. Id.
similar claims in recent years. After arguing for many years in favor of
the separationist mandate against religiously motivated legislation,
Michael Perry has recently argued that the constitutional prohibition of
religiously based legislation “deprivilege[s] religious faith, relative to
secular belief, as a ground of moral judgment.”61 Along the same lines,
Professor Douglas Laycock criticizes proponents of what he terms “so-
called separationism,” whose “defining commitment seems to be to
secular supremacy and religious subordination, or at least to religious
marginalization.”62

There are many problems with these arguments. The
discrimination argument, for example, depends on the highly disputable
assumption that democratic governance is predicated on the right of the
political majority to exercise its power with regard to the very sensitive
subject of religion. The argument is that a constitutional limit on the
exercise of that sort of power “discriminates” against the religious by
denying them the fruits of their political success. But this sort of
limitation on political victors occurs frequently in constitutional
litigation. Segregationists who comprised a large majority of the voting
population of the South in the 1960s were prohibited from exercising
their political clout by legally mandating segregation; today, broad
majorities favoring the death penalty may only carry out their policy
desires in conformance with strict constitutional limits imposed by due
process and cruel and unusual punishment strictures; and despite the
broad social revulsion directed toward the likes of Larry Flynt, his
socially unpalatable salacious satires receive the same constitutional
protection as the country’s most esteemed establishment newspapers.63
Majorities cannot do everything they want in a constitutional democracy,
even with regard to implementing their most revered and widely shared
values.

61. MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL
62. Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46
63. See Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) (holding that the
First Amendment protects salacious political satire under the standard of New York
Times v. Sullivan, 376 U.S. 254, 270 (1964), which protects criticism of public
figures even when embodied in “vehement, caustic, and sometimes unpleasantly
sharp attacks”).
As for the notion that liberal democracy cannot exist without some source of civic virtue and deep value, this proposition also asserts a dubious view of the constitutional framework of our political system. In fact, as Justice Jackson famously reminded us, "[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." Contrary to the theoretical claim at the heart of the integrationist paradigm, collective assertions of eternal social ideals and beliefs, attempts to formulate a uniform set of public values, and even the very concept of civic virtue itself are all deeply incompatible with the basic proposition that our system exists to accommodate a range of different, and even conflicting concepts of ultimate goods. Even if this were not true as a theoretical matter, it is certainly true as a practical matter. Any attempt in the United States today to identify and reach consensus about an ultimate set of religious ideals is doomed at the outset to fail. The integrationists implicitly recognize this by subtly shifting their focus in the second component of the integrationist paradigm from the pursuit of unity through common values to the imposition of religious majoritarianism.

B. The Salient Religious Values are Those of the Political Majority

There is very little in the realm of religious faith and spiritual verities that Protestants, Jews, Catholics, Hindus, Buddhists, agnostics, and atheists can agree upon. Even the most basic issues are subject to acrimonious dispute, including the validity of particular religious texts, the existence or nonexistence of a supreme being (or supreme beings), the mechanisms for communicating with the deity (or deities), and the role of the institutional church. The church/state integrationists understand this, and respond by emphasizing that the salient religious values that the government is allowed to endorse and advance are the specific values of the religious majority.

This conclusion follows directly from the historical and theoretical premises of the first component of the integrationist paradigm.  

65. See infra notes 66-69 and accompanying text.
paradigm. If the Establishment Clause permits the government to act religiously because of the country’s religious history, then the logical reference point to determine the content of that history must be the specific views of the historical actors in question. The views of these actors therefore define the religious activity in which the government is permitted to engage. As Justice Scalia once argued, the constitutional issue does not turn on “the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing . . . a feeling of exclusion, upon nonbelievers,” but rather the historical fact that the “age-old practices of our people” indicate that the Constitution favors the religious majority. Therefore, Scalia later argued, if the historical actors are monotheistic, then the government is allowed to advance the religious cause of monotheism. Likewise, if as a theoretical matter religion is necessary to stabilize and orient the political structure, then the government must be allowed to select specific religious values to advance as the official version of civic virtue. Since all religions do not have the same values, some religions must win and others must lose.

Thus, just as the church/state integrationists attempt to exclude Jefferson from the group of Framers whose views define the meaning of the Establishment Clause, they also specifically advocate the “disregard” (to use Justice Scalia’s phrase) of people who belong to groups other than major traditional monotheistic religions. Although Justice Scalia is the only member of the Court brazen enough to actually say this in so many words, the fact is that any integrationist perspective is by its very nature exclusionary. Even the generic and seemingly insignificant slogan “In God we Trust” has at its center a concept that significant numbers of Americans cannot embrace. The worship of a single God is simply not an agenda to which Hindus, Buddhists, Wiccans, agnostics, or atheists can sign on. From the perspective of these groups, the Ninth Circuit Court of Appeals was clearly correct in asserting that “[a] profession that we are a nation ‘under God’ is identical, for Establishment Clause purposes, to a profession that we are a nation ‘under Jesus,’ a nation ‘under Vishnu,’ a nation ‘under Zeus,’ or a nation

68. Id.
'under no god,' because none of these professions can be neutral with respect to religion." 69 If even the most diluted and nonspecific religious concept cannot obtain unanimous consent of all religious groups, then the entire project of achieving unanimous consent for any government religious activity is doomed. It is inevitable that religious groups associated with the political majority will be granted official favor and members of other religious groups will be relegated to outsider status. According to the second component of the integrationist paradigm, this religious exclusivity is permissible under a properly construed Establishment Clause.

C. Religion is Relevant to Political Participation

A second logical corollary of the historical and theoretical arguments in favor of church/state integration is that under an integrationist regime, a person's religion will be considered relevant to that person's status in the political system. If we accept the integrationist premises that this country is historically a religious enterprise, and that religion provides a necessary undergirding of all legitimate political policies, then it is fair to doubt that a person who is not religious (or a person who is a member of an outsider religious group) is qualified to contribute anything desirable to the political process. If the country historically has been governed by religious practitioners, then someone who does not practice religion may fairly be seen as lacking a central attribute that has historically been viewed as a key qualification for political office. Likewise, if religion is necessary to provide the civic virtue that leads to the development of wise public policy, then we can assume that anyone who has not imbibed the requisite number of religious values is not sufficiently virtuous to govern.

None of this is intended to suggest that the new integrationists would invalidate the "no religious test" clause of Art. VI of the Constitution, 70 or uphold a specific religious qualification for office. But the logic of the integrationist paradigm could lead an integrationist court to approve a number of actions by the government and its officials that

70. U.S. CONST. art. VI ("no religious test shall ever be required as a qualification to any office or public trust under the United States").
stop short of an overt requirement that political candidates join a particular church. For example, under an integrationist regime government officials could be allowed to participate openly (that is, in their role as government officials) in religious ceremonies and other sectarian affairs. Government officials could be permitted to comment (again, while acting in their official roles) on the religious practices of candidates for office. They could even be permitted to publish an official government version of Christian Coalition-style voter information cards referring to the religious beliefs and practices of candidates. Under the same theory, the government could join with churches to provide an appropriate spiritual background for public officials and staff, and government programs could incorporate the assumption that a religious component of government-financed social programs is necessary in order to better accomplish the goals of those programs. 71

In effect, as long as the government stops short of mandating specific religious practices as a condition of providing government services, the government could do everything else in its power to bolster the current public prejudice that forces political candidates to demonstrate some basic level of conformity with mainstream religious faith before being elected to office. As a practical matter, it is doubtful that an avowed atheist or an agnostic could be elected to any political office in most parts of the country; under an integrationist regime, the government would be allowed to translate into official government policy that common form of religious prejudice.

One possible response to this claim is that even if the assumption that nonbelievers could not be elected to office is true, the Establishment Clause is not violated because its strictures do not apply to voters. The unwillingness of an overwhelmingly religious public to vote for someone who does not share its faith does not violate the Establishment Clause because voters are not state actors. But even if the Establishment Clause

71. The Court has already approved a form of this sort of religious favoritism in Bowen v. Kendrick, 487 U.S. 589, 606-07 (1988) (approving a federal family planning act that provided funding to religious organizations, and noting that “these provisions of the statute reflect at most Congress’ considered judgment that religious organizations can help solve the problems to which the [act] is addressed. . . . Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems.” (citation omitted)).
does not apply to the actual decisions of voters, government actions that subtly reinforce the voters’ religious prejudice in favor of members of approved religious faiths nevertheless implicate Establishment Clause values. Even if we are not as tolerant of religious outsiders as our social mythology would have us believe, the myth of tolerance for religious diversity creates the conditions under which the reality of tolerance for religious diversity may eventually flourish. This myth was fostered by a separationist paradigm in which the government may not send “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.” The separationist paradigm instills in society an aspiration that is highly conducive to religious peace among a diverse population—an aspiration which has at its center the proposition that a person’s religious beliefs (or lack thereof) are irrelevant to that person’s status as a citizen. Proponents of a system that rejects this proposition must also acknowledge their willingness to forego the religious peace that has always been one of the most important goals of church/state separation.

D. Religion is a Collective Phenomenon

One consequence of implementing the first three components of the new integrationist paradigm is that religion will become a collective rather than an individual phenomenon. That is, the precise details that make religion politically significant will become subject to social determination. Sets of beliefs that do not fit the socially determined model of religion may still be recognized as “religious” for some purposes (application of the Free Exercise Clause, for example), but such disfavored faiths will be viewed by the public as secondary to the main enterprise of religion as represented by the government-approved mainstream belief systems. Thus, there will be a collectively determined hierarchy of faiths, in which favored religions will be certified by the government and used to instill preferred values to the citizenry and others will be merely tolerated, in much the same way that we tolerate Holmes’ “man [who] says that he has squared the circle[.]”

message this will send to adherents (and potential adherents) of the secondary faiths will be one of subordination and insignificance.

As usual, Justice Scalia has already provided both a model of how this process of collectivizing religion will work, and a series of justifications for the creation of a government-certified hierarchy of faiths. As a model for how this system will work, recall Justice Scalia's distinction between socially accepted monotheistic faith and every other type of religious belief.\textsuperscript{74} In Scalia's world, socially approved monotheistic faiths will have their symbols and belief systems endorsed by the government and incorporated into government programs; the others can be "disregarded."\textsuperscript{75} As for justifying the new religious hierarchy, Scalia describes a mutually reinforcing system in which religion does not really serve its true function unless it is incorporated into a social matrix, and the government cannot act legitimately unless it first bows to the superior power of the approved deity:

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 . . . .\textsuperscript{76}

Other courts have described a similar phenomenon.\textsuperscript{77} What all this means for the obstinate adherents of disfavored faiths depends on how far the new integrationists follow their logic. At the very least, religious minorities and nonreligious persons are given the same instructions Justice Scalia would have given to Deborah Weisman: when

\textsuperscript{74} See McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2753 (2005) (Scalia, J., dissenting).
\textsuperscript{75} Id.
\textsuperscript{76} Lee v. Weisman, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).
\textsuperscript{77} See, e.g., Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 972 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993) (upholding a student-led prayer at a public high school graduation ceremony and noting to dissenters that "[b]y attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards" (alteration added)).
confronted with the government’s celebration of the dominant religion, sit down, be quiet, or leave the premises. 78

E. The Establishment Clause Prohibits only the Most Egregious Forms of Religious Coercion

Just as Justice Scalia’s Lee v. Weisman dissent provides the lesson for how religious minorities are forced to deal with the majority’s use of government to express its faith in public ceremonies, the opinion indicates how the concept of religious coercion will be addressed in the new church/state integrationist regime. The main debate between Justices Kennedy and Scalia in Lee v. Weisman pertained to the meaning of coercion. Both Justices recognized that religious coercion would violate the Establishment Clause, but they disagreed vehemently on what the term “coercion” means.

To Justice Scalia, “coercion” means quite literally the “coercion of religious orthodoxy and . . . financial support by force of law and threat of penalty.” 79 To Justice Kennedy, on the other hand, coercion encompasses other, much more subtle, forms of social pressures that are encouraged or facilitated by the government. In his majority opinion striking down a brief, ecumenical prayer at a public school graduation ceremony, Kennedy noted that to the objecting student “attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.” 80 The coercive element was the social pressure that was brought to bear on the dissenter when a prayer that is favored by a majority of participants is included in the state ceremony:

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

78. See Lee, 505 U.S. at 646 (Scalia, J., dissenting) (“To deprive our society of that important unifying mechanism [of religion] in order to spare the nonbeliever what seems to me the minimal inconvenience of standing, or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.” (alteration added)).
79. Id. at 640 (Scalia, J., dissenting).
80. Id. at 586.
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. \(^{81}\)

Thus, at least in the public school context where juveniles are involved, social pressure becomes unconstitutional coercion, even if it is not approved by the state, and (as a later school prayer case demonstrated) even if the decision to have the prayer is that of the students rather than the government actors. \(^{82}\)

Justice Kennedy displays extraordinary sensitivity to religious minorities in his opinion in *Lee v. Weisman*. In explaining why defending the Establishment Clause rights of the dissenter did not infringe on the free speech or free exercise rights of the majority, Justice Kennedy noted that there was no equivalent to the Establishment Clause regarding any other topic on which the government might act or speak. Religion was singled out for special restrictions, Kennedy noted, because our history has taught us that

in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed. \(^{83}\)

Unfortunately, Justice Kennedy has not applied that lesson to any context other than religious exercises involving juveniles at public schools. Indeed, in a long string of cases involving official endorsements of religion outside the public school context, Kennedy has been among the Court's most consistent supporters of the government's ability to engage in religious activity. \(^{84}\) He has argued that limiting the

\(^{81}\) *Id.* at 593.


\(^{83}\) *Lee*, 505 U.S. at 591-92.

\(^{84}\) In addition to his opinion in *Allegheny County*, which is discussed at *infra* notes 85-88 and accompanying text, Kennedy voted to uphold the constitutionality of both official Ten Commandments displays in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), and *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005), and also joined the plurality's very lenient treatment of Establishment Clause restrictions on
government's ability to endorse religion might amount to unconstitutional discrimination against religion.\textsuperscript{85} In one opinion written early in his tenure on the Court, Justice Kennedy criticized the contention that the Establishment Clause prohibited the government from favoring either religion in general or particular sects.\textsuperscript{86}

Taken to its logical extreme, some of the language quoted above would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.\textsuperscript{87}

This stance puts Kennedy directly in line with the other church/state integrationists on the Court in believing that "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society,"\textsuperscript{88}—at least outside of the schools, and presumably limited by a Scalia-style narrow coercion protection against the imposition of direct legal sanctions on religious dissenters.

As discussed in Sections III and IV, infra, the adoption of this position would effectively render the Establishment Clause redundant, given the protections already offered against direct religious coercion by the Free Exercise and Free Speech Clauses of the First Amendment. Nevertheless, this result is unavoidable if the Court's new integrationist majority is to achieve its stated goal of reinvigorating the religious aspects of public culture. As Justice Kennedy recognized in his early endorsement opinion in \textit{Allegheny County}, diluting the Establishment Clause to the point of a narrow coercion standard is necessary if the

---

\textsuperscript{85} See \textit{County of Allegheny v. ACLU, Greater Pittsburgh Chapter}, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (arguing that any other approach "would border on latent hostility toward religion, as 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").

\textsuperscript{86} \textit{Id.} at 662 (arguing that "where the government's act of recognition or accommodation [of religion] is passive and symbolic . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment" (alteration added)).

\textsuperscript{87} \textit{Id.} at 657.

\textsuperscript{88} \textit{Id.}
Court’s new majority is going to permit the government to endorse religion and finance religious activity—activities that Justice Kennedy has repeatedly voted to uphold. Any attempt to extend beyond the school context Justice Kennedy’s Lee v. Weisman-style recognition that government endorsement of religion unconstitutionally facilitates religious coercion through social ostracism would derail the project of church/state integration. Church/state integration and effective coercion of religious dissenters are intertwined phenomena. Justice Kennedy has already chosen the church/state integration side in the grand theoretical debate over the meaning of the Establishment Clause; the only good news for separationists is that Justice Kennedy cannot bring himself to apply the logic of that choice to schoolchildren.

F. Private Religious Expression is Protected and Encouraged, Even in Government-Controlled Contexts

The sixth component of the integrationist paradigm involves the application of the Establishment Clause to private religious speech that occurs on government property, in government facilities, or in close conjunction with government activities. This component of the paradigm will apply in two common situations. First, it will apply in the public school context when teachers or students seek to express their religious ideas in a classroom atmosphere where officially sanctioned religious activity would be impermissible. Second, it will apply outside the school context when adults seek to place religious symbols on public property, or otherwise engage in religious speech or activity in conjunction with official government business or in close proximity to government facilities.

In the Court’s decisions involving examples of this scenario in public schools, the separationist paradigm has prevailed in the sense that a majority of the Court has interpreted the Establishment Clause to limit ostensibly private religious speech that occurs in conjunction with an official public school activity. Arguments in favor of permitting private religious speech in public schools appeared in some of the Supreme Court’s earliest religion-in-public-school cases. In Abington School

89. See, e.g., Zelman v. Harris, 536 U.S. 639 (2002), and Mitchell v. Helms, 530 U.S. 793 (2000), in which Justice Kennedy voted with the integrationist majority to uphold both government financing schemes.
District v. Schempp\textsuperscript{90} for example, the Court struck down a Pennsylvania program under which students could select and read over the school intercom ten passages from any version of the Bible that he or she chose. Justice Stewart dissented, arguing that “there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children’s school day open with the reading of passages from the Bible.”\textsuperscript{91} To prohibit students who want to engage in religious speech at the beginning of the school day from doing so, Stewart argued, would not only place religion “at an artificial and state-created disadvantage,” it would approach an “establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.”\textsuperscript{92}

Despite the failure of this argument to carry the day in Schempp, many school systems have continued to use some form of this argument in attempting to circumvent the Court’s consistent refusal to permit prayer at public school events. Most recently, the Court rejected a small Texas town’s effort to permit student prayers before public high school football games.\textsuperscript{93} The school officials argued that the restrictions usually imposed on prayer in public schools should not apply to their football game prayers because the students leading the prayer were chosen by a vote of the other students instead of the school officials themselves.\textsuperscript{94} The school argued that the principles of the Court’s school prayer cases did not apply to them “because the messages are private student speech, not public speech,” and because “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”\textsuperscript{95} The Court rejected these arguments, in an opinion joined by Justice Kennedy, on the grounds that the school board had constructed a system of choosing the student to give the prayer that effectively guaranteed that “minority candidates will

\textsuperscript{90} 374 U.S. 203 (1963).
\textsuperscript{91} Id. at 312 (Stewart, J., dissenting).
\textsuperscript{92} Id. at 313 (Stewart, J., dissenting).
\textsuperscript{94} Id. at 302.
\textsuperscript{95} Id. (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion of O’Connor, J)).
never prevail and that their views will be effectively silenced.\textsuperscript{96} Thus, under current doctrine, even private religious speech is constitutionally problematic if it occurs in a socially coercive atmosphere that the government has a hand in creating.

The Supreme Court has allowed arguments in favor of private religious speech to overcome Establishment Clause limits in the public school context only where the claims have involved speakers getting access to public school facilities after-hours, in situations in which the facilities have already been designated as public forums for other types of private speech.\textsuperscript{97} In these cases, however, the Court has been careful to emphasize that the government must take care to prevent the private religious group from infiltrating the regular school day, conveying the government's endorsement of the religious activity, or otherwise infringing on the right of other students to be free of unwanted religious proselytizing.\textsuperscript{98}

Justice Kennedy's willingness to join the separationist Justices in limiting private religious speech in public schools means that the application of the sixth component of the integrationist paradigm will produce inconsistent results inside and outside the public school context. Thus, cases implicating the sixth component of the integrationist paradigm will track the cases implicating the fifth component of the paradigm; in both sets of cases Justice Kennedy's broad interpretation of the concept of coercion in the public school context will deny his

\textsuperscript{96} Id. at 304.

\textsuperscript{97} See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (allowing church group to use a school auditorium that had been used for similar expressive purposes by a wide range of other speakers); Mergens, 496 U.S. 226 (upholding the Equal Access Act, which permitted religious groups to use school facilities after-hours, where the facilities had been opened up for a range of different expressive purposes); Widmar v. Vincent, 454 U.S. 263 (1981) (allowing religious group at a public university to use school property for meetings on the same terms as other student groups).

\textsuperscript{98} The Court has been especially careful to prevent participation in the religious activity by school officials such as teachers. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 117 (2001) ("[W]hen individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns [about coercion] expressed [previously] are not present." (alterations added)); Mergens, 496 U.S. at 253 ("Under the Act, . . . faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control, or regularly attend activities of student groups.")
integrationist colleagues the same leeway to permit extensive religious activity in schools that Kennedy is willing to grant them in cases arising in the adult world. But the survival of this sliver of separationist doctrine may be short-lived, since the other four integrationists on the Court are almost certainly willing to loosen (or even remove) Establishment Clause restrictions on private religious speech in public schools. Indeed, during his tenure as a court of appeals judge, Justice Alito wrote two opinions that specifically utilize the “private speech” model to permit the infusion of religion into public school classrooms.\textsuperscript{99} Thus, one more strategic change in Court personnel could spell the demise of even the Establishment Clause protections of children in the captive atmosphere of a schoolroom.

Outside the public schools, the situation is much clearer, and the integrationist model probably already has majority support on the Court. Justice Kennedy does not display the same hesitation to permit the joinder of private religious speech and government action in the adult world that he exhibits in the public school cases. Thus, once the church/state integration paradigm is fully implemented, the Court is likely to permit private religious speech in public facilities, on public property, and in conjunction with government-sponsored events—without regard to the fact that the religious speech will often be so intertwined with the government that a neutral observer would view the religious speech as having been endorsed by the government, and without regard to the fact that the private religious speech may dominate the government forum or activity. Indeed, three of the five church/state integrationists have already so held in \textit{Capitol Square Review and Advisory Board v. Pinette},\textsuperscript{100} and every indication is that the two new Justices will join them in expanding the scope of permissible private religious activity in these situations.

In \textit{Pinette}, the question was whether various private groups could erect a series of Latin crosses in a government-owned plaza surrounding the statehouse in Ohio.\textsuperscript{101} Four Justices—including Justices


\textsuperscript{100} 515 U.S. 753 (1995).

\textsuperscript{101} Id. at 757.
Scalia, Thomas, Kennedy, and the late Chief Justice Rehnquist—ruled that the crosses did not violate the Establishment Clause, and that the Constitution did not require an independent assessment of the religious impact of a display in a public forum. According to the opinion of these four Justices, "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."^102 Although Justice O'Connor also was willing to permit the particular display at issue in *Pinette*, she objected that the plurality's standard would effectively gut the Establishment Clause by permitting private religious activity that occurs in such close conjunction with the government that a reasonable observer would perceive an official endorsement of religion.\(^103\) In response, Justice O'Connor noted that under the traditional understanding of the Establishment Clause,

> the Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism . . . ; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.\(^104\)

Under the sixth part of the integrationist paradigm, the Court would abandon this traditional understanding in favor of a hollow neutrality premise. In other words, if all religious groups are given the same opportunity to use public spaces and official ceremonies to advance their faith, it is not a constitutional problem if the dominant faith happens to appear more often. In effect, this approach allows the government to privatize its Establishment Clause violations. As Justice Souter summarized the problems with this approach in *Pinette*: "By allowing government to encourage what it cannot do on its own, the proposed *per

---

102. *Id.* at 770 (plurality opinion) (alteration added).

103. *Id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment).

104. *Id.* at 777 (O'Connor, J., concurring in part and concurring in the judgment) (alteration added).
se rule would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself."  

G. Religious Establishment is Largely a Local, Rather than a National Concern

The final element of the new integrationist church/state paradigm is the devolution of church/state disputes to the states. Evidence of this theme has already cropped up in disparate decisions by the present Court, including one recent decision that represents a rare separationist victory in a government financing case. The basic position of the church/state integrationists is that the federal government has no business stepping in to limit close associations between local governments and powerful local religious majorities. In the explicit articulation of these principles, Justice Thomas has argued that under a properly construed Establishment Clause, "[s]tates may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any individual religious liberty interest." Justice Thomas reaches this conclusion based on his view that the Establishment Clause should never have been incorporated into the Fourteenth Amendment and applied to the states. In his view, the real purpose of the Establishment Clause was to protect state establishments of religion, not prevent them. Other integrationist members of the Court have been more circumspect than Justice Thomas in expressing their desire to subject religious minorities to the whims of locally powerful religious communities, but they all seem at least to share the general sentiment. The federalism approach to Establishment Clause issues has been just below the surface of many recent church/state decisions, especially in the area of government financing of religious activity. For example, in

105. Id. at 792 (Souter, J., concurring in part and concurring in the judgment).
Zelman v. Simmons-Harris, a five-member majority upheld a Cleveland program providing millions of dollars of public funds to private religious schools. The Court imposed only a weak formal neutrality requirement on localities that chose to finance private education, and specifically refused to take into account the local religious demographics of the private educational system. The fact that religious schools dominate the private educational systems in some states must not enter into the constitutional calculation, the Court's integrationist majority held, because if such a calculation were made, "an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools." But contrary to the Zelman majority's implication, evidence of religious domination does not undercut the separationist view of the Establishment Clause; rather, it illustrates the very point of the Establishment Clause. The Establishment Clause is designed to take into account the fact that in many areas powerful religious majorities will have the capacity to use the political system to funnel tax money to finance their sectarian goals. The larger the religious majority, the less likely that religious diversity can serve as an adequate political check on sectarian self-dealing; a judicially enforced Establishment Clause exists to prevent powerful religious majorities from using the political system to consolidate their dominance. To an integrationist Court, however, the fig leaf of formal neutrality is all that is required to satisfy the local government's constitutional obligations. The fact that (as in Cleveland) 96% of the students receiving government educational funds spend those funds in a religious institution is quite literally irrelevant.

A few years after it upheld the Cleveland program that funneled substantial funds to finance religious education, the Court used the same local-control approach to uphold a separationist scholarship program operated by the state of Washington. Washington, which has a very

109. 536 U.S. at 643.
110. Id. at 657-58.
111. Id. at 658 (quoting ninety-six percent figure and asserting 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").
strict separation principle in its state constitution, designed its scholarship program to ensure that no state funds would be used to finance religious education. In *Locke v. Davey*, the Court noted the strong anti-establishment sentiment in some states and held that the enforcement of this sentiment in state law did not violate the federal Constitution. The Court noted that there was "play in the joints" between the Establishment and Free Exercise Clauses, and that this "play" permits a state to be far more rigorous than the federal Constitution in prohibiting all forms of direct and indirect aid to religion. The Court's recognition that "we can think of few areas in which a State's antiestablishment interests come more into play" is certain to please separationists, but the separationist victory in this particular local battle is likely to be Pyrrhic if it entails surrendering the national war over a uniform meaning of the federal Establishment Clause. If one places *Locke* and *Zelman* side-by-side, the result is a constitutional regime in which the Supreme Court steps aside and lets the religious contestants decide most (or all) of these matters on a local level. In some states the separationists will win the political battle; in other states the religious groups will prevail. Either way, the Constitution is satisfied.

I will leave until the final section a full discussion of what this localization of church/state disputes portends for religious dissenters in a country in which significant religious homogeneity is the rule in approximately one-third of the states. For the moment, however, it is worth noting that there is a single theme running through all of the components of the integrationist paradigm discussed in this section, which culminates with the proposition that the resolution of disputes over religion should be shifted from the national to the local level of government. The theme unifying the various aspects of the integrationist paradigm is that the law of church and state should no longer be

113. See WASH. CONST. art. I, § 11, which states in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."
114. See *Locke*, 540 U.S. at 723 (noting the many state constitutions that included anti-establishment provisions at the time of the founding).
115. Id. at 718-19 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).
116. Id. at 722.
117. Id.
118. See infra Section IV.
primarily a constitutional matter, but rather should be considered largely political in nature. Church/state integrationists believe that the rules governing the relationship between church and state, if they exist at all, should be fought out in the political process just like the rules regarding every other type of public policy. This will be a comforting prospect only to those who read the history of political disputes over religion as largely peaceful, rational, tolerant, and calm affairs. Anyone who sees a darker tone to the history of religious political discord has cause to worry. Maybe sixty years of separationist jurisprudence has instilled in this society a degree of religious tolerance sufficient to prevent the worst excesses that usually attend political battles over religion elsewhere. Then again, considering the vitriol that has been directed at the very notion of church/state separation over the last few years, maybe not.

III. THE NEW COURT’S REVAMPED ESTABLISHMENT CLAUSE DOCTRINE

The one thing that almost everyone is likely to concede about the shift in power to the Court’s newly dominant church/state integrationists is that the new majority is likely to clean up the doctrinal thicket that has grown around the Establishment Clause over the last several decades. At present, there are ten different doctrinal standards for applying the Establishment Clause that have been embraced by one or more Justices currently on the Court. These include:

1) The notorious Lemon test, which 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.’” 119

2) An endorsement analysis, which modifies 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.” 120

(3) The broad coercion analysis used by Justice Kennedy in Lee v. Weisman,121 which takes into account government facilitation of private social and peer group pressure on religious dissenters.

(4) Justice Scalia’s narrow coercion analysis, which prohibits only “coercion of religious orthodoxy and . . . financial support by force of law and threat of penalty.”122

(5) A formal neutrality standard, which is used in cases involving government financial aid to religious institutions, and holds that

where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.123

(6) A substantive neutrality standard, which asks whether government aid to a religious organization actually advances the sectarian goals of the organization.124

(7) Justice Thomas’s disincorporation theory, which states that the Establishment Clause should not have been incorporated into the Fourteenth Amendment and therefore imposes no limits whatsoever on state and local governments.125

(8) The nonpreferential establishment standard, which would permit any religious activity by the government so long as the government does not prefer one specific religious sect over another.

121. 505 U.S. 577 (1992); see supra notes 80-83 and accompanying text.
122. Id. at 640 (1992) (Scalia, J., dissenting).
124. See Mitchell v. Helms, 530 U.S. 793, 837-40 (2000) (O’Connor, J., concurring in the judgment) (criticizing the plurality’s limited focus on formal neutrality and suggesting that a more rigorous analysis of government aid is necessary). Justice O’Connor never provided a clear description of the precise parameters of this substantive neutrality, beyond noting that it was constitutionally impermissible for a religious organization receiving government funds to divert those funds to sectarian activities. Although Justice O’Connor has now left the Court, Justice Breyer joined her Mitchell opinion, and presumably will continue to be concerned about the issues she raised.
Chief Justice Rehnquist popularized this analysis in an opinion that current Chief Justice Roberts seems to have endorsed while working for the Reagan Administration.

(9) The divisiveness standard, which would judge the constitutionality of a government action endorsing religion based on whether the action caused substantial religious strife.

(10) An ad hoc analysis, which gives up the effort to define a constitutional standard for applying the Establishment Clause on the ground that “[w]hile the Court’s prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases.”

It is relatively simple to identify the standards listed above that will not long survive the Court’s turn toward the integration of church and state. The Lemon test, in particular, has long been the bete noir of the integrationist wing of the Court. Justice Scalia’s criticism of what he calls “the brain-spun ‘Lemon test’” has been particularly scathing. He once likened 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.” This time Lemon may be interred permanently.

The Court is also likely to abandon the endorsement test, which builds on Lemon, and has been criticized from an integrationist perspective

127. See supra note 4.
128. See Van Orden v. Perry, 125 S. Ct. 2854, 2871 (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” (alteration added)); 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.”).
129. Van Orden, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment) (alteration added).
because the effort to assess the religious meaning of a government action is "fraught with futility."¹³³ From the perspective of the integrationists, the endorsement test "either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those views."¹³⁴ Particular criticisms aside, the real reason the integrationists detest both Lemon and the endorsement variant of Lemon is that both tests are deeply tied to the notion that religion should not infiltrate the government, either overtly, through statutes that have religious effects, or surreptitiously, through the passage of facially secular legislation for religious reasons.

For similar reasons, religious divisiveness does not seem to concern the integrationists. Justice Scalia even mocks the separationist concern with the possibility that a religious group's "actions may prove (shudder!) divisive."¹³⁵ The substantive neutrality analysis is also unlikely to find favor in the new Court, since it was raised in response to the heavily integrationist overtones of Justice Thomas's plurality opinion in Mitchell v. Helms.¹³⁶ Finally, an ad hoc analysis will be unnecessary for an integrationist Court once it provides a definitive standard for compliance with the Establishment Clause that has no real substance.

Which leaves the five remaining standards, all of which can easily be combined into an essentially toothless mechanism for granting the government virtually unfettered authority to endorse religion and finance the activities of religious organizations. The model for this approach has already been provided by the existing integrationist members of the Court. In the government financing cases, for example, the integrationists have articulated the standard clearly in Zelman and Mitchell. In Zelman they have said that aid to religious organizations will be judged by a formal neutrality standard, such that the mere pretense that all religious and secular organizations can apply for a government aid program will render that program constitutional—even if the reality is that virtually 100% of the funds under the program go to

---

¹³³ Van Orden, 125 S. Ct. at 2867 (Thomas, J., concurring).
¹³⁴ Id.
religious organizations, and even if the sums in question run into the millions of dollars.\footnote{137}{See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).}

Mitchell fine-tunes this analysis by making it clear that so long as a program satisfies the formal neutrality requirement, the Constitution is not violated if the religious organization receiving the government funds converts those funds to specifically religious purposes:

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.\footnote{138}{Mitchell, 530 U.S. at 820 (plurality opinion) (citation omitted) (alteration added).}

In other words, the government cannot give a religious school Bibles, but it may give the religious school money that the school can use to buy Bibles. Welcome to the brave new world of an eviscerated Establishment Clause.

In the area of religious endorsements by the government, a similarly weak standard will apply. In the symbolic endorsement context the integrationists are likely to apply something akin to Justice Scalia’s narrow coercion standard, on the ground that any restriction on religion more rigorous than this would “signify the callous indifference toward religious faith that our cases and traditions do not require.”\footnote{139}{County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).} There might be some slight willingness to go beyond a standard requiring proof of outright legal coercion; Justice Kennedy acknowledges, for example, that the Establishment Clause “forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall,”\footnote{140}{Id. at 661.} although his phrasing of this point leaves in question the constitutional status of a temporary cross on the roof of city hall.

Two of the remaining standards may be easily incorporated into this mix. The nonpreferential establishment analysis is inherent in the

\begin{footnotesize}
\footnote{137}{See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).}
\footnote{138}{Mitchell, 530 U.S. at 820 (plurality opinion) (citation omitted) (alteration added).}
\footnote{139}{County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).}
\footnote{140}{Id. at 661.}
\end{footnotesize}
formal neutrality standard, since under a formal neutrality standard the
government would be permitted to fund many different churches, which
conforms to the gist of the nonpreferential notion that the government
may establish religion in general so long as it does not favor a particular
sect. Likewise, with regard to the disincorporation standard, it would be
simple for the Court to conclude, based on a revised historical analysis,
that the Establishment Clause was mistakenly incorporated into the
Fourteenth Amendment; after all, Justice Thomas has already written that
opinion. On the other hand, given the fact that very little will violate the
Establishment Clause in the new era, anyway, it hardly seems worth the
bother to release state and local governments from shackles that are no
longer locked.

All of which leaves the religion-in-school cases as the only area
in which (because of Justice Kennedy's reluctance to follow in the
school cases the instincts he exhibits in other areas of church/state
disputes) the Establishment Clause will retain some vitality—at least
unless and until a sixth church/state integrationist joins the others on the
Court.

This description of the doctrinal fallout from the adoption of a
church/state integrationist perspective on the Establishment Clause paints
a bleak picture of the future of religious liberty in the United States.
Indeed, it is difficult to see what will remain of the Establishment Clause
in an integrationist regime. To address that issue, it is necessary to
broaden the focus of analysis once again, and revisit the basic question of
what the integration of church and state is really intended to achieve.

IV. WHAT'S LEFT OF THE ESTABLISHMENT CLAUSE?: THE MEANING OF
THE INTEGRATION OF CHURCH AND STATE

Proponents of abandoning Jefferson's and Madison's notion of
church/state separation usually cast their arguments in the negative; they
are very clear about what they are against. Opponents of church/state
separation are much less clear, however, about what they are for. As a
starting point, it should be clear that there are only two models of
church/state relations. If we abandon the model defined by the
separation of church and state, the only other option is to adopt a model
defined by the integration of church and state. But beyond the doctrinal
details discussed in the previous section, what does the integration of
church and state really mean? What kind of society is the integration
paradigm supposed to serve? More precisely, can the integrationist paradigm logically impose any real limits on the religious activities of the government beyond what is already available under the Free Exercise and Free Speech Clauses of the same Amendment? Does the integrationist paradigm effectively write the Establishment Clause out of the Constitution?

A few points seem beyond serious debate. At a bare minimum, a constitutional structure defined by the integration of church and state would permit the government to become infused with sectarian influences and would also permit the state to advance sectarian interests through the use of government symbols, financing, and moral and spiritual suasion. As the discussion in Section II of the first component of the integrationist paradigm makes clear, this conclusion is at the heart of the paradigm shift away from separationism. The erection of crosses on public property, government financing of religious schools and social service programs, and officially sanctioned prayer are all consistent with the integrationist notion that this is a religious country, which needs a steady infusion of religion into its political institutions to maintain the culture’s social bearings. Any attempt to deny the government the ability to engage religion in this way would require the courts to fall back into the separationist mindset that a majority of the Court actively opposes.

But a constitutional theory that permits the government to use religion extensively and overtly in this fashion would seem to leave little for the Establishment Clause to do. In particular, there seems to be no logical constitutional restriction on government favoritism of the religious sects that dominate among members of the political majority. The integrationist response to this fear is to fall back on the claim that the integration of church and state will be marked by a benignly ecumenical inclusiveness, which will be policed by an Establishment Clause that is interpreted in light of the country’s history of respecting religious diversity, the population’s general inclination toward religious forbearance and moderation, and the broad unity of purpose among the various different faiths that comprise the American religious landscape.141 Unfortunately, all of these claims regarding the inherent

141. See Lee v. Weisman, 505 U.S. 577, 631-46 (1992) (Scalia, J., dissenting); McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2748-64 (2005) (Scalia, J., dissenting). The two opinions of Justice Scalia that have been referred to repeatedly in this Article—his dissent in Lee and his dissent in McCreary County—emphasize
inclusiveness of a system that integrates church and state are probably wrong.

With regard to the country's history of respecting religious diversity, the sad fact is that the history of relations between dominant and minority religious groups in this country is not a terribly happy one. In pre-revolutionary times, religious groups who came to America seeking religious freedom for themselves quickly fell into the habit of oppressing members of other faiths when they became the dominant religious group in their new home. The history of the American colonies is riddled with examples of religious oppression. When John Jay, the first Chief Justice of the Supreme Court, was governor of New York, he proposed to ban Catholics from that state. Similarly, Massachusetts proposed to banish Anabaptists and to execute Catholic priests who strayed back into Massachusetts after having been excluded from that state. Religious oppression did not end with the revolution. In the young republic religious oppression took various forms, from the refusal each of these themes, but these themes are repeated at various times by many different members of the Court. Even some who do not agree with the general agenda of integrating church and state nevertheless are sympathetic to these arguments. In her concurring opinion in the Pledge of Allegiance case, for example, Justice O'Connor provided her version of how references to God were inherently inclusive and unifying:

I believe that although these references [to God] speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins. . . . [The Court] should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.


to grant full rights to Catholics in five states, to the more mundane Protestant establishments in states like Massachusetts, and requirements in states like Virginia that non-Anglican clergy be specially licensed to perform marriage rites.

Modern proponents of church/state integration have tin ears for the implications of the history they cite to support their plan to permit the government to engage in religious activity. The centerpiece of Justice Thomas’s arguments against separationist Establishment Clause theory in the financing context, for example, is the history of anti-Catholic sentiment during the nineteenth century. But one of the primary manifestations of anti-Catholic animus during the nineteenth century was the use of public schools to proselytize Catholic children on behalf of dominant Protestant sects. Trading a coercive use of the government by Protestant sects for a system in which Catholics may join Protestants in a more expansive version of religious coercion seems to miss the point of the history that Justice Thomas so heatedly recounts.

The fact is that the proponents of the integration of church and state can only rest their proposed revamping of the Establishment Clause on the country’s history as a religious nation if they first rewrite the nature of that history. Douglas Laycock once nicely summarized the country’s religious context at the time of the framing:

The nation was overwhelmingly Protestant and hostile to other faiths. Bare tolerance of other

144. See 1 Anson Phelps Stokes, Church and State in the United States 402 (North Carolina); id. at 406 (New York); id. at 430 (New Hampshire); id. at 435 (New Jersey); id. at 441 (Vermont).
145. See, e.g., III Francis Newton Thorpe, Ed., The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1890 (Government Printing Office 1909) (discussing the Declaration of Rights in the 1780 Massachusetts Constitution, which required towns in the state “to make suitable provision, at their own expense, for the institutions of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality”).
147. See Mitchell v. Helms, 530 U.S. 793, 828 (in which Justice Thomas refers to anti-Catholic sentiment during the nineteenth century, and concludes that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow”).
148. See Stokes, supra note 144, at 830-35.
faiths was a major accomplishment, not yet safe from reaction; accepting other faiths as equals was far in the future. Non-Protestants could practice their religion, but they often could not vote, hold public office, or publicly criticize Protestantism. Non-Protestants certainly could not expect the government to refrain from preaching Protestantism. These conditions would not change easily. Half a century later, mob violence, church burnings, and deaths would result when Catholics objected to studying the "Protestant Bible" in public schools. The anti-Catholic, anti-immigrant Know Nothing Party would sweep elections in eight states.

In 1791, almost no one thought that government support of Protestantism was inconsistent with religious liberty, because almost no one could imagine a more broadly pluralist state. Protestantism ran so deep among such overwhelming numbers of people that almost no one could see that his principles on church taxes might have implications for other kinds of government support for religion. The exclusion of non-Protestants from pronouncements of religious liberty was not nearly so thorough or so cruel as the exclusion of slaves from pronouncements that all men were created equal, but both blind spots were species of the same genus.149

At the end of the day, the argument that the United States is historically a religious nation simply proves too much, because an honest appraisal of the nation's early religious tendencies would produce something like the nineteenth century Supreme Court's assertion that the United States is a "Christian nation,"150 or in the blunter words of a South Dakota Supreme Court Justice in the early 1920s, the claim that

149. Laycock, supra note 50, at 918-19.
“Christianity is our national religion.” Under whatever formulation, the exclusionary ramifications are obvious, and despite their repressive overtones, these ramifications have been explicitly embraced by notable figures earlier in the nation’s history. “The real object of the [First] amendment,” Justice Story wrote in his Commentaries on the Constitution, “was not to countenance much less advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects . . . .” As a historical matter, therefore, Justice Scalia is flatly inaccurate in asserting that the proper historical approach to defining the nature of a religious state in this country would be monotheistic rather than Christian. In light of this background, the comforting overtures toward ecumenical inclusion by the advocates of the newly religious state can be seen as little more than ahistorical political gestures intended to mollify members of non-Christian faiths to the point that they concede hard-won constitutional protections against expressions of dominance by the country’s religious majority.

The second variation on the theme that ecumenical inclusion will characterize the new regime of church/state integration is that the country is naturally inclined toward a broad deference to and respect for the many different faiths that are now part of the American religious landscape. Once again, Justice Scalia has articulated this argument most forcefully, in various different contexts. If almost all of us agree that

152. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (Fred B. Rothman & Co. 1991) (1833).
154. See id. (“Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices 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.”); Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting) (“The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.”).
God is a good thing, Scalia repeatedly argues, then what is the problem with “our” government recognizing that fact officially?

The problem with this argument is that it does not accurately reflect the motivation or the effect of the religious exercises at issue when the government endorses religion. No matter how subtly it is accomplished, the incorporation into official government functions of even the most benign religious symbols and exercises is an assertion of dominance by the religious majority. In a school prayer case decided soon after Lee v. Weisman, the Fifth Circuit Court of Appeals described the gist of the religious majority’s perspective:

This case requires us to consider why so many people attach importance to graduation ceremonies. If they only seek government’s recognition of student achievement, diplomas suffice. If they only seek God’s recognition, a privately-sponsored baccalaureate will do. But to experience the community’s recognition of student achievement, they must attend the public ceremony that other interested community members also hold so dear. By attending graduation to experience and participate in the community’s display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different. 155

To rephrase the Fifth Circuit’s conclusion slightly: If the public were merely interested in the secular task of education, a graduation ceremony would suffice; if the public were merely interested in practicing its religion, then a private religious ceremony would be sufficient; but what the public (by which the court means “the dominant faction of the public”) really wants is to assert control over the government ceremony by infusing the ceremony with the dominant faction’s religious standards. As the court forthrightly admits, religious dissenters are thereby gently reminded of their outsider status. To the extent that religious dissenters may have the bad fortune to end up in a community that does not include many of their number, the court dryly notes, they have no cause to complain. According to the court, members

of religious minorities who attend "the community’s" ceremony "should not be surprised to find the event affected by community standards."\textsuperscript{156} Thus, the inclusion of religion in the ceremony is specifically intended to mark the religious majority’s territory; it’s our community, the majority says to dissenters, so get used to it. So much for the claim of ecumenical inclusion.

It is difficult to take seriously the overtures to inclusion frequently espoused by proponents of the integration of church and state. Integrating religion into government affairs is about power, control, and the communication of domination. It would be illogical for any religious group to argue against the separation of church and state in the hope that some other religious group would infuse public affairs (including the system of public education) with the other group’s contrary (or even sinful) religious views. Religious groups who seek to incorporate religious views into government logically only seek to advance their own religious views through government. The use of government to inculcate society with the dominant group’s religious faith is the entire object of the exercise.

One of the most common objections to the separationist Establishment Clause model asserts that separationism improperly denies to members of the religious majority the right to exercise the common prerogative of those who are victorious in the political process, which is to incorporate the victor’s views into law.\textsuperscript{157} This is also the primary objection to the secular purpose requirement of the three-part \textit{Lemon} standard.\textsuperscript{158} The underlying theme of these arguments is that religiously-based political activity should be treated in the same manner as secular political activity. But proponents of the integration of church and state cannot have it both ways. They cannot argue, on the one hand, that the separationist Establishment Clause model unfairly disenfranchises religious political activists, and then on the other hand deny that powerful religious factions want the ability to enact into law policies that

\textsuperscript{156}Id. at 972.

\textsuperscript{157}Michael Perry has recently argued, for example, that to prohibit legislators from writing religiously based moral proscriptions into law would “unfairly deprivilege religious faith, relative to secular belief, as a ground of moral judgment—and unfairly deprivilege too, therefore, those moral judgments that, in their view, cannot stand independent of religious faith.” \textit{PERRY, supra} note 61, at 30.

\textsuperscript{158}See \textit{supra} note 119 and accompanying text.
are specifically religious in nature and flatly inconsistent with the religious views of their religious adversaries. Religion is either a contentiously political phenomenon or it is not. Religious activists cannot demand to be treated the same as every other scrappy political group when opposing constitutional limits on government political activity, then immediately clamber onto the high ground and deny that they will use their new political authority to impose their views on members of other religious groups. Politics is about victors exercising power over losers. An unavoidable consequence of the integration of church and state, therefore, is that religion will become like every other political matter and political battles will therefore be fought along religious lines. History abundantly demonstrates the fratricidal dangers of going down this path, and this reality cannot be avoided by illogically claiming that a religious politics will be less fractious than political disputes over other matters.

The third defense of the claim that integrating church and state will be defined by ecumenical inclusion is the notion that the form of religion adopted by the new sectarian government will incorporate the views of virtually everyone in society and therefore will not lead to cultural and political divisions along religious lines. This notion is inherent in Justice Scalia’s references to the bonding effect of members of the community “voluntarily joining in prayer together, to the God whom they all worship and seek.” Of course, the assertion that any concept of God could encompass all faiths should be viewed as a mere rhetorical flourish, not a statement of literal fact. In any community large enough to be worth discussing, members of that community will not “all worship and seek” the same God. In any but the most intimate gatherings some people will not want to pray with members of other faiths, some will not want to pray in public, others will not want to pray in response to social pressure, and still others will not want to pray at all. Indeed, even Justice Scalia has implicitly acknowledged that an all-embracing God does not exist; this explains his subsequent effort to collect under one tent the major monotheistic faiths as favored religions, while diminishing the importance (and the numbers) of those left outside the tent. But even this effort is intellectually dishonest to the extent that it relies upon the pretense that only a small number of unimportant

159. *Lee*, 505 U.S. at 646 (Scalia, J., dissenting).
160. *See supra* note 74-76 and accompanying text.
religious eccentrics will object to the sectarian principles adopted by the newly religious government.

The most forthright rendition of this pretense is in Justice Scalia’s opinion in one of the recent Ten Commandments decisions. In that opinion Justice Scalia argued 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.” The recognition of God and the official endorsement of biblically derived precepts such as the Ten Commandments should be constitutionally permissible, Scalia argued, because such practices “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.” Thus, as he concluded elsewhere in the same opinion, the overwhelming numbers of citizens who agree with these religious propositions justify permitting the government to “disregard” the miniscule and therefore constitutionally insignificant numbers of those who do not. “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.”

The only problem with these statements is that their central premise—that all but one or two percent of the nation’s citizens embrace the government’s authority to engage in these specific religious exercises—is demonstrably inaccurate. The fact that, as Scalia points out, 97.7% of the population is monotheistic does not in any fashion suggest that 97.7% of the population agrees with the proposition that the government should be used to advance the cause of a particular religion or religion in general. First of all, there is serious disagreement among the various faiths (even among the Christian sects) about what mandates are in the Commandments. Even if the various monotheistic faiths

162. Id. at 2753 (Scalia, J., dissenting) (alteration added).
163. Id. (Scalia, J., dissenting).
164. Id. (Scalia, J., dissenting).
agreed on the content of the Ten Commandments, there are serious disagreements among the various faiths as to how those Commandments (and the other precepts of their faiths) should be presented to the world.

For example, Justice Scalia’s 97.7% figure includes both members of both the Jewish and Christian faith. As Scalia notes, both of these religions are monotheistic, but they take a very different approach to the issue of proselytizing members of other faiths. Judaism does not embrace proselytizing, in part because Jewish theology does not declare that only Jews can have a valid relationship with God. Christians, on the other hand, are specifically directed in the New Testament to: “Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost.” From the Christian perspective, proselytizing does nothing to infringe upon the beliefs of members of other faiths. With respect to Jews, for example, “a Jew who becomes a Christian does not lose anything Jewish but completes his or her identity.” This attitude creates a certain inevitable friction between the sects. “Christians are often asked by Jews to agree not to ‘proselytize.’ They cannot comply, of course, since their Lord has commanded them otherwise.” Allowing the government to embrace specifically religious commands such as those in the Decalogue will always be perceived against the background of conflicts over some faiths’ desire to convert those who belong to other faiths. Perhaps church/state integration can be accomplished without having the government’s religious activities lapse into proselytizing, although that is

what the Ten Commandments contain among Jewish, Roman Catholic, and different Protestant sects). For an extended discussion of the complications that arise whenever religious objects (including Ten Commandments displays) are considered in a legal context, see Frank S. Ravitch, Religious Objects as Legal Subjects, 40 WAKE FOREST L. REV. 1011 (2005).

166. See GEORGE ROBINSON, ESSENTIAL JUDAISM: A COMPLETE GUIDE TO BELIEFS, CUSTOMS, AND RITUALS 175 (2001) (“It is said in Jewish lore that there will be a reward in the World to Come for the righteous of all nations, and those who follow the Noahide laws [the essential religious duties of humanity as prescribed in Torah] . . . are considered to be among them. Indeed, for that reason, Jews have felt less of a pressing need to seek converts; we don’t believe that only ‘believers can be saved.’”).


169. Id.
highly doubtful. In any event, it should be clear that members of a faith that does not seek converts will have a different perspective on state-supported religious activity than members of a faith who are instructed by their God to convert the world.

Jews are not the only religious group improperly lumped together by Justice Scalia in his integrationist phalanx. There are also substantial numbers of Christians who adopt a position that is diametrically opposed to the vision of church/state integration sketched by Scalia. This should not be news to anyone; opposition to church/state integration from Christian sects has long been a feature of the American religious scene. Traditional Baptists were, of course, some of the most vociferous opponents of religious establishments in the colonies and early Republic, as were Quakers. They were joined in states like Virginia—where some of the most important battles over establishment occurred—by Presbyterians, Roman Catholics, and even some Methodists. It is fair to say that for many of these groups the biblical mandate to convert the world is conditioned by the injunction in the Sermon on the Mount to be wary of praying “like the hypocrites. For they love to pray standing in the synagogues and on the corners of the streets, that they may be seen by men.” For traditional evangelical sects such as the Baptists, the use of government for religious purposes soils the entire enterprise. In this view, the “wall of separation” between church and state is necessary just as much to protect the purity of religion as it is to protect the independence of the government—which was the reason that Roger Williams coined the phrase “wall of separation” in the first place.

170. See Leonard Levy, The Establishment Clause: Religion and the First Amendment 16 (1986) (noting common opposition of Baptists and Quakers to religious establishments, and further noting in the rare towns where they formed a majority they successfully opposed the payment of legally mandated religious tithes). “Neither Baptists nor Quakers maintained a learned ministry, and both believed that the state had no jurisdiction over religion, which should be left to [the] voluntary support of believers.” Id. (alteration added).


172. Matthew 6:5.

173. See Roger Williams, Mr. Cotton's Letter Examined and Answered (1644), reprinted in 1 The Complete Writings of Roger Williams 313, 392 (Russel & Russel, Inc. 1963) (“[W]hen they have opened a gap in the hedge or wall of
The final problem with Justice Scalia's effort to claim near-unanimous support for sectarian governance is his willingness to ignore entirely the presence in American society of substantial numbers of nonreligious or religiously indifferent individuals. This is not a minor oversight. According to the same source of religious demographics that provided Justice Scalia the statistic that 97.7% of all believers are monotheists, 13.2% of the population describes itself as nonreligious, and another 6.3% of the population refuses to respond to questions about its religious affiliation.\footnote{174} Thus, a substantial part of the national population is avowedly secular. On a more localized basis, the numbers of secularists are even more pronounced. People who express no religious faith are the largest “religious” group in four states: Oregon, Washington, Idaho, and Wyoming.\footnote{175} Fully 25% of the population in Washington classifies itself as “nonreligious.”\footnote{176} The portion of the population that identifies itself as nonreligious is equally as large in other western states. Even in Utah, for example, the nonreligious portion of the population is the second largest religious group—almost twenty percent of the population.\footnote{177} The percentages are only slightly smaller in the northeastern states.\footnote{178} Only in the southeastern states is the nonreligious portion of the population routinely counted in the single digits.\footnote{179}

Thus, in contrast to Justice Scalia's implication that permitting the government to openly align itself with religion would ostracize only

Separation between the Garden of the Church and the Wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, and made his Garden a Wilderness, as at this day. And that ther[e]fore if he will ever please to restore his Garden and Paradise again, it must of necessity be walled in peculiarly unto himself from the world, and that all that shall be saved out of the world are to be transplanted out of the Wilderness of [the] world, and added unto his Church or Garden." (alterations added).

\footnote{174} U. S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 58 (125th ed. 2006) (Table No. 69).
\footnote{175} ARIS 2001 Study, supra note 33, at 38. The ARIS study is one of the most comprehensive recent state-by-state surveys of this country's religious demographics, and is the source of the information in the table in the United States Statistical Abstract that is cited in Justice Scalia's \textit{McCreary} dissent and in \textit{supra} note 174 of this Article.
\footnote{176} See \textit{id.} at Ex. 15
\footnote{177} \textit{id.}
\footnote{178} \textit{id.}
\footnote{179} \textit{id.}
an infinitesimal and therefore constitutionally insignificant portion of the population, the reality is that his proposal would permit the government to engage in activity that would directly contradict the religious views of well over 10% and probably closer to 20% of the population. There is no benign explanation for the refusal to take into account the views of the nonreligious in assessing the implications of a sectarian government. The explicit message of an approach such as Justice Scalia's is that secularists, like their fellow outsiders the polytheists, are not full-fledged members of the relevant polity. At least subliminally, many citizens already seem to assume that patriotism and religious faith are inseparable. Justice Scalia and the others in the Court's new majority propose to erect a constitutional regime that would make this strain of religious bigotry explicit.

At the end of the day, the main point is clear: If one adds the 10-20% of the population that is nonreligious to the 2 or 3% of the population who embrace nontraditional (but well-known) polytheistic faiths, and then further adds the substantial number of Jews, Muslims, and Christians whose denominations (or personal theology) oppose the concept of government participation in religious affairs, then the list of religious outsiders under the new integrationist Establishment Clause regime becomes quite large. This reality poses problems for Justice Scalia and the other new integrationists, on both theoretical and practical levels. The theoretical problem it poses is that the official ostracism of 20-30% of the population undercuts the theme (frequently sounded by Justice Scalia) that pretty much everyone in society wants the government to become more religious, except a tiny handful of pesky malcontents. The integrationist position becomes far less compelling if it allows the government to engage in activity with which fully a quarter to a third of society profoundly disagrees. The practical problem is that it is unreasonable to expect that a quarter to a third of society will passively subject themselves (and, in the school context, their children) to government insinuations that their personal beliefs on matters of faith place them outside the mainstream of American society. The more reasonable expectation is that once the government begins to use its new religious authority with gusto, political opposition to those religious activities will ensue. And we will then be in precisely the position that Madison feared: a political culture in which religion becomes the subject of acrimonious political battles.
Although many opponents of the separationist approach to the Establishment Clause would undoubtedly disagree on the details of Justice Scalia’s particular rendition of the integrationist position, some version of his argument lies just below the surface of all variations on the integrationist theme. The basic integrationist claim is that the integration of church and state is the best interpretation of the Establishment Clause because the United States is historically and demographically a religious country, and “religious” in this context refers to the form of religion that has traditionally dominated the culture, which is Protestant Christianity. The Free Exercise Clause prohibits the imposition of overtly theocratic mandates such as those that exist in states such as Iran. Even in its denuded post-Smith form, the free exercise protection would at least prevent the government from pursuing its sectarian agenda in a manner that aggressively intrudes into the expressly religious activities of members of officially disfavored faiths. Free exercise protections would not, however, prevent the government from imposing religiously-based moral mandates on everyone in society, nor would it prevent the government from employing symbolic and verbal cues to urge everyone in society to adopt the religious perspective of the political faction that controls the government. In short, under a regime governed by the integration of church and state, all government religious activity that falls short of legalized coercion of religious practice would be viewed as simply a recognition of the reality that this is, as the Court noted early in its history, a Christian nation.

All of this foreshadows a state of affairs that this country has not faced in many decades. As the new Court consolidates its recent move away from a separationist Establishment Clause model, religion will, at least conceptually, become just as much a matter for political debate as education policy, trade policy, or the efficacy of the flat tax. The political reality in many parts of the country is that the details of the proper form of religion to be incorporated into the public sphere will not be debated at all, but will rather be treated as a universally accepted

180. See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (holding that laws targeting specific religious groups or practices are not laws of general applicability, and requiring such laws to meet a compelling interest test); Employment Div. v. Smith, 494 U.S. 872 (1990) (permitting the government to apply all laws of general applicability to religious practitioners without establishing a compelling interest).

181. See supra notes 150-151 and accompanying text.
expression of social values that effectively become synonymous with patriotism itself. Religious practitioners will be granted the ability to ply their wares politically, but it will be largely a Soviet-style political exercise, in which dissent is assumed not to exist because the expression of dissent will subject the dissenter to the kind of social reprobation that forecloses serious participation in the political culture. In the land of the blind, the one-eyed man is a dangerous oddball.

It is likely that proponents of the new integrationist Establishment Clause model will reject virtually all of these derogatory descriptions and dire predictions about the consequences that attend the constitutional recognition of a sectarian political culture. But if the new integrationists seek to allay the fears of the dwindling numbers of separationists, then they need to answer a few questions about their new constitutional paradigm. For example: What, in the view of the integrationists, is left of the Establishment Clause in the new constitutional regime? Under the lenient integrationist view of the government religious activity, what actions of the government will violate the Establishment Clause that do not already violate the Free Exercise or Free Speech Clauses? If the answer to the previous question is “none,” then what does this say about the integrationist approach as a matter of constitutional interpretation? Is it a legitimate constitutional interpretation to consider the Establishment Clause a mere appendage to the Bill of Rights, with no effective meaning? Even though they do not say so explicitly, have the integrationists essentially adopted the view of the Establishment Clause long advanced by Justice Thomas, which is that the Establishment Clause should not be interpreted to limit religious establishments by state and local governments, but rather should be interpreted to protect sectarian actions by the very governments that most directly affect citizens’ daily lives? And finally, how does the integrationist approach jibe with any current concept of religious liberty? What is the meaning of religious liberty in a system in which the government can explicitly endorse some religious views over others, explicitly link approved religious views with patriotism (“one nation under God”), and “disregard” those who do not conform to the government’s approved brand of religious faith? In short, what kind of a country do the religious integrationists really intend to create?
CONCLUSION

At the end of the day, religious groups who seek to use the government to advance their cause will rue the day that they captured control of the Supreme Court. The integration of church and state is most likely to lead to one of two consequences, neither of which should give comfort to even the most powerful and well-entrenched religious group.

One possible consequence can be called the European option. Throughout most of its modern history, Europe has been defined by various degrees of religious establishment, and the net result has been that religion has for all practical purposes become a meaningless afterthought for most Europeans. Demographic surveys of Europeans attest to the gradual fading away of religious sentiment among every sector of the population in every European country. If this is indeed the consequence that follows in the United States from the implementation of the new integrationist model of the Establishment Clause, no one should be surprised; after all, Madison himself described the phenomenon in the Memorial and Remonstrance over two hundred years ago.

The other possible consequence of adopting the integrationist Establishment Clause model is that religious disputes will exponentially increase in both number and intensity as the government becomes increasingly involved in religious affairs at a time when the culture is

182. For a compilation of demographic surveys of religious belief in Europe and elsewhere, see Phil Zuckerman, *Atheism: Contemporary Rates and Patterns in The Cambridge Companion to Atheism* (Cambridge Companions to Philosophy) (forthcoming 2006) (a preliminary draft of this essay can be found at http://www.pitzer.edu/academics/faculty/zuckerman/atheism.html). For an extended argument describing the reasons for secularization in Western Europe, see STEVE BRUCE, *God is Dead: Secularization in the West* (2002).

183. See Madison, Memorial and Remonstrance, *excerpted in* Everson v. Bd. of Educ., 330 U.S. 1, 67-68 (1947) ("Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.").
becoming ever more religiously diverse, and ever more intensely divided politically and culturally. Once we abandon a separationist Establishment Clause, religious factions will no longer be constrained by the sense of mutually assured destruction that has always been one of the most compelling justifications for keeping religion out of politics. In the new America, different types of fundamentalists will fight each other, and fundamentalists of all stripes will do battle with an equally vociferous and growing group of Americans who are intensely averse to social and political pressure to adopt a publicly religious stance in life. None of this should make anyone happy, and the implications for religious liberty are not good, but every indication is that the new Court will be content to step aside and let us fight it out among ourselves.