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# Must God Be Dead or Irrelevant: Drawing a Circle That Lets Me In

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# **MUST GOD BE DEAD OR IRRELEVANT: DRAWING A CIRCLE THAT LETS ME IN**

Richard M. Esenberg\*

## **ABSTRACT**

Some scholars claim that current Establishment Clause doctrine can increasingly be explained in terms of substantive neutrality—that is, the idea that government ought to treat religion and irreligion (or comparable secular activities) in the same way. Whether a product of the Court’s commitment to the idea or an artifact of the positions of the “swing” Justices, this proposition has considerable explanatory power. The Supreme Court has, in recent years, permitted the government to make financial support equally available for religious uses, as long as it is done on a neutral basis and through the private choice of the recipients. It has required the government, in its superintendence of general and limited purpose public forums, to treat comparable religious and secular speakers identically.

But the Court has continued to insist upon a substantial degree of secularity with respect to government speech. Some have argued that this is consistent with substantive neutrality as well. Government has but one voice and, while money and facilities can be made available in a way that respects individual choice, prayers and messages concerning religion cannot. Substantive neutrality, the argument continues, requires government silence on religious matters.

The problem is that modern government is not—and probably cannot be—silent on such matters. In addition, current doctrine is ambitious. It seeks to prevent even very subtle injury to dissidents. As a consequence, it cannot protect religious objectors to secular speech with religious implication in the same way it seeks to protect even secular objectors from even the most bland of religious speech.

I argue that this asymmetry is not substantively neutral. Drawing, in part, on the insights of post-liberal theology, I suggest that it permits the precise expressive harm that Establishment Clause doctrine claims to seek to prevent—that is, permits religious dissidents to feel they are disfavored members of the political community and allows the state to influence religious formation. Drawing on theories regarding the value of mediating institutions, including the Catholic notion of subsidiarity and the Calvinist idea of sphere sovereignty, I maintain that this asymmetry is undesirable and offer a less ambitious paradigm. Because we cannot protect the religious and secular from subtle expressive injury in the same way, we ought not to try.

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#### PRELUDE

This past term in *Pleasant Grove City v. Summum*,<sup>1</sup> the Supreme Court once again affirmed the “government speech doctrine”—the idea that the First Amendment’s Free Speech Clause applies to government regulation of private speech, and not speech by the government itself.<sup>2</sup> Applying the doctrine, the Court held that a municipal display of a privately donated Ten Commandments monument in a public park was

<sup>1</sup> 129 S.Ct. 1125 (2009).

<sup>2</sup> *Id.* at 1134.

government speech<sup>3</sup> and not private speech within a traditional or limited purpose public forum.<sup>4</sup> The city, therefore, was under no obligation to accept and display a monument setting forth the Seven Aphorisms of Summum.<sup>5</sup> The Court rejected the argument that the city was required to expressly endorse the message of the display in order for it to qualify as government speech.<sup>6</sup> It recognized, in fact, that at least in the context of a public monument, government speech can be perceived to convey a number of messages and the government cannot be presumed to have endorsed any particular one.<sup>7</sup> If the state were forced to acknowledge and convey all messages that compete with, or are complementary with these potential meanings, this would substantially impair its ability to function.<sup>8</sup>

Although the Court recognized that government speech is subject to the Establishment Clause, the question of whether the Ten Commandments display was itself unconstitutional was not raised and, therefore, not decided.<sup>9</sup> *Summum*, then, does not itself alter our Establishment Clause jurisprudence. But that jurisprudence, as it relates to government speech, relies heavily on judicial divination of the message that such speech “is” perceived to have “endorsed.”<sup>10</sup> Nevertheless, *Summum*’s recognition that government speech may convey a number of messages, and that evenhandedness in that speech is impractical, suggests further clarification of just when and how government speech is limited by the Establishment Clause. In my view, not merely clarification, but a thorough re-thinking—is just what is required.

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<sup>3</sup> *Id.* at 1138.

<sup>4</sup> Some public spaces such as streets, parks, and civic plazas that, by tradition and custom, have been devoted to public assembly and debate have come to be regarded as traditional public forums. *Greer v. Spock*, 424 U.S. 828, 836 (1976). In such places, a speaker may be excluded only if it is necessary to serve a compelling state interest, and that exclusion must be narrowly drawn to achieve that end. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001). Even public places not traditionally recognized for public assembly and debate may become so by government policy. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). A limited purpose public forum is created when the government designates a forum for use by certain speakers or for the discussion of certain subjects. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In these circumstances, an entire class of speakers or entire subjects may be excluded through the application of reasonable restrictions on the *content* of the speech allowed. *Id.* But, crucially, those restrictions must be *viewpoint neutral*. *Id.*

<sup>5</sup> Summum is a religious organization grounded in elements of Gnostic Christianity. It claims that its Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai, but shared with only a select group of people. Today they can be found on the church’s website, if not in Pleasant Grove City. Seven Summum Principles, <http://www.summum.us/philosophy/principles.shtml> (last visited Sept. 18, 2009).

<sup>6</sup> *Summum*, 129 S.Ct. at 1129.

<sup>7</sup> *Id.* at 1136.

<sup>8</sup> *Id.* at 1131.

<sup>9</sup> *Id.* at 1139.

<sup>10</sup> *See infra* Part I. D.

## INTRODUCTION

In an earlier article, I told the story of Dick and Jane.

Dick is an atheist. He may be exposed to such things as voluntary prayer or a sticker on his textbook that identifies random evolution as a theory and informs him that some people argue in favor of an alternative theory called Intelligent Design. He is not coerced to believe or proclaim anything. He is not told that his ideas are wrong or untrue. He may feel left out. He may feel pressure to go along and affirm what many of his classmates affirm.

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

The harm, if that is what it is, suffered by Dick and Jane is similar. Both may feel excluded on the basis of their religious views. Both are reminded that a majority of their classmates—and the school which each attends—embrace a different set of beliefs. Both are subject to school and peer pressure to alter their own beliefs. But it is a generally accepted view that only Dick has an Establishment Clause remedy.<sup>11</sup>

Dick (or his parents) will certainly be able to enjoin the religious messages that offend him, either because they violate the test set forth in *Lemon v. Kurtzman*,<sup>12</sup> or constitute a government endorsement of religion.<sup>13</sup> The court would likely observe

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<sup>11</sup> Richard M. Esenberg, *You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 36–37 (2006).

<sup>12</sup> 403 U.S. 602, 612–13 (1999) (stating that state action must (1) “have a secular legislative purpose;” (2) have a “primary effect . . . that neither advances nor inhibits religion;” and (3) does not “foster ‘an excessive entanglement with religion’”).

<sup>13</sup> *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O’Connor, J., concurring) (finding that the Establishment Clause prohibits government from appearing to take a position on

that “the preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.”<sup>14</sup> It would probably say, that even though Dick was not required to affirm anything, “given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.”<sup>15</sup> Dick could reasonably conclude that the school has endorsed a position on religion other than his own and, the court would conclude, that is constitutionally impermissible. This is because constitutional doctrine has developed in a way that seeks to prevent government from neither “advanc[ing] nor inhibit[ing] religion,”<sup>16</sup> or causing him to feel like an “outsider[, not [a] full member[] of the political community.”<sup>17</sup>

But the principles that protect Dick are of little help to Jane. Communications that are inimical to her religious beliefs, but are not themselves expressed in “theological” or “religious” language, are likely to be regarded as constitutionally permissible.<sup>18</sup> A court would almost certainly say that “[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive.”<sup>19</sup>

It might cite the observation of Justice Anthony Kennedy that, while “students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony,” this “odd measure” of justice is precisely what the Establishment Clause requires.<sup>20</sup>

Dick has been subjected to explicitly, if bland, religious language concerning, however broadly, extratemporal matters. The messages to which Jane objects have been couched in “secular” language. While one might distinguish a prayer or explicit theological claims from the expression, or approval, of a position that contradicts a dissenter’s religious beliefs, it is not clear that this distinction matters to the dissenter.<sup>21</sup>

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questions of religious belief or from “making adherence to religion relevant in any way to a person’s standing in the political community”).

<sup>14</sup> *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (holding that school may not sponsor prayer at graduation ceremony).

<sup>15</sup> *Id.* at 593.

<sup>16</sup> *Lemon*, 403 U.S. at 612.

<sup>17</sup> *Lynch*, 465 U.S. at 688.

<sup>18</sup> Courts have repeatedly held that parents have no right to object to the provision of secular information that is inconsistent with their religious beliefs. *See, e.g.*, *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005) (challenging school survey containing sexual matter); *Leebaert v. Harrington*, 332 F.3d 134, 135 (2d Cir. 2003) (objecting to mandatory health education course); *Parents United for Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 262 (3d Cir. 1998) (objecting to condoms being distributed in public schools); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (objecting to attendance at AIDS awareness assembly).

<sup>19</sup> *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008).

<sup>20</sup> *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

<sup>21</sup> *See infra* Part III.C.

The notion that faith can be cabined into a private sphere largely concerned with metaphysical assertions is itself a claim about what religion is or should be.<sup>22</sup> It does not comport with the best scholarship about how religious beliefs form, evolve and are transmitted.<sup>23</sup> Whatever harm might be caused by the government's participation in the preservation and transmission of religious beliefs seems to be the same whether that participation comes in the form of a bland non-denominational prayer or the contradiction of a core belief.

Recognition of the asymmetry with which plaintiffs like Dick and Jane are treated is not new,<sup>24</sup> but a resolution has proven to be elusive. Some have attempted to justify<sup>25</sup>—and even celebrate<sup>26</sup>—the idea of asymmetry, while others have argued that modification of doctrine—or sage policy—could alleviate the imbalance.<sup>27</sup> Still others have said that it is simply the best we can do.<sup>28</sup>

In a seminal article,<sup>29</sup> Professor Naomi Maya Stolzenberg discussed the problem in the context of *Mozert v. Hawkins County Board of Education*,<sup>30</sup> in which a group of conservative Christians sought unsuccessfully to have their children excused from certain readings that they found offensive to and contradictory to their religious beliefs. The title of the article draws upon a concurrence by Judge Boggs, while holding that the parents and their children had no constitutional right to be excused, nevertheless expressed the difficulty of the case by quoting a portion of a poem by Edward Markham:

He drew a circle that shut me out—  
Heretic, Rebel, a thing to flout.

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<sup>22</sup> Dissenting in *Lee v. Weisman*, Justice Scalia questioned what he saw as the majority's assumption that religion is "some purely personal avocation that can be indulged entirely in secret . . . in the privacy of one's room. For most believers it is not that, and has never been." 505 U.S. at 645 (Scalia, J., dissenting). See also Mark D. Rosen, *Establishment, Expressivism and Federalism*, 2003 CHI. L. REV. 669, 676 ("[S]eparationism is neutral only within a set of assumptions in respect to human nature and religion that many people do not share.").

<sup>23</sup> See *infra* Part II. B. 1.

<sup>24</sup> See, e.g., Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 162 (1986).

<sup>25</sup> See, e.g., Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 70–72 (2007).

<sup>26</sup> See, e.g., Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1017.

<sup>27</sup> See, e.g., Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something*, 70 FORDHAM L. REV. 1147, 1195–96 (2002).

<sup>28</sup> See, e.g., Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 78 (2004) (stating that the government could not function if it could not vitiate religious views).

<sup>29</sup> Naomi Maya Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination and the Paradox of Liberal Education*, 106 HARV. L. REV. 582 (1993).

<sup>30</sup> 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

But Love and I had the wit to win:  
We drew a circle that took him in!<sup>31</sup>

In Judge Boggs's view, the school board should have found a way to take the children in, even if the Constitution did not compel it.<sup>32</sup> As we will see, the *Mozert* plaintiffs did not raise the issue of Establishment Clause asymmetry.<sup>33</sup> They, and most litigants bringing similar challenges in the intervening years, have sought only to be excused from objectionable activities, relying more frequently on Free Exercise than Establishment arguments. Nevertheless, Judge Boggs's twenty-year-old regret that a circle was not drawn to let in religious objectors to an ostensibly "secular" government message remains unaddressed.

The purpose of this article is to challenge the asymmetrical treatment of Dick and Jane. My point is not that schools and public spaces can be made completely acceptable to all manner of believers and non-believers, or that the sentiments of the Janes of the world ought to be the measure of what can and cannot be said in public school classrooms. Just as one school may have been entitled to solemnize a graduation ceremony with a prayer, another school may have a legitimate interest in communicating a message about tolerance of those with differing sexual orientations. We ought however, to seek to treat those who claim to be harmed by each proposal equally, and a jurisprudence that seeks to protect dissenters from relatively slight injuries cannot manage this.

I want to explore a new paradigm. One that seeks not a hopeless attempt to hold dissenters harmless, but to promote tolerance of, and room for, dissenting religious beliefs. It draws on theological and sociological insights into the nature of religion and its interaction with the larger society to argue that the harms suffered by those in the position of Jane do not differ materially from those suffered by Dick. It borrows from theories emphasizing the vital importance of a mediating institution, including churches and religious organizations, to demonstrate why this asymmetry is undesirable.

Although some scholars have argued that respect for the independence of mediating institutions supports Establishment Clause asymmetry,<sup>34</sup> I believe that, in light of the role in our lives played by the contemporary state, the picture is more complicated. If the state seeks to address matters with which religion is concerned (and it will), then it ought to have more room to facilitate the inclusion of religious perspectives. Everyone cannot be equally comfortable within the circle, but comfort ought not to be a function of one's willingness to accept public secularity and private religion.

Part I considers the current state of the law, and Part II demonstrates its asymmetrical treatment of government speech about religion. Part III argues that this asymmetry

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<sup>31</sup> Stolzenberg, *supra* note 29, at 584–85 (quoting Edwin Markham, *Outwitted*, in *THE BEST LOVED POEMS OF THE AMERICAN PEOPLE* 37 (Hazel Felleman ed., 1936)).

<sup>32</sup> *Mozert*, 827 F.2d at 1074.

<sup>33</sup> See *infra* note 185 and accompanying text.

<sup>34</sup> See *infra* Part III. B.

interferes with individual liberty, is inconsistent with the notion of substantive neutrality that seems to inform, however fitfully, much of our Establishment Clause jurisprudence, and encroaches upon spheres of life with which religion is concerned. Our jurisprudence fails, therefore, on its own terms. Part IV sets forth a new paradigm for an asymmetrical Establishment Clause, rooted in a principle of nonestablishment.

### I. AN AMBITIOUS NEUTRALITY

I have argued elsewhere that this asymmetry is born of ambition.<sup>35</sup> It arises from an effort to ensure that government do nothing to promote either religion or irreligion and that it not act in a way that might make nonadherents uncomfortable. But seeking an evenhandedness that cannot be achieved requires that we fudge our insistence on neutrality, and, with respect to government speech, we fudge it in favor of a public secularity that makes religious dissenters just as uncomfortable as public religiosity would make nonadherents.

#### A. *The Roots of Neutrality*

Before assessing the problem, it is helpful to briefly trace its origin. The modern era's emphasis on neutrality of Establishment Clause jurisprudence began in *Everson v. Board of Education*,<sup>36</sup> holding that the prohibition against laws "respecting an establishment of religion" was incorporated into the Fourteenth Amendment and is applicable to the states.<sup>37</sup> Although *Everson* is traditionally associated with a rigorously separationist view of disestablishment,<sup>38</sup> the Court actually upheld the reimbursement of the parents of parochial school children for money spent on transportation to and from school.<sup>39</sup> *Everson* is best known, however, not for its result, but for its rhetoric.

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<sup>35</sup> Esenberg, *supra* note 11, at 24.

<sup>36</sup> 330 U.S. 1 (1947).

<sup>37</sup> *Id.* at 8; *see also* *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (holding the religion clause applicable to the states in the context of free exercise claim).

<sup>38</sup> *See, e.g.*, Jonathan Mills, *Strict Separationism's Sacred Canopy*, 39 AM. J. JURIS. 397, 421 (1994) ("In formal argumentation though not in practice (for it did not invalidate New Jersey legislation that provided transportation at public expense for Roman Catholic schools), *Everson* is the founding strict separationism decision . . ."); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233–34 (1994) (noting that the "dominant era of separationism" began in 1947 with the Court's *Everson* decision). Lupu states that "*Everson* is best and most importantly remembered for its broad separationist dicta and for the Court's unanimous adoption of the Virginia history of religious liberty as the key to the meaning of the First Amendment's Establishment Clause." *Id.* He further states that "[t]his historical account, which placed James Madison and his justly famed (and staunchly separationist) *Memorial and Remonstrance Against Religious Assessments* at the heart of the meaning of the Establishment Clause, became the 'official' history of the clause until challenged by scholars and justices in the early 1980s." *Id.*

<sup>39</sup> *Everson*, 330 U.S. at 18.

Justice Black's first move was to emphasize religion as something uniquely inflammatory and potentially corrupting.<sup>40</sup> Writing for the majority, Justice Black argued that disestablishment was rooted in the uniquely divisive nature of religion as well as the special importance of religious liberty.<sup>41</sup> He pointed to early colonial settlers fleeing a Europe "filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."<sup>42</sup> "In efforts to force loyalty," he wrote "to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed."<sup>43</sup> Justice Black also pointed to colonial impositions on religious liberty—Catholics "hounded and proscribed," Quakers sent "to jail"—that "shock[ed] the freedom-loving colonials into a feeling of abhorrence."<sup>44</sup> This prompted the framers to eschew a national establishment.

It would be a mistake, however, to attribute Justice Black's concern over the dangers of religion to anti-clericalism or a hostility to religion. Religion may be dangerous, in his view, because its adherents regard it as fundamental to their identity and essential to life in this world and beyond. This is presumably behind both the temptation to abuse and the integral value of religious freedom.<sup>45</sup>

But, although he found disestablishment to be rooted in an abhorrence of coercive practices and direct establishments, Justice Black's second move was to read the mandate of nonestablishment as reaching well beyond these evils that prompted its enactment.<sup>46</sup> If religion is especially divisive or a strong temptation for the abuse of power, coercion or the creation of a state church may not be the only evil to be avoided.<sup>47</sup> If religious freedom is a special form of liberty, then the state may imperil it in other ways:

Not only, in his view, can the government not establish a church, it cannot "aid one religion, aid all religions, or prefer one religion over another" and "[n]either a state nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." Not only may it not participate in coercive practices, it ought not to "force nor influence

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<sup>40</sup> *Id.* at 8–10.

<sup>41</sup> *Id.* at 13–14.

<sup>42</sup> *Id.* at 8–9.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 10–11.

<sup>45</sup> *Id.* at 11–12 (citing the arguments of Madison and Jefferson).

<sup>46</sup> See, e.g., Carlton Morse, *A Political Process Theory of Judicial Review Under the Religion Clauses*, 80 S. CAL. L. REV. 793, 807–08 (2007).

<sup>47</sup> *Id.* at 808.

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.”<sup>48</sup>

In *Everson*, Justice Black suggested that the best policy might be separation. Echoing James Madison’s famous demand that not “three pence” be taxed to support religion,<sup>49</sup> Justice Black wrote 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.”<sup>50</sup>

The principle of disestablishment, in his view, reflected “the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”<sup>51</sup> Thus his ringing conclusion that “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>52</sup>

This wall of separation has never been as high or steadfast as Justice Black’s language might suggest. From the beginning (as *Everson*’s result suggests), there has been a counter-theme, suggesting that, if religious liberty is an important objective, separation may not always advance it. Thus began a theme of neutrality between religion and irreligion—a formulation that has been repeated over the intervening decades. It is conceivable that separation might mean a state promotion of secularity but disestablishment in America has never meant that.

In *Everson* itself, for example, Justice Black observed that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary: State power is no more to be used so as to handicap religions than it is to favor them.”<sup>53</sup> Nevertheless, after *Everson*, the avoidance of establishment has been understood to require more than the absence of coercion or an established church. But it is also understood to require a neutrality between religion and irreligion.

The ambition of *Everson* was extended to government speech in *Engel v. Vitale*.<sup>54</sup> The Court, perhaps for the first time, found a practice that was clearly not coercive, at least in the traditional sense, to violate the Establishment Clause.<sup>55</sup> A school district

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<sup>48</sup> *Everson*, 330 U.S. at 15–16 (internal citations omitted).

<sup>49</sup> JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 WRITINGS OF JAMES MADISON 183, 186 (G. Hunt ed., 1901).

<sup>50</sup> *Everson*, 330 U.S. at 16.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *Id.* at 18.

<sup>53</sup> *Id.*

<sup>54</sup> 370 U.S. 421, 424 (1962).

<sup>55</sup> Judge Michael McConnell has argued that *Engel* is the first case to clearly abandon coercion as an element of establishment. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 934–35 (1987); see, e.g., *Cantwell v.*

in New Hyde Park, New York, acting upon the recommendation of the State Board of Regents, adopted a policy requiring teachers to begin each school day by reciting a brief prayer: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”<sup>56</sup> No student was required to recite the prayer.<sup>57</sup>

In finding recitation of the prayer “wholly inconsistent with the Establishment Clause,”<sup>58</sup> Justice Black once again found that the purpose of nonestablishment was rooted in reaction to coercive and exclusionary practices materially different in degree and kind from the Regents’ prayer.<sup>59</sup> He again made clear, however, that such practices did not define the reach of the constitutional command:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.<sup>60</sup>

*Engel* further advanced the notion of nonestablishment as strict separation, but it also continued to root separation in, not only the avoidance of division, but the service of religious liberty, emphasizing the division that stemmed from historic (coercive) practices and seeing nonestablishment as reflecting the principle that “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”<sup>61</sup>

The next term, in *Abington School District v. Schempp*,<sup>62</sup> the Court found unconstitutional a requirement for the daily reading of scripture passages and recitation of

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Connecticut, 310 U.S. 296, 303 (1940) (finding that the Establishment Clause “forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship”).

<sup>56</sup> *Engel*, 370 U.S. at 422.

<sup>57</sup> *Id.* at 430.

<sup>58</sup> *Id.* at 424.

<sup>59</sup> Justice Black focused, in particular, on controversies in England around the content of the Book of Common Prayer, which was, of course, a dispute over what the state would require in religious services conducted by a national church. *Id.* at 425–29.

<sup>60</sup> *Id.* at 430–31.

<sup>61</sup> *Id.* at 432.

<sup>62</sup> 374 U.S. 203 (1963).

the Lord's Prayer.<sup>63</sup> Although students could be excused,<sup>64</sup> the Court once again made clear that the establishment prohibition, unlike the guarantee of free exercise, need not involve coercion.

The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.<sup>65</sup>

Nonestablishment, in the view of the *Abington* majority, required a separation grounded in neutrality. It requires that government action have “a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”<sup>66</sup>

Justice Clark, writing for the Court, emphasized that nonestablishment placed the state in a position of “wholesome ‘neutrality’” regarding religion such that every person might “freely choose his own course with reference thereto, free of any compulsion from the state.”<sup>67</sup>

Separation was again thought to serve that end. But our counterpoint remained present. Justice Goldberg, concurring, warned that:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.<sup>68</sup>

What is significant for our purposes is that *Everson* and *Engel* reflect a turn away from reading the Establishment Clause to bar only classic establishments and coercive or punitive government practices. More specifically, *Everson* and, in particular, *Engel*

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<sup>63</sup> *Id.* at 205–06.

<sup>64</sup> *Id.* at 205.

<sup>65</sup> *Id.* at 222–23.

<sup>66</sup> *Id.* at 222.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 306.

began a doctrinal quest for a neutrality that could serve religious liberty and equality and completely ban the heavy hand of the state from its citizens' religious lives.

### *B. The Imperative of Neutrality*

But, in and of itself, neutrality makes sense only in light of ground rules—that is, some sense of that state of affairs with respect to which we must be neutral.<sup>69</sup> Does the absence of religion constitute a neutrality that is disturbed by its inclusion? Or does neutrality require its inclusion? We need a theory of how things should be. That this reference point is not readily identified is suggested by the point and counter-point of avoiding, on the one hand, establishment of religion and, on the other, its inhibition.

Dean Erwin Chemerinsky argues that there are three competing conceptions of nonestablishment among the Justices.<sup>70</sup> Each represents a different conception of neutrality. One view is strictly separationist, committed to a relatively robust quarantine of religion from the precincts of government.<sup>71</sup> The state—all that it does and all that it pays for—should be secular.<sup>72</sup> This may be expressed in terms of neutrality,<sup>73</sup> but it is a neutrality predicated upon a certain view of religion. If you believe that religion is private and can be separated from all or most of what concerns the modern state, then evenhandedness and equality may well be served by exclusion.<sup>74</sup> For separationist judges and scholars, the baseline for assessing neutrality is secular. No mention of religion, or funding to individuals for religious purposes, or use of facilities by religious groups is neutral because all religious groups are excluded. There are certainly cases in which that type of neutrality seems to have prevailed.<sup>75</sup> In practice

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<sup>69</sup> Rosen, *supra* note 22, at 707 (citing Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115, 148–49 (1992)). Professor Rosen reminds us that any such baseline is “nonaxiomatic and contestable.” *Id.* There is no objective “view from nowhere.” *Id.* (borrowing the phrase from THOMAS NAGEL, *THE VIEW FROM NOWHERE* 6 (1986)).

<sup>70</sup> Erwin Chemerinsky, *Why Church and State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2196–98 (2008); *see also* Esenberg, *supra* note 11, at 11, 14, 18 (describing a separationist, accommodationist, and “ambitious” Establishment Clause, with the latter rooted in a concept of endorsement neutrality).

<sup>71</sup> Chemerinsky, *supra* note 70, at 2196.

<sup>72</sup> *Id.*

<sup>73</sup> *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (“The touchstone for our analysis is the principle that the ‘First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.’” (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

<sup>74</sup> *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (concluding that religion is a “product of free and voluntary choice”); *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part) (arguing that “[r]eligion is an individual experience”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 39 (1947) (Rutledge, J., dissenting) (noting that James Madison considered religion to be “wholly private”).

<sup>75</sup> *See, e.g.*, note 37 and cases cited therein; *see also* *Lee v. Weissman*, 505 U.S. 577 (1993); *Lemon v. Kurtzman*, 403 U.S. 602 (1970); *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington, Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

(if not in rhetoric), this view does not emphasize neutrality between religion and irreligion because it is less likely to see them in conflict.

Another view is accommodationist.<sup>76</sup> Although Dean Chemerinsky describes this view as holding that the Establishment Clause can only be violated by the literal establishment of a church or the coercion of religious participation,<sup>77</sup> it is unclear that any Justice has ever taken such an extreme view.<sup>78</sup> What is key is that judicial and academic accommodationists believe that nonestablishment leaves room for some substantial facilitation and acknowledgment of religion by the state.<sup>79</sup> Once again, accommodationists may also speak in terms of neutrality,<sup>80</sup> but it is a neutrality that emphasizes the value of religion in civil society. When accommodationists are more likely to have in mind an evenhandedness among religions, rather than between religion and irreligion.<sup>81</sup> The baseline for determining governmental neutrality is something like our historic regard and acknowledgment of either a generic monotheism or the Judeo-Christian tradition.<sup>82</sup> For accommodationists, de-emphasis of neutrality between religion and irreligion does not stem from a failure to see them in conflict as much as it does from the view that evenhandedness between them, (as opposed to among religions) is not required.

A third view also argues in terms of governmental neutrality toward religion.<sup>83</sup> In fact, Dean Chemerinsky calls it the “neutrality” approach<sup>84</sup> probably because, with some justification, he believes that the other two approaches are not neutral at all. On this view, government must remain neutral among religions *and* between religion and

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<sup>76</sup> Chemerinsky, *supra* note 70, at 2197–98.

<sup>77</sup> *Id.*

<sup>78</sup> Even Justice Scalia, for example, argued that the state may not endorse any particular form of monotheism. *McCreary County*, 545 U.S. at 893–94 (Scalia, J., dissenting).

<sup>79</sup> Justice Scalia, for example, has argued that there was no basis in the Constitution’s text, nor in our society’s historic or current understanding of the words, for the majority’s conclusion that “manifesting a purpose to favor adherence to religion generally is unconstitutional” (citations omitted). *Id.* at 889; *see also* *Van Orden v. Perry*, 545 U.S. 677, 687 (2005) (plurality opinion) (recognizing “the role of God in our Nation’s heritage”); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting) (quoting with approval Justice Kennedy’s partial dissent in *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989), in which he recognized that the Establishment Clause must be construed in light of the “[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage”).

<sup>80</sup> *See, e.g.,* *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) (arguing that the majority opinion had the effect of approving a program that socially discriminated against religion, and that such approval was inconsistent with the court’s prior decisions mandating neutrality); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>81</sup> *See Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (noting that tests measuring only neutrality could lead to hostility against religion).

<sup>82</sup> *See id.*

<sup>83</sup> Chemerinsky, *supra* note 70, at 2197.

<sup>84</sup> *Id.* at 2197, 2209.

irreligion.<sup>85</sup> This form of neutrality recognizes the dangers warned of in the counter-theme we found in *Everson* and *Engel* and related cases.<sup>86</sup> There are circumstances in which separation is not neutral. Borrowing from Douglas Laycock,<sup>87</sup> I want to refine Dean Chemerinsky's taxonomy by calling this view substantive neutrality, meaning the imperative that the state act in a way which, insofar as it is possible, ensures each person might freely choose his or her religious course free of government interference.<sup>88</sup> To achieve this, the state must often treat religious activities as it treats comparable secular activities in order to maintain evenhandedness, but it must avoid endorsing any particular religion *or* religion (or secularism) in general.

It is unclear that any of these three views (which are, of course, held to differing degrees and applied differently even by Justices identified with one "camp") currently commands a majority on the Court. Most recently, the Justices emphasizing substantive neutrality have, depending on the case, joined with the Justices more committed to separation or accommodation to form a majority.<sup>89</sup>

### *C. The Triumph of Substantive Neutrality*

In cases involving public funding of private activities and private access to public facilities, the result has been the functional triumph of substantive neutrality—the idea that government treats religious activities in the same way it treats comparable secular activities. This avoids tilting the influence of public funding or the use of public facility toward any particular religion or toward religion or irreligion in general.

#### 1. Public Funding

The Court has shown a broad willingness to permit government funding of faith-based services as long as the choice of those alternatives was made by an individual and there remains a private secular alternative. It has upheld tax deductions for expenses connected with sending children to private schools, including religious ones,<sup>90</sup>

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<sup>85</sup> *Id.* at 2197.

<sup>86</sup> *See supra* notes 38–39.

<sup>87</sup> Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 3 (1986).

<sup>88</sup> *Id.*

<sup>89</sup> For example, in *Zelman v. Simmons-Harris*, Justices O'Connor and Kennedy joined with Chief Justice Rehnquist and Justices Scalia and Thomas to uphold vouchers for use in sectarian schools. 536 U.S. 639 (2002). Dean Chemerinsky sees the Court's tangled decision in *County of Allegheny v. ACLU*, as reflecting the way in which "neutralist" Justices O'Connor and Blackmun saw the differing expressive nature of a nativity scene and a menorah. 492 U.S. 573 (1989) (finding a Christmas nativity display unconstitutional while permitting a large Chanukah menorah to be displayed). The former, in their view, sent a message of religious endorsement while the latter did not. *Id.*; Chemerinsky, *supra* note 70, at 2198–2200.

<sup>90</sup> *Mueller v. Allen*, 463 U.S. 388 (1983).

educational grants to be used at sectarian colleges,<sup>91</sup> sign language interpreters to be used by a student at a sectarian school,<sup>92</sup> grants to religiously affiliated organizations for sexuality and pregnancy counseling,<sup>93</sup> funding for remedial education in religious schools,<sup>94</sup> and direct aid for instructional materials to pervasively sectarian schools.<sup>95</sup>

In *Zelman v. Simmons-Harris*<sup>96</sup> the Court upheld Ohio's school voucher plan permitting families in Cleveland to receive tuition aid for both secular and sectarian private schools. Because the program had the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, and provided assistance directly to citizens who themselves directed the aid to religious schools, the program did not violate the Establishment Clause.<sup>97</sup> Writing for a 5-4 majority, Chief Justice Rehnquist argued:

[W]here 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.<sup>98</sup>

This movement seeks substantive neutrality, at least with respect to what the Constitution permits the government to do. If the state is, for example, going to finance public education or other services, then substantive neutrality is served by making similar resources available for comparable parochial education and services provided by religious organizations.

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<sup>91</sup> *Witters v. Wash. Dep't of Serv. for the Blind*, 474 U.S. 481 (1986).

<sup>92</sup> *Zobrest v. Catalina Foothills*, 509 U.S. 1 (1993).

<sup>93</sup> *Bowen v. Kendrick*, 487 U.S. 589 (1987).

<sup>94</sup> *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>95</sup> *Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>96</sup> 536 U.S. 639 (2002).

<sup>97</sup> *Id.* at 662–63. Evenhandedness between religious and secular uses of neutrally available funds may not, however, be *required*. In *Locke v. Davey*, the Court held that the state of Washington could refuse to permit the use of a generally available scholarship program to fund preparation for the ministry without violating a student's free exercise rights. 540 U.S. 712 (2004). Some scholars have argued that *Locke* permits, but does not require, state discrimination in favor of a secular state. *See, e.g.*, Richard S. Myers, *The Privatization of Religion and Catholic Justices*, 47 J. CATH. LEG. STUD. 157, 161 (2008) (stating that neutrality is a matter of "legislative grace"); Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 TULSA L. REV. 267, 268, 272 (2004). *Locke* may also represent the Court's aversion to the argument that the government might be required to fund religious activities. *See* Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995, 1001.

<sup>98</sup> *Zelman*, 536 U.S. at 652.

## 2. “Private” Speech in Public Places

The Court has also permitted substantial *private* religious expression in places or fora that the government funds or controls. For example, the Court has held that student religious groups were entitled to equal access to university facilities, generally available to other student groups,<sup>99</sup> and upheld that the Federal Equal Access Act, guaranteeing student religious groups access to school facilities made generally available to other extracurricular groups during noninstructional time.<sup>100</sup> It has held that the state must permit a cross on a state-owned plaza that was a traditional public forum, open generally to private speech,<sup>101</sup> and ruled similarly in cases involving more limited public fora, holding that public school facilities made available to the public during nonschool hours must be made available to a church group that wished to show a film on child rearing.<sup>102</sup>

The key move, however, was made in *Rosenberger v. Rector and Visitors of the University of Virginia*; the Court held that the University of Virginia could not deny funding to a religious group seeking to publish a Christian magazine where funding for this purpose was made available to other student groups.<sup>103</sup> Notwithstanding the pervasively religious content of the publication, the majority held that this constituted nothing more than a particular perspective toward which the state, having chosen to fund private speech, was required to be neutral.<sup>104</sup> Once again, the Court declined to regard a state mandated secularity as religiously neutral and rejected the notion that a neutral program of funding private religious speech in public spaces is impermissibly divisive.<sup>105</sup>

*Rosenberger* was extended in *Good News Club v. Milford Central School*.<sup>106</sup> The Court held that a school which allowed after-school use of its building by any group promoting the moral and character development of children could not deny use to a Christian club that wished to use the space for Bible study, prayer, and moral instruction.<sup>107</sup> Writing for the Court, Justice Thomas was untroubled by Justice Souter’s suggestion that the program involved worship, observing that it still constituted moral instruction, and rejected the suggestion that “reliance on Christian principles taints moral and character instruction in a way that other foundations for

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<sup>99</sup> *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>100</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

<sup>101</sup> *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

<sup>102</sup> *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

<sup>103</sup> 515 U.S. 819, 828–29 (1995).

<sup>104</sup> *See id.* at 845–46.

<sup>105</sup> *See id.*

<sup>106</sup> 533 U.S. 98, 111–12 (2001).

<sup>107</sup> *See id.* at 108–112 (“*Milford’s* exclusion of the club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.”).

thought or viewpoints do not.”<sup>108</sup> Once again, neutrality was thought to require inclusion of religious uses in a forum made available on a neutral basis.<sup>109</sup>

Professor Laycock sees *Zelman* as substantively neutral. It “creates no incentives to choose religious or secular education” and “protects individual choice; each family can choose for itself which school to attend.”<sup>110</sup>

The quest for substantive neutrality is expressed in the Court’s on-again,<sup>111</sup> off-again,<sup>112</sup> test of nonestablishment, first announced in *Lemon v. Kurtzman*,<sup>113</sup> requiring that a government action: “First . . . must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances *nor* inhibits religion; finally, the [action] must not foster ‘an excessive government entanglement with religion.’”<sup>114</sup> It is, as we will see, reflected in former Justice O’Connor’s view that religious expression by the state is forbidden when its purpose or effect is to endorse religion or nonreligion, or one religion over another. Endorsement, in her view, “sends a message to nonadherents that they are outsiders, not full members of the political community.”<sup>115</sup>

#### *D. Government Speech: Substantive Neutrality Becomes Endorsement Neutrality*

But, in the realm of government speech, substantive neutrality cannot mean state evenhandedness between private choices. The government often has only one voice (or, in some circumstances, a relatively limited number of voices). There are only so many monuments and village hall displays that can be erected. Only so many invocations can be offered at graduation. While funding and forums may be neutrally available to all religious and secular comers, the government often wishes to express a distinctive point of view and, when the government itself is speaking, that message will bear its imprimatur.<sup>116</sup> Because, in most circumstances in which the government speaks, everyone cannot be accommodated, the argument goes, we ought to expect religious expression to be off-limits. In the case of government speech, substantive neutrality requires separation. The state, if it can, and, as we shall see, it cannot, ought say nothing at all on religious matters.

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<sup>108</sup> *Id.* at 111.

<sup>109</sup> As noted at the outset, government speech does not create a public forum and thus does not create an obligation to communicate or permit other views. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

<sup>110</sup> Laycock, *supra* note 25, at 71.

<sup>111</sup> *McCreary County v. ACLU*, 545 U.S. 844 (2005) (invoking *Lemon*).

<sup>112</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005) (declining to apply *Lemon* yet decided the same day as *McCreary*).

<sup>113</sup> 403 U.S. 602 (1971).

<sup>114</sup> *Id.* at 612–13 (emphasis added) (citations omitted).

<sup>115</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989) (O’Connor, J., concurring).

<sup>116</sup> *Id.* at 72. (“[M]oney can be delivered in a way that is consistent with individual choice. Prayers cannot. Neither can scripture, creeds, Christmas displays, or any other speech promoting or denigrating religion.”).

So, while the Court has allowed significant interaction between religion and government in the areas of public aid and private speech in certain public fora, government speech must remain relatively religion-free.<sup>117</sup> The Court has banned and compelled voluntary prayer in school settings.<sup>118</sup> It has struck down laws calling for a moment of silence when persuaded of its religious provenance<sup>119</sup> and the Court invalidated a state requirement that the Ten Commandments be posted in public classrooms.<sup>120</sup>

In *Epperson v. Arkansas*, the Court struck down a state law prohibiting the teaching of evolution because the prohibition was based upon certain religious views and thus violated the constitutional mandate of neutrality.<sup>121</sup> In *Edwards v. Aguillard*, the Court struck down a law requiring schools to teach “creation science” as well as evolutionary theory where it found the mandate to be religiously motivated.<sup>122</sup>

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

In *Lee v. Weisman*,<sup>123</sup> the Court held that a school could not provide for nonsectarian prayer by a clergyperson at a graduation ceremony. The prayers—an invocation and benediction—were a brief nonparticipatory statement of a generic monotheism implying no more than that there is a God whose care can be invoked. Writing for the majority, Justice Anthony Kennedy allowed that “students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return,” yet Kennedy was himself untroubled.<sup>124</sup> The Court noted that “for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the [R]abbi’s prayer.”<sup>125</sup> In the view of the majority, the “perseveration and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself

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<sup>117</sup> Government may, under certain circumstances, communicate “objectively” about religion, although the legal rigor required to do so may often operate as a disincentive to even try. See *infra* note 137 and accompanying text.

<sup>118</sup> See *supra* note 58 and accompanying text.

<sup>119</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985) (finding that an Alabama law that “authorized a period of silence ‘for meditation or voluntary prayer’” violated the First Amendment).

<sup>120</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

<sup>121</sup> See 393 U.S. 97, 107–09 (1968).

<sup>122</sup> See 482 U.S. 578, 594 (1987).

<sup>123</sup> 505 U.S. 577 (1992).

<sup>124</sup> *Id.* at 591.

<sup>125</sup> *Id.* at 593.

is promised freedom to pursue that mission.”<sup>126</sup> Because “given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it,” Deborah had a right to be free of it.<sup>127</sup> In *Santa Fe Independent School District v. Doe*, the Court held that even student-led and student-initiated prayers at high school football games, at least where conducted pursuant to a school policy authorizing an invocation of some sort, amounted to an unconstitutional endorsement of religion.<sup>128</sup>

At first blush, this greater willingness to require the exclusion of religious perspectives can also be seen as a guest for substantive neutrality among religions and between religion and irreligion—one that focuses on the message communicated by government speech. In the context of government speech, substantive neutrality looks a lot like Justice O’Connor’s principle of nonendorsement. In her view, “government must not make a person’s religious beliefs relevant to his or her standing in the political community by conveying a message ‘that religion or a particular religious belief is favored or preferred.’”<sup>129</sup> Whether or not endorsement has occurred is to be determined by a reasonable observer, familiar with the text and background of both the First Amendment and of the challenged practice.<sup>130</sup>

Although a majority of the Court has not expressly adopted nonendorsement, either generally or with respect to government speech cases,<sup>131</sup> the principle has great explanatory power.<sup>132</sup> Consider, as an example, the Court’s most recent cases on public displays of the Ten Commandments.

<sup>126</sup> *Id.* at 589.

<sup>127</sup> *Id.* at 593. In his dissent, Justice Scalia observed that while we live in “a vulgar age,” our social conventions “have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence.” *Id.* at 637.

<sup>128</sup> 530 U.S. 290, 306–07, 313 (2000) (“[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”).

<sup>129</sup> *Id.* at 627 (O’Connor J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)).

<sup>130</sup> Some courts have seen the endorsement test as a refinement of the first two prongs in *Lemon* (i.e., “purpose” and “effect”), see for example *Ind. Civ. Liberties Union v. O’Bannon*, 259 F.3d 766, 770 (7th Cir. 2000), *cert. denied*, 534 U.S. 1162 (2002) (calling the focus on the first two prongs of the *Lemon* test the “endorsement test”), while others have considered it to be a refinement of the effects prong. See, e.g., *ACLU v. Ashbrook*, 375 F.3d 484, 503 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005) (“[I]n evaluating the ‘effects’ prong of the *Lemon* test, I apply the ‘endorsement test.’”).

<sup>131</sup> Thomas Berg has argued that, although the nonendorsement principle may be appropriate for government speech cases, it is not appropriate as a general requirement of the Establishment Clause. See Thomas Berg, *What’s Right and Wrong with “No Endorsement,”* 21 WASH. U. J. L. & POL’Y 307, 308 (2006).

<sup>132</sup> See, e.g., Laycock, *supra* note 25, at 70 (suggesting that with respect to the Establishment Clause, substantive neutrality and the protection of individual religious choice can explain votes of Justices Kennedy and O’Connor).

In *McCreary County v. American Civil Liberties Union*, a 5-4 plurality held that a municipal display of the Ten Commandments, even when accompanied by materials designed to emphasize their historic role in the development of law and displayed in conjunction with secular materials, was unconstitutional.<sup>133</sup> The display was original; and the county, having initially displayed only the Ten Commandments, added additional nontheistic documents only in response to allegations that the initial display was unconstitutional.<sup>134</sup> Writing for the majority, Justice Souter emphasized the governmental purpose for the display, concluding that, in this context, the display was intended to—and did—convey a religious message secondary to a religious objective.<sup>135</sup> Justice Souter insisted that he was not advocating “judicial psychoanalysis of a drafter’s heart of hearts,”<sup>136</sup> but what an “objective observer” would conclude about the government’s purpose based upon “traditional external signs.”<sup>137</sup>

This emphasis on the expressivist nature of government actions that this reasonable observer is thought to discern, turned out to be dispositive in *Van Orden v. Perry*,<sup>138</sup> decided the same day as *McCreary*. *Van Orden* also involved a display of the Ten Commandments, this time a free standing monument that had stood on the grounds of the State Capitol in Austin, Texas for over forty years.<sup>139</sup> Unlike the display in *McCreary*, the Commandments were not paired with other historic sources of law. Eight Justices thought the case was substantially the same as *McCreary*.<sup>140</sup>

Justice Breyer disagreed and this made all the difference. For Justice Breyer, a reasonable observer, in spite of its expressly religious content, would not (or, perhaps more accurately, should not) perceive a religious message.<sup>141</sup> The display in *Van Orden* had stood for over forty years.<sup>142</sup> The absence of controversy for most of that period demonstrated that the reasonable observer would “consider the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage.”<sup>143</sup> In other words, the *Van Orden* display stood because, at least in the mind of Justice Breyer, if no one else, it did not endorse the religious sentiments it expressed.

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<sup>133</sup> 545 U.S. 844, 856–57, 881 (2005). With respect to the Establishment Clause, substantive neutrality and the protection of individual choice in religious matters can explain the votes of Justices Kennedy and O’Connor regarding government funding and government speech. See Laycock, *supra* note 25, at 70.

<sup>134</sup> See *McCreary County*, 545 U.S. at 851–57.

<sup>135</sup> See *id.* at 868–73.

<sup>136</sup> *Id.* at 862.

<sup>137</sup> *Id.*

<sup>138</sup> See 545 U.S. 677, 691 (2005).

<sup>139</sup> See *id.* at 681–82.

<sup>140</sup> Only Justice Breyer disagreed. See *id.* at 703 (Breyer, J., concurring).

<sup>141</sup> See *id.* at 702 (Breyer, J., concurring) (“[T]hese factors provide a strong . . . indication that the Commandments’ text on this monument conveys a predominantly secular message.”).

<sup>142</sup> See *id.*

<sup>143</sup> *Id.* at 702–03 (Breyer, J., concurring).

## II. THE ASYMMETRICAL ESTABLISHMENT CLAUSE

*A. The Ambition of Nonendorsement*

In and of itself, the prohibition of certain forms of endorsement might be a useful guiding principle. But the ambition of nonendorsement, first made clear in *Engel*, *Abington*, and *Lee* and as detailed by Justice Breyer in *Van Orden*, is staggering.

As noted earlier, and consistent with the theme originating in *Everson*, *Engel* and *Abington*, endorsement can be very slight.<sup>144</sup> The endorsement can be vague enough to encompass the views of almost everyone. *Engel* and *Lee*, for example, involved brief nondenominational prayers, endorsing no theological propositions other than that there is a God who, perhaps, responds to intercessory prayer.<sup>145</sup> Endorsement of a religious perspective need not involve any claim of exclusive truth or affirmation.<sup>146</sup> It can even consist of a speech that expressly disavows endorsement, merely acknowledging religious sentiment or belief as a source of our democracy or as something which is or has been believed by some of us at some time.<sup>147</sup> Prohibited endorsement can occur even when the burden is conceded to be minimal or without any real assessment of the likelihood that it will have any real impact on religious choices.<sup>148</sup> We

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<sup>144</sup> See *id.* at 694–95 (Thomas, J., concurring) (“[T]his Court’s precedent permits even the slightest public recognition of religion to constitute establishment of religion.”). See *infra* note 143.

<sup>145</sup> See *supra* Part I.A., Part I.D.

<sup>146</sup> No modern Establishment Clause case considered by the Court involves such a claim, other than in the sense that facilitating invocations of God implies that there is one and that those who say there is not must be wrong.

<sup>147</sup> See *McCreary County v. ACLU*, 545 U.S. 844, 870–71 (2005) (“Foundations of American Law and Government” exhibit included Ten Commandments on display with other documents thought significant on historical foundation of American government). But see, *Lee v. Weisman*, 505 U.S. 577, 644–45 (1992) (Scalia, J., dissenting) (“Given the odd basis for the Court’s decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in prayers.”).

<sup>148</sup> As Justice Thomas has observed, students exposed to what was taken as a state-sponsored prayer at a graduation ceremony are not “‘coerced to pray’” but “[a]t most, . . . are ‘coerced’ into possibly appearing to assent to the prayer.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 47 (2004) (Thomas, J., concurring). One separationist scholar has observed:

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

Stephen G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885, 1910 (2001).

require the government to not simply avoid intolerance, but to adhere to a rather elaborate etiquette of sensitivity.<sup>149</sup> A holiday crèche scene might be unconstitutional even if combined with a Chanukah menorah,<sup>150</sup> but may be permissible if displayed in a way, such as alongside secular symbols, that convinces a majority—or the Justice or Justices casting the deciding votes—that, as in *Van Orden*, no endorsement was intended or reasonably perceived.<sup>151</sup>

Shortly following Justice O'Connor's promulgation of the endorsement list, Stephen Smith identified at least four forms of endorsement, roughly labeled: (1) exclusive preferment of a belief; (2) endorsement of the truthfulness of a belief; (3) endorsement of the value of a belief; and, (4) recognition that many have believed.<sup>152</sup> Following the Court's decisions in *McCreary* and *Van Orden*, it seems that a slim majority of the Court believes that, at least, the first three may all be forbidden by the Establishment Clause.

There seems to be no doubt that if the government claimed explicitly that all believers are irrational (exclusive preferment) or that "Jesus saves" (endorsement of truthfulness), the Establishment Clause would be violated. It is hard to see how communication of the value of a particular religious belief would steer clear of Establishment Clause difficulty, given, for example, invalidation of laws providing for moments of silence,<sup>153</sup> informing students of alternative views of the origins of life,<sup>154</sup> or acknowledging the importance of the Ten Commandments in the development of the Western legal tradition.<sup>155</sup> If a purpose to validate or advance that belief is seen as dispositive, government would walk a fine line in ever suggesting the value of any religious belief.

It may be that only where, as in *Van Orden*, a court (or at least the decisive vote on a court) can conclude no claim is made, or perceived, regarding the value of a belief, that a government statement concerning that belief, if it is religious, can stand.

<sup>149</sup> For example, in *Doe v. Beaumont Ind. Sch. Dist.*, 240 F.3d 462, 464 (5th Cir. 2001), the Court held that an issue of fact existed as to whether a volunteer "Clergy In the Schools" counseling program was an establishment, notwithstanding that the clergy were required to speak from a secular perspective and wore no religious garb. Apparently their mere identity was problematic. Upon remand, the district court found that the program constituted an establishment. See *Oxford v. Beaumont Ind. Sch. Dist.*, 224 F. Supp. 2d 1099, 1114 (E.D. Tex. 2002).

<sup>150</sup> See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 614–15 (1989) ("The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry.").

<sup>151</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 680–81 (1983).

<sup>152</sup> See Stephen D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276–77 (1987).

<sup>153</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1985) (striking down a law authorizing a period of silence at school for prayer or meditation).

<sup>154</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987) (finding unconstitutional a law that required either the banishment of teaching evolutionary theory in the classroom or the presentation of a religious view rejecting the theory).

<sup>155</sup> See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 856–58 (2005) (recognizing that the Ten Commandments greatly influenced Western legal thought).

Because endorsement may be implicit—may, in fact, be found even where it claims to be something else<sup>156</sup>—one wonders how often endorsement in the fourth sense (a recognition that many have believed) will be permitted.<sup>157</sup>

Again, my point is not that the injury suffered by those in the position of Deborah Weisman is not real. Nor do I wish to argue that there are no injuries of this type that deserve constitutional remedy. At this point, I mean only to observe that the Court's jurisprudence seeks to avoid a wide variety of subjective psychological injury and to impose upon the state a rather exacting expressive goal.

Justice Breyer, without apparent irony, recently summed up that goal.<sup>158</sup> The purpose of the religion clauses is to promote “the fullest possible scope of religious liberty” and “tolerance for all.”<sup>159</sup> They must be interpreted to avoid “divisiveness” by maintaining “separation of church and state.”<sup>160</sup> But so much separation as to “purge from the public sphere all that in any way partakes of the religious” because that, too, would “promote the kind of social conflict the Establishment Clause seeks to avoid.”<sup>161</sup> The state must not “engage in nor compel,” nor do anything resulting in excessive “interference with, or promotion of” religion.<sup>162</sup> It must maintain this perfect equipoise not only among “sects,” but between “religion and nonreligion.”<sup>163</sup> Justice Breyer can conceive of no test that might tell us whether government has strayed from the narrow path on which it must stay.<sup>164</sup> I should think not.

This ambition puts us in a bind. Given the scope of the modern state and the diversity of religious perspectives, requiring a true neutrality between those claiming that they have been exposed to a message that causes them to feel disfavored on religious grounds would substantially restrict the state's ability to speak and to enforce it to withdraw from much of what it does. Not surprisingly, faced with an unenforceable mandate of neutrality, courts have abandoned it. If the endorsement of competing beliefs or disapproval of the dissenter's beliefs is expressed through secular speech or selective omission, courts have refused to find a constitutional injury.

### *B. The Asymmetrical Treatment of “Secular” Speech*

While we might loosely refer to speech that, while not expressly religious, contradicts or marginalizes certain religious beliefs as “secular speech” that is not quite accurate or, if it is, the label is not pertinent. Speech that communicates to some that

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<sup>156</sup> See *id.* at 859 n.9.

<sup>157</sup> The line between acknowledging that many have believed and that this belief has value is rather imprecise.

<sup>158</sup> *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 699.

<sup>162</sup> *Id.* at 698–99.

<sup>163</sup> *Id.* at 698.

<sup>164</sup> *Id.* at 699.

their religious beliefs are wrong will not be perceived as secular, nor will calling it such deprive it of religious significance.

### 1. Government Speech that Ignores Religious Perspectives

One frequent manifestation of asymmetry is in the exclusion or restriction of religious perspectives or messages under circumstances in which some—or perhaps even many—religious adherents believe them to be pertinent. This is the driving force behind cases involving holiday displays, public monuments and voluntary prayer. The idea is that there ought to be public acknowledgment of major and widely shared religious observations and of the perceived religious sources of law and human liberty. Dedication of public events, it is argued, ought to take place in a way that many citizens will find meaningful. To be told that there are certain ways in which this may not be done can be, and is perceived as, a message of disapproval and marginalization.<sup>165</sup> But it is more than that.

As I argued in an earlier piece, schools do much more than teach academic subjects unrelated to religious concerns.<sup>166</sup> They routinely engage students about how and what to think about issues such as sexuality, tolerance for the choices and lifestyles of others, diversity of races and cultures, and the environment.<sup>167</sup> “Education,” as Judge Stephen Reinhardt recently noted, “serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds.”<sup>168</sup>

If, for example, a school encourages certain ways of moral decision-making or making choices about sexual activity<sup>169</sup> that may exclude, or minimize,<sup>170</sup> religious

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<sup>165</sup> Our annual Christmas wars, it seems to me, are more about the propriety of public secularity than they are about decorations, music, and greetings.

<sup>166</sup> See Esenberg, *supra* note 11, at 31–32.

<sup>167</sup> This “clarification” of values may be mandatory as well as merely suggestive. It is not unusual for a teacher certification program to require successful teaching candidates to exhibit a “commitment to social justice” and the National Council for Accreditation of Teacher Education has expressly recognized this as a “disposition” that may be required for accreditation. See, e.g., Robert “K.C.” Johnson, *Disposition For Bias*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, May 23, 2005, available at <http://www.thefire.org/index.php/article/6250.html>. At Washington State University, a student received negative values on “dispositions” requiring him to be “sensitive to community and cultural norms” and to “appreciat[e] and valu[e] human diversity” allegedly because he was a self-described “conservative Christian” who did not believe that male and white privilege exist. Press Release, Foundation for Individual Rights in Education, Education Programs May Have a ‘Disposition’ for Censorship, (Sept. 21, 2005) available at <http://www.thefire.org/index.php/article/6280.html>.

<sup>168</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005), *aff’d*, 447 F.3d 1187 (9th Cir. 2006), *cert. denied*, 549 U.S. 1089 (2006).

<sup>169</sup> See *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528, 1531 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985) (objecting to a book in an English literature curriculum); *Gheta v. Nassau County Cmty. Coll.*, 33 F. Supp. 2d 179, 180 (E.D.N.Y. 1999) (challenging a sexuality course).

<sup>170</sup> Even if the publicly expressed view is that religion is one of many more or less

considerations. It is hardly a stretch to say that such instruction may reasonably be perceived by believers as a message that these perspectives are less important—and are certainly never to be urged upon others—even if no student complains that such speech directly contradicts her religious values.

Even in the more traditionally “academic” realm, what schools say—or, again, do not say—about the role of religion in the nation’s history and current affairs have implications for students’ religious lives. As we have seen, throughout most of the twentieth and now into the twenty-first century, bitter controversy surrounds the fact and manner of teaching evolution and whether to include alternatives ranging from “creation science” to “intelligent design.”<sup>171</sup> Even if, for example, teaching about evolution makes no claims about (the absence of) a theological purpose or the implications of scientific explanations for processes and phenomena once thought to be explicable only by invocation of the divine, students may nevertheless be indoctrinated into a preference for materialism. Judge Michael McConnell has put it this way:

If the public school day and all its teaching is strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not “neutral.” Studious silence on a subject that parents may say touches all of life is an eloquent refutation.<sup>172</sup>

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

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equivalent considerations or portrayed as something that “some people” believe which may be further explored outside the formal educational process. If what is constitutionally significant is the requirement that no one be made to feel like an outsider or to believe that the state disapproves of his or her faith, “establishment” in the sense of endorsement may arise. Those who believe that duty to God is paramount will feel that duty has been slighted.

<sup>171</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 580–81 (1987) (creationism); *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968) (evolution); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000) (creation science); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005) (intelligent design); *Scopes v. State*, 289 S.W. 363, 363–64 (Tenn. 1927) (evolution).

<sup>172</sup> Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 162 (1986).

as they grow more dependent on government funds.<sup>173</sup> The exclusion—or state mandated<sup>174</sup> modification—of religious perspectives may well be perceived as a message of disapproval.<sup>175</sup>

Public spaces, moreover, have always been places in which the state expresses the values of the community. Plaques, public art and memorials purport to express and reinforce the values of the community.<sup>176</sup> If state-sponsored public acknowledgments of various aspects of a community's values and heritage must be secular, does the state risk crowding out religious values and heritage by its failure to acknowledge them? The point is not that the failure to include religious perspectives ought to be a constitutional violation, but that doctrine that prohibits, or significantly restricts, their inclusion will not be neutral as between them and competing secular perspectives.

## 2. Government Speech that Contradicts Religious Principles

Governmental messages may expressly contradict the religious views of those to whom they are directed. While government may not directly address religious doctrine “some of what schools do teach will imply that various religious perspectives are untrue or unsound.”<sup>177</sup>

For some, teaching evolution may contradict the belief that God created life and calls into question the authority of a sacred text that, in their view, describes how He created it.<sup>178</sup> This is particularly true where evolution is taught in a way that makes teleological claims that go beyond the observable facts of evolution and its mechanisms.<sup>179</sup> Teaching students how to make their own decisions on moral questions or the expression of their sexuality contradicts the notion that such matters require submission to the will of God.

Instruction on the equality of men and women may contradict the view of certain Muslims. Teaching the social and moral equivalence of same-sex relations may seem

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<sup>173</sup> See, e.g., Rev. Robert A. Sirico, *Taking the “Catholic” out of Catholic Charities: He Who Pays the Piper Calls the Tune*, PHILANTHROPY, Jan. 1, 1998, available at <http://www.philanthropyroundtable.org/printarticle.asp?article=1364>.

<sup>174</sup> Often the allegedly “secularizing” influence has been the prohibition of certain forms of discrimination, such as on the basis of sexual orientation or religious belief, or mandates for services, such as abortion or contraception, in a way that is claimed to be inconsistent with a religious organization's mission.

<sup>175</sup> It may, in addition, “crowd out” religious providers as taxpayer-funded entities occupy the field. See *infra* Part III.A.

<sup>176</sup> See Brief for International Municipal Lawyers Ass'n as Amicus Curiae Supporting Petitioners at 5–6, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009) (No. 07-665) (citing SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 90 (1998)).

<sup>177</sup> Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J. L. & POL. 329, 332 (2002).

<sup>178</sup> See, e.g., *Genesis*.

<sup>179</sup> See, e.g., RICHARD DAWKINS, *THE GOD DELUSION* (2006).

to conflict with the view of conservative Christians about human sexuality. That message, in and of itself, may interfere with “the preservation and transmission of religious beliefs” that the *Lee* Court “insisted be committed to the private sphere.”<sup>180</sup> That interference, moreover, may go beyond this particular subject. If believers regard these views as explicitly set forth in the Q’uran<sup>181</sup> or the Bible,<sup>182</sup> the state has communicated the notion that these sacred texts, which they may claim to be infallible, are wrong.

### 3. The Absence of a Remedy

#### *a. Secular Speech as Interference with Free Exercise*

One approach taken by those who feel aggrieved by these messages has been to argue that the communication of such messages—or at least the refusal to exempt non-adherents from having to receive them—is a violation of the Free Exercise Clause. That approach has failed.

As noted earlier, the classic case is *Mozert v. Hawkins County Board. of Education*.<sup>183</sup> In *Mozert*, plaintiffs argued that certain required readings in the Hawkins County, Tennessee school district were offensive to and contradicted their religious beliefs.<sup>184</sup> For that reason, requiring their children to be exposed to such material constituted a violation of their free exercise rights.<sup>185</sup> A divided panel of the Sixth Circuit found no free exercise violation because the students were required neither to affirm nor to deny any particular point of view.<sup>186</sup> In the Court’s view, “[w]hat [was] . . . absent . . . [was] the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of plaintiff’s religion.”<sup>187</sup> Public schools have the right, the Court noted, to teach fundamental values “‘essential to a democratic society’” including

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<sup>180</sup> *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

<sup>181</sup> Q’uran, *Book of Nissa*, 6:34 (“Men are the protectors / And maintainers of women, / Because Allah has given / The one more (strength) / Than the other, and because / They support them / From their means. / Therefore the righteous women / [a]re devoutly obedient, and guard / In (the husband’s) absence / What Allah would have them guard. / As to those women / On whose part ye fear / disloyalty and ill-conduct, / Admonish them (first), / (Next), refuse to share their beds, / (And last) beat them (lightly); / But if they return to obedience, / Seek not against them / Means (of annoyance): / For Allah is Most High, Great (above you all).”) (Abdullah Yusuf Ali trans., Sh. Muhammad Ashraf 1969).

<sup>182</sup> *Leviticus* 18:22 (“You must not lie with a man, as with a woman: that is an abomination.”).

<sup>183</sup> 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

<sup>184</sup> *Id.* at 1060–61.

<sup>185</sup> *Id.* at 1061. The *Mozert* plaintiffs chose not to advance an Establishment Clause claim. They sought to be exempted from the offending curriculum, not to change it. *Id.* at 1069.

<sup>186</sup> *Id.* at 1069.

<sup>187</sup> *Id.*

“tolerance of divergent political and religious views.”<sup>188</sup> This (and other aspects) of the *Mozert* holding have been roundly criticized, not least of all for the Court’s failure to recognize that exposure to, and the admonition to tolerate, certain “divergent” views were precisely what the plaintiffs argued was inconsistent with the exercise of their religion.<sup>189</sup>

Most recently in *Parker v. Hurley*,<sup>190</sup> the First Circuit rejected a *Mozert*-type challenge brought by parents who objected to the use in kindergarten and first grade classes of books depicting families in which both parents were of the same gender and the in-class reading of a book that depicted and celebrated a gay marriage.<sup>191</sup> As in *Mozert*, the plaintiffs did not seek to ban the books from the school curriculum, but to be provided with notice of such materials and the opportunity to be exempted.<sup>192</sup> They argued that the classroom instruction interfered with their ability to inculcate their religious beliefs and that the children were “essentially” required “to affirm a belief inconsistent with and prohibited by their religion.”<sup>193</sup>

The court rejected both free exercise and establishment complaints.<sup>194</sup> Under the Supreme Court’s current free exercise paradigm, announced in *Oregon v. Smith*,<sup>195</sup> the plaintiffs would have little prospect of success. Under *Smith*, the Free Exercise Clause does not exempt persons from complying with neutral laws of general applicability.<sup>196</sup> Courts and commentators have differed as to what extent *Smith*’s rejection of the need for heightened scrutiny of the state’s regulatory interest should be balanced against the plaintiff’s interest in being free of interference in “hybrid” cases<sup>197</sup>—that is, those cases in which a free exercise claim combined with another constitutional objection.<sup>198</sup> But the *Parker* court found that the challenged curriculum violated neither the plaintiff’s free exercise rights nor the due process right of parents to control the education of their children.<sup>199</sup> It rejected the plaintiff’s free exercise claim because

<sup>188</sup> *Id.* at 1068 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

<sup>189</sup> Stolzenberg, *supra* note 29, at 605–06 (“After all, requiring impressionable children to exhibit adherence to beliefs they do not (yet) hold is an effective way of cultivating adherence to those beliefs.”).

<sup>190</sup> *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 129 S.Ct. 56 (2008).

<sup>191</sup> *Id.* at 90, 92–93.

<sup>192</sup> *Id.* at 90.

<sup>193</sup> *Id.* at 94 (quoting the Complaint filed by plaintiffs).

<sup>194</sup> *Id.* at 101–07.

<sup>195</sup> 494 U.S. 872, 877 (1990).

<sup>196</sup> *Id.* at 879; *accord*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

<sup>197</sup> Compare Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2220–21 (2005), with Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990).

<sup>198</sup> *Parker*, 514 F.3d at 98–99. As for the due process rights, see, for example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

<sup>199</sup> *Parker*, 514 F.3d at 101–07.

it lacked an allegation of coercion and declined to recognize a free exercise right to be free of indoctrination.

Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them. . . . The reading of *King and King* was not instruction in religion or religious beliefs.<sup>200</sup>

With respect to the due process claim, the court distinguished *Wisconsin v. Yoder*, holding that the state may not require Amish families to send their children to school past the eighth grade as involving a greater degree of compulsion.<sup>201</sup> The court reasoned that the plaintiffs, objecting to the curricular materials, were not seeking to preserve a largely separate exposure and faced no sanctions for withdrawal.<sup>202</sup> They could simply choose to send their children to private schools.<sup>203</sup>

The results are not surprising within the four corners of free exercise doctrine. Quite apart from whether the challenged practices constitute neutral laws of general applicability, the Court has generally required that a dissenter be coerced into violating her religious beliefs or that a state measure penalize religious activity by denying her “an equal share of the rights, benefits and privileges enjoyed by other citizens.”<sup>204</sup> No free exercise case has required that government be required to speak and act in a manner acceptable to a litigant’s religious beliefs.

*b. Secular Speech as Establishment*

But government’s ability to speak and to act has been found to be restricted by the Establishment Clause and, in the post-*Everson* era, the absence of coercion or penalty

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<sup>200</sup> *Id.* at 106 (citing *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994); *Mozert v. Hawkins County Bd. Of Educ.*, 827 F.2d 1058, 1063-65, 1070 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988)); *see also* *Bauchman v. W. High Sch.*, 132 F.3d 542, 558 (10th Cir., 1997) (“[P]ublic schools are not required to delete from the curriculum all materials that may offend any religious sensibility.”); *cf.* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (distinguishing between compelling students to declare a belief through mandatory recital of the pledge of allegiance, which violates free exercise, and “merely . . . acquaint[ing students] with the flag salute so that they may be informed as to what it is or even what it means”) (citations omitted).

<sup>201</sup> *Parker*, 514 F.3d at 99–100, 105 (“The parents allege neither coercion in the form of a direct interference with their religious beliefs, nor compulsion in the form of punishment for their beliefs, as in *Yoder*.”); *see Yoder*, 406 U.S. at 210–12.

<sup>202</sup> *Parker*, 514 F.3d at 99–100.

<sup>203</sup> *Id.* at 102.

<sup>204</sup> *See, e.g.,* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

has been largely irrelevant. In virtually no modern Establishment Clause case, certainly not in *Engel*, *Edwards*, *Abington*, *Wallace*, *Lee*, *Santa Fe*, or *McCreary*, was anyone compelled to affirm anything.

Nevertheless, the claim that pervasive secularism violates the Establishment Clause has also failed. In *Board of School Commissioners v. Smith*,<sup>205</sup> the trial court held that certain textbooks used in Alabama elementary and secondary schools violated the Establishment Clause because they advanced the religion of secular humanism and inhibited theistic religion.<sup>206</sup> The Court of Appeals for the Eleventh Circuit disagreed.<sup>207</sup> In its view, the texts conveyed a message of “independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decision-making,” and this was an “entirely appropriate secular effect.”<sup>208</sup> The absence of a discussion of religion, it concluded, did not convey a message of approval of secular humanism.<sup>209</sup> Other cases considering allegations of an “establishment” of secularism have generally reached similar conclusions.<sup>210</sup>

Even where government has arguably directly denounced a religious tradition or group, plaintiffs have struggled. An illustrative example is the Ninth Circuit’s decision in *American Family Association v. San Francisco*.<sup>211</sup> Certain conservative Christian organizations ran a newspaper advertisement proclaiming that, while

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<sup>205</sup> 655 F.Supp. 939 (S.D. Ala. 1987), *rev’d*, 827 F.2d 684 (11th Cir. 1987).

<sup>206</sup> *Id.* For example, District Judge Brevard Hand found that home economics textbooks promoted an “individualistic,” “relativist,” and utilitarian form of moral decision-making. *Id.* at 986.

<sup>207</sup> *Smith v. Bd. of Sch. Comm’rs*, 827 F.2d 684, 693 (11th Cir. 1987).

<sup>208</sup> *Id.* at 692.

<sup>209</sup> *Id.* at 693.

<sup>210</sup> *See, e.g.*, *Fleischfresser v. Dirs. of Sch. Dist.* 200, 15 F.3d 680 (7th Cir. 1994); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994). An Establishment Clause claim was also made in *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001), *cert. denied*, 534 U.S. 827 (2001). Although the plaintiffs lacked standing for some of their claims, the Court reached a claim brought by the guardian of a student that a high school Earth Day celebration constituted establishment of religion worshiping the Earth—or “Gaia”—as a living thing and interfered with the plaintiff’s guardian’s free exercise rights. A unanimous panel of the Second Circuit disagreed with the District Court’s conclusion that an objective observer would view the celebration as endorsing Gaia or Earth worship. *Id.* at 79. It rejected the plaintiff’s free exercise claim based upon the absence of any evidence that attendance at the ceremony was compulsory. *Id.* at 80; *cf. Morrison v. Bd. of Educ. of Boyd County*, 419 F. Supp. 2d 937 (E.D. Ky. 2006), *cert. denied*, 129 S.Ct. 1318 (2009) (noting that students exposed to sensitivity training alleged to inculcate positive view of homosexuality does not compel students to disavow their religious principles or endorse homosexuality). Most often, courts will avoid Establishment claims by characterizing a refusal to move from a secular baseline as supported by an interest in avoiding the perception of religious endorsement or in avoiding religious controversy. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring); *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005), *cert. denied*, 547 U.S. 1097 (2006).

<sup>211</sup> 277 F.3d 1114 (9th Cir. 2002), *cert. denied*, 537 U.S. 886 (2002).

Christians love homosexuals, “God abhors any form of sexual sin,” including “homosexuality, premarital sex or adultery.”<sup>212</sup> The ad stated:

For years, Christians have taken a stand in the public square against aggressive homosexual activism. We’ve paid a heavy price, with sound-bite labels like “bigot” and “homophobe.” But all along we’ve had a hand extended, something largely unreported in the media . . . an open hand that offers healing for homosexuals, not harassment. We want reason in this debate, not rhetoric. And we want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope.<sup>213</sup>

In response, the San Francisco Board of Supervisors sent a letter to the groups condemning the acts as “hateful rhetoric,” and claiming a direct correlation between their message and crimes against gays and lesbians.<sup>214</sup> The Board passed a resolution condemning the murder of a gay man in Alabama and calling “for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes.”<sup>215</sup>

The Board also passed a resolution naming one of the plaintiff Christian organizations and suggesting that ads encouraging gays and lesbians to change their sexual orientation “are erroneous and full of lies.”<sup>216</sup> This resolution said that ads suggesting that “gays and lesbians are ‘immoral and undesirable create an atmosphere which validates oppression of gays and lesbians’ and encourages maltreatment of them.”<sup>217</sup> Additionally, the Board passed a resolution calling upon local television stations to boycott the ads.<sup>218</sup>

Applying the *Lemon* test, the Ninth Circuit noted that “although the letter and resolutions may appear to contain attacks on the Plaintiffs’ religious views, in particular that homosexuality is sinful, there is also a plausible secular purpose in the defendants’ actions—protecting gays and lesbians from violence.”<sup>219</sup> Although noting that there is little guidance in determining whether a government action has the primary purpose of inhibiting religion, the majority concluded that while “the letter and resolution may contain over-generalizations about the Religious Right, at times misconstrue the Plaintiffs’ message, and may be based on a tenuous perceived connection

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<sup>212</sup> *Id.* at 1118–19.

<sup>213</sup> *Id.* at 1119.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1119–20.

<sup>217</sup> *Id.* at 1120.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 1121.

between the Plaintiffs' advertisements and the increase in violence against gays and lesbians," none of this "make[s] religious hostility the primary effect of the Defendants' actions."<sup>220</sup> Although conceding that the letter and resolution might create division along religious lines, it concluded that political divisiveness alone cannot create an Establishment Clause violation,<sup>221</sup> or else "government bodies would be at risk any time they took an action that affected potentially religious issues, including abortion, alcohol use, other sexual issues, etc."<sup>222</sup> The majority also rejected the plaintiffs' Free Exercise claim, concluding (without mentioning the call for a boycott) that no religious conduct was affected by the defendants' conduct.<sup>223</sup>

Judge Noonan dissented. Writing that "[t]o assert that a group's religious message and religious categorization of conduct are responsible for murder is to attack the group's religion," and that it is "difficult to think of a more direct attack,"<sup>224</sup> He concluded:

The city is saved as to its purpose by its plausible purpose of seeking to reduce violence against gays and lesbians; but this plausible purpose does not neutralize the effect of the means chosen by the city—a means that achieves its effect by its assertion of a direct correlation between the plaintiffs' religious beliefs and the killing of human beings. It is difficult to believe that any informed and reasonable observer could think that the primary effect of the city's message was, "Don't incite violence against gays and lesbians." The city, well aware of the plaintiffs' advertising campaign proclaiming their love for homosexuals, knew that such a conventional admonition would have been brushed off as a bromide with an "Of course not." To reach the plaintiffs, to strike at what the city perceived as a danger, the city had to strike at the heart of the plaintiffs' religious belief, to focus on their belief that the conduct they were trying to change was an offense to God and to make that belief responsible for murder.<sup>225</sup>

"Suppose a city council," Judge Noonan observed, ". . . adopted a resolution condemning Islam because its teachings embraced the concept of a holy war and so, the resolution said, were 'directly correlated' with the bombing of the World Trade Center."<sup>226</sup> While a purpose of the resolution might be to discourage bombings,

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<sup>220</sup> *Id.* at 1122.

<sup>221</sup> *Id.* at 1123.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 1124. The Court also rejected a hybrid claim, alleging violations of the plaintiffs' free speech rights.

<sup>224</sup> *Id.* at 1126.

<sup>225</sup> *Id.* at 1126–27.

<sup>226</sup> *Id.* at 1127.

Judge Noonan asked (rhetorically) if “any reasonable, informed observer [would] doubt that the primary effect of such an action by a city could be the expression of official hostility to the religion practiced by a billion people?”<sup>227</sup>

In *Harper v. Poway Unified School District*,<sup>228</sup> a student, in response to a school sponsored “Day of Silence” promoting tolerance for gays and lesbians, wore a home-made T-shirt expressing his disapproval of homosexuality on religious grounds.<sup>229</sup> The shirt read “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD CONDEMNED” handwritten on the front and “HOMOSEXUALITY IS SHAMEFUL” written on the back.<sup>230</sup> Although the district court denied his motion for a preliminary injunction, he was found to have stated establishment and free exercise claims at least in part because school officials had told him to “leave his faith ‘in his car,’” and that Christianity was “not based on hate” and, therefore, he should not offend others.<sup>231</sup>

On appeal, a divided panel of the Ninth Circuit affirmed the denial of a preliminary injunction on free speech grounds, emphasizing the “disruptive nature” of Harper’s speech and finding that schools may restrict speech that “attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.”<sup>232</sup> The majority held that Harper had not demonstrated a reasonable likelihood of success on his Free Exercise or Establishment Clause claims.<sup>233</sup>

With respect to Harper’s free exercise claim, the majority found that there was no substantial burden on his religious practice because he was not compelled to affirm a repugnant belief.<sup>234</sup> He was not penalized or discriminated against because of his religious views, or was the availability of a benefit conditioned on violation of a tenet of his faith.<sup>235</sup> It noted the school’s interest in prohibiting disruption of the educational process or “physical and psychological injury to young people entrusted to their care.”<sup>236</sup>

In response to Harper’s allegation that school officials tried to change his beliefs or told him that his interpretation of Christianity was wrong, the majority characterized the challenged behavior as an attempt to change his inflammatory conduct and

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<sup>227</sup> *Id.* Judge Noonan also noted that the complaint alleged that television stations had, in fact, refused to air the plaintiffs’ ad as a result of the resolution, creating an issue as to whether they had suffered an official sanction. *Id.*

<sup>228</sup> 345 F. Supp. 2d 1096 (S.D. Cal. 2004), *aff’d in part*, 445 F.3d 1166 (9th Cir. 2006), *cert. granted and judgment vacated*, 549 U.S. 1262 (2007).

<sup>229</sup> *Id.* at 1100.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1101.

<sup>232</sup> *Harper*, 445 F.3d at 1178, *cert. granted and judgment vacated*, 549 U.S. 1262 (2007).

<sup>233</sup> *Id.* at 1192.

<sup>234</sup> *Id.* at 1188.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 1188–89.

that, in any event, “school officials’ statements and any other school activity intended to teach Harper the virtues of tolerance constitute a proper exercise of a school’s educational function, even if the message conflicts with the views of a particular religion.”<sup>237</sup>

The majority also rejected Harper’s Establishment Clause claim. It suggested that nonestablishment, as opposed to free exercise, is more properly concerned with government measures that advance religion and concluded that the school had a secular purpose in teaching “secular democratic values” that neither advanced nor inhibited religion.<sup>238</sup>

Judge Kozinski dissented on free speech grounds. He did not believe that the record supported the claim that the t-shirt would cause substantial disruption or invade the rights of others.<sup>239</sup> Having introduced the topic of homosexuality, the school could not, in his view, engage in viewpoint discrimination even to protect minorities.<sup>240</sup> He also thought Harper was likely to prevail on a claim that the school’s harassment policy was overly broad.<sup>241</sup>

Condemnation of a religious group by the San Francisco Board of Supervisors was once again at issue in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*.<sup>242</sup> In March 2006, Cardinal William Joseph Levada, the head of the Congregation for the Doctrine of the Faith, directed the Archdiocese of San Francisco to stop placing children in need with homosexual couples.<sup>243</sup> In response, the Board passed a resolution that expressed outrage that “a foreign country, like the Vatican, meddles with” the city’s “existing and established customs.”<sup>244</sup> It said that his decree was “absolutely unacceptable to the citizenry of San Francisco.”<sup>245</sup> It called Cardinal Levada’s directive “hateful and discriminatory rhetoric [that] is both insulting and callous, and shows a level of insensitivity and ignorance . . . seldom encountered” by the Board.<sup>246</sup> Referring to the Congregation for the Doctrine of the Faith as the former “Holy Office of the Inquisition,” the resolution called on Cardinal Levada to withdraw his doctrine and for the San Francisco Archdiocese to defy it.<sup>247</sup> The District Court had little trouble rejecting a challenge to the resolution.<sup>248</sup> Although the state “may be perceived as pejorative,” the court found it clear from the text of the statute that any “criticism” was presented “in the context of same-sex adoption—a

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<sup>237</sup> *Id.* at 1189–90.

<sup>238</sup> *Id.* at 1191.

<sup>239</sup> *Id.* at 1195–97.

<sup>240</sup> *Id.* at 1197–1200.

<sup>241</sup> *Id.* at 1201–07.

<sup>242</sup> 464 F. Supp. 2d 938 (N.D. Cal. 2006).

<sup>243</sup> *Id.* at 940.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 944.

<sup>248</sup> *Id.*

secular dimension of the City's culture and tradition,"<sup>249</sup> it saw the call upon the archdiocese to defy the order as a secular attempt to promote same-sex adoption and non-discrimination "rather than meddling with internal church affairs."<sup>250</sup> "Elected officials," it concluded, "are certainly free to express their electorates' views."<sup>251</sup>

### III. THE PROBLEM OF ASYMMETRY

Much, then, seems to turn on whether a government message uses expressly theological propositions. Perhaps one could argue that the insult is somehow less fundamental if it avoids direct comment on what are thought to be core religious principles, such as whether there is a God, Jesus is the Messiah, and the Q'uran is the word of God. In this view, the insult is simply a product of living in a society in which not everyone shares the same religious beliefs and no sectarian group is entitled to have the temporal implications of its faith made into public policy. Whatever insult results from, say, the teaching of evolution or the acceptance of gays and lesbians, is simply the inevitable consequence of democratic give and take in a pluralistic society.

#### *A. Asymmetry Does Not Satisfy Substantive or Endorsement Neutrality*

Some commentators have endorsed this, arguing that establishment of "non-religion" would require the express advocacy of an agnostic or atheistic position.<sup>252</sup> To quote one commentator, as long as the schools have not taught "that there is no God," the fact that they have taught values and methods of reaching them incompatible with some students' religious view is unproblematic.<sup>253</sup> Several lower courts, faced with an argument that the exclusion of expressions of faith from public life constitutes an establishment of secularism, stated the need for some active advocacy, as opposed to the mere assumption, of irreligion.<sup>254</sup> In an attempt to justify such an approach, Steven Shiffrin argues that while there may be no distinction between these assertions as a matter of "logical entailment," there is as a matter of "social meaning."<sup>255</sup>

In this view, the disfavored position of religious dissenters who claim harm from public secularity is the price we pay for religious freedom. Secularity is the common ground that must be accepted in order to avoid, as Kathleen Sullivan put it, the war of "all against all" and domination of the majority.<sup>256</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 945–46.

<sup>251</sup> *Id.* at 948.

<sup>252</sup> Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1082 (1996).

<sup>253</sup> *Id.*

<sup>254</sup> *See supra* Part II. B.

<sup>255</sup> Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 726 (2003).

<sup>256</sup> Kathleen M. Sullivan, Comment, *Rainbow Republicanism*, 97 YALE L. J. 1713, 1717 (1988).

The argument is that religion is foundational in a way that other beliefs are not. Because it addresses matters of ultimate concern, religion's claim on adherents is uniquely strong and tantamount to an immutable characteristic like race and gender. Thus, religion is commonly a prohibited basis for discrimination.<sup>257</sup> Because of this, the argument continues, individuals are uniquely sensitive to messages that are contrary to their beliefs about religion, including beliefs regarding the uncertainty or nonexistence of God. Even if disputes about religion do not actually result in greater division than those about politics, religious insults are alienating in a way that others are not.<sup>258</sup> When the government takes a position on religious matters that is contrary to that of its citizens, nonadherents are more likely to perceive it as an attack on their identity and take it as a message that they are disfavored members of the political community.

Of course, there is no constitutional injunction against division as such and much of our constitutional jurisprudence holds that a multiplicity of views and a marketplace of ideas are good things. In fact, James Madison famously believed that the answer to factionalism was to permit each faction full access to the public square.<sup>259</sup> As Professor Gerald Bradley has noted, perhaps the Court, on matters of religion, has abandoned Madison's vision of "manageable conflict" and turned instead to the "privatization" of faith.<sup>260</sup>

But the larger problem is that it does not work and the notion that faith ought to be "privatized" is anything but substantively neutral. To borrow from Richard Garnett, limiting the "nonendorsement" principle to the expressly religious "depends on the possibility of identifying such matters and distinguishing them meaningfully from other 'matters' about which people deeply disagree."<sup>261</sup> He notes that "[f]or many

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<sup>257</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Numerous state laws also prohibit discrimination on the basis of religion or creed in employment and other contexts. See, e.g., ALASKA STAT. § 18.80.220 (2008) (religion); ARIZ. REV. STAT. ANN. § 41-1463 (2008) (religion); COLO. REV. STAT. ANN. § 24-34-402 (West 2008) (creed and religion); 775 ILL. COMP. STAT. ANN. 5/1-103 (West 2008) (religion); ME. REV. STAT. ANN. tit. 5, § 4572 (2008) (religion); MINN. STAT. ANN. § 363A.08 (West 2008) (creed and religion); N.J. STAT. ANN. § 10:5-4 (West 2008) (creed); OR. REV. STAT. ANN. § 659A.030 (West 2008) (religion); WIS. STAT. ANN. § 111.321 (West 2008) (creed).

<sup>258</sup> Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 320 (1996).

<sup>259</sup> See THE FEDERALIST NO. 51 (James Madison) (claiming that "[i]n a free government the security for civil rights must be the same as that for religious rights . . . consist[ing] in the one case in the multiplicity of interests, and in the other in the multiplicity of sects"). Madison argued that "the utmost freedom of religion," actually "arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society." James Madison, Remarks at the Virginia Ratifying Convention, in 5 THE FOUNDERS' CONSTITUTION 88 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>260</sup> Gerald V. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 276–77 (1986).

<sup>261</sup> Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1666, 1712 (2006).

religious people, much or even all that they do—whether or not it is done in the context of prayer, liturgy, or ritual—is ‘religious.’”<sup>262</sup> If this is the case, then a line drawn that prohibits explicitly religious assertions but permits secular assertions without regard to how they may contradict the religious beliefs of those who hear them is unlikely to avoid division. The extant evidence—continued litigation and complaints of a secular public square—suggests that it does not.

One can imagine two expressive harms or impacts from government messages concerning religion. The first is that it may express impermissible attitudes toward persons or groups.<sup>263</sup> Nonestablishment, at least as conceived in the post-*Everson* era, is concerned not only with political equality, but also with social equality—at least as far as the government is concerned. Nonendorsement, then, serves an important expressivist purpose, namely, to make clear that religion is not a marker of political status or a basis for exclusion. It is a statement about equality, tolerance, and inclusion. As Dean Chemerinsky puts it, everyone is entitled to assume that the government is “theirs;”<sup>264</sup> or if it is not, that the basis for alienation is not religious. The second is that it forms and shapes them—that is, it expresses and inculcates social values and norms.<sup>265</sup>

In each of these cases discussing “secular” messages, government speech was nevertheless claimed to communicate something about citizens’ religious beliefs. Although nonadherents were not coerced or asked to affirm offending beliefs, this would not, as we have seen, excuse messages perceived to endorse religion. The absence of coercion has never, or at least not recently, been a required element of an Establishment Clause claim. Although the government’s messages were not explicitly religious in the sense of using theological language or making assertions about extratemporal matters, to argue that there is a meaningful distinction between advocacy for a set of ideas that are completely inconsistent with a proposition and express denial of the proposition is to insult the intelligence of the hearer.<sup>266</sup>

As the *Mozert* line of cases—and our hypothetical Dick and Jane—illustrate, the exclusion or limitation of religious perspectives when they are, in the view of many, pertinent or the communication of messages contrary to certain citizens’ strongly held religious beliefs does convey religious insult. If we are concerned with the messages that objective observers will draw from this, it is that religious beliefs—or their temporal implications—are either not appropriate for public discourse or that they are

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<sup>262</sup> *Id.* at 1713.

<sup>263</sup> Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1521 (2000).

<sup>264</sup> Erwin Chemerinsky, *Why the Rehnquist Court is Wrong About the Establishment Clause*, 33 LOY. U. CHI. L.J. 221, 227 (2001).

<sup>265</sup> Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910 (1996) (arguing that law expresses social values and norms that shape and constitute the political community).

<sup>266</sup> Stephen D. Smith, *Barnette’s Big Blunder*, 78 CHI.-KENT L. REV. 625, 629–30 (2003).

inherently subjective and are more or less incomprehensible outside of the community of believers. That they cannot—and perhaps even ought not—be asserted outside the community of adherents. Thus, those in the position of Chase Harper are told to keep their religion in their car.<sup>267</sup>

The idea that such ostensibly secular messages convey religious insult and interfere with religious formation is buttressed by recent—and widely accepted—scholarship on the nature of religious formation. Sociologists of religion and theologians have increasingly turned away from an individualized or “private” view of religion in which one’s search for meaning is private and taken fundamentally. As Professor Kathleen Brady has pointed out, “modern” theology was rooted in Kant’s argument that one cannot know a thing in itself (“noumena”), including God, but only the “phenomenon” of experience, and in Friedrich Schleiermacher’s subsequent adoption of that idea to theology.<sup>268</sup> For Schleiermacher, religion becomes far more subjective, a feeling of “absolute dependence.”<sup>269</sup> For those writing in this modern tradition, human beings are innately religious—that is, we have common intuitions or feelings that point to, in the words of Paul Tillich, “the ground of our being.”<sup>270</sup> Although we may well feel compelled to express or reinforce religious experiences and emotions in community, “human nature begins with a divine orientation which will inevitably express itself in communal forms without external prodding or support.”<sup>271</sup>

What Brady refers to as the “postliberal” challenge to modern theology argue that religions resemble languages or cultures, and that “people do not become religious by tapping into a religious dimension that exists as a pre-reflective or pre-thematic experience in the depths of self,” but “by being ‘socialized’ into a religious community and by ‘interioriz[ing]’ a set of skills by practice and training.”<sup>272</sup> Other scholars writing in this tradition have argued that, in addition to being formed in community, religion is porous and “permeable”—that is, religious communities interact with the larger culture<sup>273</sup> and, thus, will “always share[] cultural forms with its wider host culture and other religions.”<sup>274</sup> In other words, they are influenced by what occurs during the rest of the week and outside the doors of houses of worships and homes. Brady writes, “for postliberals, humans all ‘stand within traditions,’ and truth is something

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<sup>267</sup> See *supra* Part II. B.3.b.

<sup>268</sup> Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433, 479–81 (1999).

<sup>269</sup> See FRIEDRICH SCHLEIERMACHER, *THE CHRISTIAN FAITH*, 16–17 (H.R. MacIntosh & J.S. Steward eds., T&T Clark, Ltd. 1928) (1830).

<sup>270</sup> PAUL TILlich, 1 *SYSTEMATIC THEOLOGY* 110 (1951).

<sup>271</sup> Brady, *supra* note 268, at 488.

<sup>272</sup> *Id.* at 490 (citing GEORGE A. LINDBECK, *THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE* 33–41 (1984)).

<sup>273</sup> See, e.g., KATHRYN TANNER, *THEORIES OF CULTURE: A NEW AGENDA FOR THEOLOGY* (1997).

<sup>274</sup> *Id.* at 114.

which can be attained only in and through particular religious communities.”<sup>275</sup> People do not rely on reason to reach religion as Jefferson envisioned, nor do they find it deep within the self or as the result of a direct revelation from God to the individual. Rather, they learn it, and thus, it is only in the context of particular religious communities that it makes sense to talk about religious truth.<sup>276</sup>

If this is so, then the expansion of government in daily life will magnify the influence of what the government says and there is no reason to believe that its impact on religious choice and upon the political standing of adherents will turn on the use of expressly theological language or the assertion of metaphysical claims.

Our Establishment Clause jurisprudence assumes that the voice of government carries great weight and that its endorsement of a religious position may place great pressure on religious dissenters to conform. It may have a disproportionate influence and “crowd out” religious perspectives that are inconsistent with the state’s message. There is little reason to believe that this pressure and influence is avoided by messages that, while avoiding theological language, are just as inconsistent with theological presuppositions as explicitly theological claims.

To believe otherwise is to choose to assume one particular interpretive choice as a matter of law. We have, again, constructed the “reasonable observer” of our choice. It seems evident that real world dissidents do not ascribe to Professor Shiffrin’s social meaning and that to tell our hypothetical Jane to choose one meaning over another is tantamount to telling her to, in Dean Garvey’s words, “cover your ears!”<sup>277</sup> Although that may be a perfectly reasonable bit of advice, it is not the way we treat even the most bland religious expressions. We may well need to modify doctrine in a way that tells dissenters, under certain circumstances, to cover their ears. In fact, I believe that we do. But if there is a justification for treating offending messages differently based upon their use—or non-use—of express religious language, it is not because one form of speech impacts dissenters differently than the other.

The distinction between express religious expression and the communication of messages that might be understood to convey an implied religious message, moreover, has not generally been thought to resolve establishment concerns.

The Court has long recognized the potential for endorsement of a religious proposition by secular language. In *Epperson v. Arkansas*, the mere exclusion of secular messages, where thought to be religiously motivated, was found to constitute an establishment.<sup>278</sup> In *Edwards v. Aguillard*, as we have seen, the Supreme Court struck down a law requiring that creation science be taught in public school whenever evolution was taught.<sup>279</sup> Although the law defined creation science as “the scientific evidences

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<sup>275</sup> Brady, *supra* note 268, at 494 (quoting William C. Placher, UNAPOLOGETIC THEOLOGY: A CHRISTIAN VOICE IN A PLURALISTIC CONVERSATION 12 (1989)).

<sup>276</sup> *Id.* at 492.

<sup>277</sup> John H. Garvey, *Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 767–68 (1993).

<sup>278</sup> *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968).

<sup>279</sup> *Edwards v. Aguillard*, 482 U.S. 578 (1987).

for [creation or evolution] and inferences from those scientific evidences,”<sup>280</sup> the Court found that the law’s “purpose” was to advance religion (as it certainly was) and, therefore, the law violated the Establishment Clause.<sup>281</sup> It emphasized the right of families to “entrust public schools with the education of their children” with the assurance that those schools would not “advance religious views that may conflict with the private beliefs of the student and his or her family.”<sup>282</sup> But that interest is precisely what prompts parental objections to the teaching of evolution or to the exclusion of alternative views of the origins of life.

As I have noted in a previous article, the difficulty is

not finessed by reference to the well-known rule that government is not barred from communicating a particular message simply because it is consistent or inconsistent with the tenets of a religion. The problem is not simply that government has taken a position that happens to run afoul of a tenet of someone’s religion or is simply consistent with an atheistic or agnostic world view but that it has systematically, whether by constitutional fiat, fear of litigation, or a secularist bent, ruled out—or restricted—religion as an approach to whatever information is being imparted or service being provided, effectively denying its relevance. The exclusion is neither happenstance nor partial.<sup>283</sup>

To argue, as does Andrew Koppelman, that government may establish all orthodoxies but religious ones, is to say something about religion.<sup>284</sup>

### *B. Asymmetry and Mediating Institutions*

Even if asymmetry cannot be justified in terms of individual liberty, or of substantive neutrality toward the religious choices of its citizens, perhaps it can be seen as a form of jurisdictional limit, as a means of protecting the institutional prerogatives of churches, mosques, synagogues and other voluntary religious associations. In other words, as many have argued, asymmetry protects churches by keeping the eight-hundred pound gorilla of the state from involving itself with theological matters.

Such a view is suggested by recent scholarly emphasis on First Amendment institutions and the religion clauses as a demarcation of jurisdiction between church and

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<sup>280</sup> *Id.* at 581. Whether there are any such “evidences” is another matter.

<sup>281</sup> *Id.* at 593.

<sup>282</sup> *Id.* at 584.

<sup>283</sup> Esenberg, *supra* note 11, at 52; *see, e.g.*, Harris v. McCrae, 448 U.S. 297, 318–20 (1980). *But see* Edwards, 482 U.S. 578 (holding that the teaching of creation science was an establishment because it was “religiously motivated”).

<sup>284</sup> Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 732 (2003).

state.<sup>285</sup> This view certainly seems consistent with much of what we have from Madison and other founding era proponents of religious liberty and disestablishment who emphasized the superior demands of God and a conscience which, for them, was most likely to be based in religious faith. It is also consistent with the view, expressed by Roger Williams and others, that the “wilderness” of the state corrupts the “garden” of true religion.<sup>286</sup>

There are a number of theories concerned with the role of voluntary associations as mediating institutions—that is, as sources of values and social capital that, while perhaps complementary with the state, are independent of it. We may consider the idea of subsidiarity—the notion, most commonly associated with Catholic social thought,<sup>287</sup> that a community of the “higher order” ought to interfere as little as possible with those of a lower order.<sup>288</sup> Tocqueville wrote of the value of “associationalism” in sustaining American democracy. A similar, but not quite identical idea, is rooted in Dutch theologian and politician Abraham Kuyper’s notion of sphere sovereignty.<sup>289</sup>

Although the Establishment Clause cannot be said to have “enacted” or even to have been informed by notions such as sphere sovereignty or subsidiarity (neither of which existed in present form at the time it was written), some scholars have suggested that they have antecedents that may well have influenced American thinking.<sup>290</sup> In any event, the notion of the independence of the Church and religious formation conscience from the state can be found in the historical record and the idea may be a useful lens through which to view Establishment Clause asymmetry, but not, as we will see, to reconcile it. Even if we move from an individual to an institutional view and from an emphasis upon lack of state interference to facilitation of the proper roles of separate spheres, asymmetry remains problematic.

### 1. Subsidiarity

Often traced to Pope Leo XIII’s encyclical *Rerum Novarum*, subsidiarity emphasizes the existence of independent institutions with an autonomy that is not subject to state control or interference. Leo emphasized the family:

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<sup>285</sup> See Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Steven Douglas Smith, *Discourse in the Dusk: The Twilight of Freedom* (San Diego Legal Studies Research, Working Paper No. 09-016), available at <http://ssrn.com/abstract=1431556> (forthcoming 122 HARV. L. REV. 1869 (2009)).

<sup>286</sup> Roger Williams, *Mr. Cotton’s Letter Lately Printed, Examined and Answered* (1644), reprinted in PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (1953).

<sup>287</sup> See Pope John Paul II, CENTESIMUS ANNUS ¶ 48 (1991).

<sup>288</sup> *Id.*; see Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 89 (1996).

<sup>289</sup> See *infra* Part III. B. 3.

<sup>290</sup> Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 110–113 (2007); Horwitz, *supra* note 285, at 106–15.

Provides for what, in the limits which are prescribed by the law, at least equal rights with the State in the choice and pursuit of the things needful to its preservation and its just liberty. We say, “at least equal rights;” for, inasmuch as the domestic household is antecedent, as well in idea as in fact, to the gathering of men into a community, the family must necessarily have rights and duties which are prior to those of the community, and founded more immediately in nature. If the citizens, if the families on entering into association and fellowship, were to experience hindrance in a commonwealth instead of help, and were to find their rights attacked instead of being upheld, society would rightly be an object of detestation rather than of desire. The contention, then, that the civil government should at its option intrude into and exercise intimate control over the family and the household is a great and pernicious error.<sup>291</sup>

Forty years later, in his 1931 encyclical *Quadragesimo Anno*, Pope Pius XI cautioned that “it is an injustice and at the same time a grave evil and a disturbance of right order, to assign to a greater and higher association what lesser and subordinate organizations can do.”<sup>292</sup> Much later, Pope John XXIII argued that “the founding of a great many . . . intermediate groups or societies for the pursuit of aims which it is not within the competence of the individual to achieve efficiently, is a matter of great urgency.”<sup>293</sup> In *Gaudium et Spes*, Pope Paul VI emphasized that “[r]ulers must be careful not to hamper the development of family, social or cultural groups, nor that of intermediate bodies or organizations, and not to deprive them of opportunities for legitimate and constructive activity; they should willingly seek rather to promote the orderly pursuit of such activity.”<sup>294</sup> In their respective spheres, he argued, “[t]he Church and the political community in their own fields are autonomous and independent from each other.”<sup>295</sup> Thus, the realm of the Church ought to be free of state interference.

Subsidiarity is not a Madisonian notion, seeing the respective realms of society—the state, churches, universities, business—as checks and balances upon each other;<sup>296</sup> but rather sees society as “a complex web of family, social, religious, and governmental ties with the ultimate goal of encouraging and empowering the individual exercise of

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<sup>291</sup> Pope Leo XIII, *RERUM NOVARUM* ¶ 13–14 (1891).

<sup>292</sup> Pope Pius XI, *QUADRAGESIMO ANNO* ¶ 79 (1931).

<sup>293</sup> Pope John XXIII, *PACEM IN TERRIS* ¶ 24 (1963).

<sup>294</sup> Pope Paul VI, *GAUDIUM ET SPES* ¶ 75 (1965).

<sup>295</sup> *Id.* at ¶ 76.

<sup>296</sup> See *supra* note 259 and accompanying text.

responsibility.”<sup>297</sup> It has aspects of positive, as well as negative liberty.<sup>298</sup> It is not simply a doctrine mandating restraints upon power and is not “adequately represented as a question of scale (lowest possible level), and even less of devolution” of power from the state to “lesser” institutions.<sup>299</sup> As Robert Vischer has written, “the government has an obligation to ensure the efficacy of mediating structures . . . .”<sup>300</sup> Sometimes, he stated, subsidiarity requires the government to intervene although it may not “eviscerat[e] the real limitations on such intervention.”<sup>301</sup> Thus, in *Dignitatis Humanae*, the Second Vatican Council, while insisting upon the independent spheres of the Church and state, and that one may not direct the activity of the other, teaches that the state must recognize and promote the religious life of its citizens.<sup>302</sup>

In the same way, the church may interact with and influence larger society, but not by the exercise of its authority or by participation in the exercise of civil power. Rather, it is the community of believers (in Catholic terms, the laity) whose role it is “to see that the divine law is inscribed in the life of the earthly city.”<sup>303</sup> In sum, subsidiarity’s “guiding principle is that intervention should ‘assist but not usurp’ mediating structures.”<sup>304</sup> This implies both limits and obligations on the various social spheres.

## 2. Associationalism

Writing on the Rehnquist Court, John McGinnis has summarized its jurisprudence as Tocquevillian:<sup>305</sup>

Tocqueville believed that while political factions try to use government coercion for their own ends, civil associations organize

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<sup>297</sup> Paul D. Marquardt, *Subsidiary and Sovereignty in the European Union*, 18 FORDHAM NAT’L L.J. 616, 619 (1994).

<sup>298</sup> Cf. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (defining “active liberty” as the “sharing of nation’s sovereign authority with its citizens,” and stating that, of the three federal branches, Congress has done the best job of balancing citizens’ views).

<sup>299</sup> Russell Hittinger, *Introduction to Modern Catholicism*, in THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE 3, 23 (John Witt, Jr. & Frank S. Alexander eds., 2006).

<sup>300</sup> Robert K. Vischer, *Subsidiarity As a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 119 (2001).

<sup>301</sup> *Id.* (citing Fred Crosson, *Catholic Social Teaching and American Society*, in PRINCIPLES OF CATHOLIC SOCIAL TEACHING 165, 170–71 (David A. Boileau ed., 1998)).

<sup>302</sup> Pope Paul VI, DIGNITATIS HUMANAЕ ¶ 3 (1965) (“Government therefore ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare.”).

<sup>303</sup> Pope Paul VI, *supra* note 294, at ¶ 43.

<sup>304</sup> Duncan, *supra* note 290, at 74 (quoting Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 66 (2003)).

<sup>305</sup> John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

to meet the common goals of their members. Civil associations promote reciprocity among their members and create social norms from which other individuals can voluntarily choose. In this way they generate what modern sociologists would call social capital: the glue that binds society together through a group of interlocking networks.<sup>306</sup>

For Tocqueville, the “vibrancy, innovation, and beneficence of American society did not come from its rulers but bubbled up from below.”<sup>307</sup> Religion was essential to the vibrancy of American democracy, and was separated politically from the state not to protect “secular people” but to prevent it “from being corrupted into something less than itself.”<sup>308</sup> Although there is obviously much more to be said about this, the idea is again one, not only of jurisdictional division, but of complementarity.

In fact, Professor McGinnis argues that the Rehnquist Court sought to rediscover and empower decentralizing structures, including religious associations.<sup>309</sup> This objective, in his view, suggests greater leeway for government to provide equal funding opportunities for private schooling, including sectarian schools.<sup>310</sup>

Drawing on the insights of public choice theory regarding the distortion of democratic decision-making by special interests,<sup>311</sup> Professor McGinnis argues that the Rehnquist Court can be seen as encouraging the development of mediating institutions as “discovery machines” for the generation of potentially beneficial values and norms in a jurisprudence of “spontaneous order.”<sup>312</sup>

Significantly, for our purposes, Professor McGinnis cites Michael McConnell’s observation that “‘as long as the domain of collective decision making is small, religious freedom is protected . . . as a byproduct of a limited state. As the domain of government increases in scope, some government involvement in religious activity becomes necessary if religious exercise is to be possible at all.’”<sup>313</sup> In other words, a change in the role—and size—of the state may influence its proper relationship with subsidiary institutions. Thus, once again, the state is seen as having the freedom, if not the constitutional duty, to act in a way that empowers mediating structures. In such a world, literal reliance on Madison’s insistence that “not three pence” go to the support

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<sup>306</sup> *Id.* at 491; see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., 1990) (1840).

<sup>307</sup> TOCQUEVILLE, *supra* note 306.

<sup>308</sup> HUGH HECLLO, *Christianity and Democracy in America*, in CHRISTIANITY AND AMERICAN DEMOCRACY 1, 15–16 (2007) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273–74, 410, 517 (J.P. Mayer & Max Lerner eds., George Lawrence, trans., 1966) (1840)).

<sup>309</sup> McGinnis, *supra* note 305, at 505.

<sup>310</sup> *Id.* at 545.

<sup>311</sup> *Id.* at 503 (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 141–44 (1965)).

<sup>312</sup> *Id.* at 495, 505.

<sup>313</sup> *Id.* at 545 (quoting Michael W. McConnell, *Why is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1261 (2000)).

of religion,”<sup>314</sup> may be an anachronism. Given, for example, the taxation for public education, as long as it acts on a neutral basis, “the state is empowered to help create an infrastructure that enables associations organized for an educational purpose.”<sup>315</sup>

### 3. Sphere Sovereignty

Echoing the Catholic notion of subsidiarity, Abraham Kuyper, writing in the Calvinist tradition, believed that

[T]he family, the business, science, art and so forth are all social spheres, which do not derive the law of their life from the superiority of the state, but obey a high authority within their own bosom; an authority which rules by the “grace of God,” just as the sovereignty of the State does.<sup>316</sup>

For Kuyper, the state, although bound by God’s ordinance (as, in his view, was the entire creation), was not so compelled directly or “even by the proclamation of any church but only via the consciences of persons in positions of authority.”<sup>317</sup> At the same time, “[t]he State may never become an octopus, which stifles the whole of life.”<sup>318</sup>

Once again, however, the image is organic. The state, he wrote, “must occupy its own place, on its own root, among all the other trees of the forest, and thus it has to honor and maintain every form of life which grows independently in its own sacred autonomy.”<sup>319</sup> It should be noted, moreover, that Kuyper did not see the state’s sphere as including the promotion of a public secularity:

All [the gospel] asks is unlimited freedom to develop in accordance with its own genius in the heart of our national life. We do not want the government to hand over unbelief handcuffed and chained as though for a spiritual execution. We prefer that the power of the gospel overcome that demon in free combat with comparable weapons. Only *this* we do not want: that the government arm unbelief to force us, half-armed and handicapped by an assortment of laws, into an unequal struggle with so powerful an enemy. Yet that *has* happened and is happening *still*. It happens in all areas of popular education, on the higher as well as the

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<sup>314</sup> MADISON, *supra* note 49, at 186.

<sup>315</sup> McGinnis, *supra* note 305, at 548.

<sup>316</sup> ABRAHAM KUYPER, LECTURES ON CALVINISM 90 (Wm. B. Eerdmans Pub. Co. 1970) (1931).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 96.

<sup>319</sup> *Id.* at 96–97.

lower levels, by means of the power of money, forced examinations, and official hierarchy. For this reason we may never desist from our protest or resistance until the gospel recover its freedom to circulate, until the performance of his Christian duty will again be possible for every Dutch citizen, whether rich or poor.<sup>320</sup>

### C. Government Speech as Interference with Mediating Institutions

Paul Horowitz, drawing upon Kuyper's notion of sphere sovereignty, divides, as I have here, Establishment Clause concerns into two categories: "[T]hose involving equal funding and equal access to the public square for religious institutions, and those involving . . . 'symbolic support' for religious institutions."<sup>321</sup> He argues that, as long as other sovereign spheres are entitled to funding or to access to public facilities, "churches should be in a similar position, provided that government does not interfere too much in their internal operations."<sup>322</sup> On the other hand, "[t]he sovereignty of the State and the sovereignty of the Church' are mutually limiting, and that both are harmed if they intertwine."<sup>323</sup> Religious institutions "'mark the limits of state jurisdiction by addressing spiritual matters that lie beyond the temporal concerns of government."<sup>324</sup> Therefore, Professor Horwitz concludes, government "has no business weighing in on religious questions or endorsing particular religious messages."<sup>325</sup>

Similarly, Professor McGinnis, in his discussion of associationalism, distinguishes funding and forum cases from those involving government speech. Defending *Lee* and *Santa Fe*, he argues that "government can facilitate competition between norms by providing resources that are neutral among them, but it cannot itself enter the arena on the side of one set of religious norms or another."<sup>326</sup> Religious messages, therefore, remain outside the province of the state.

These are reasonable arguments—well stated and tightly made. But, as Professor Horwitz recognizes,<sup>327</sup> there is another side to the story. Respect for the separate spheres of the state and the church is likely to work only if there is at least rough agreement on the contours of those spheres and a commitment on the part of each not to intrude upon what is reserved to the other. If religion is relegated to private life it cannot "be expected to serve as a buffer, to mediate between persons and the state,

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<sup>320</sup> Abraham Kuyper, *Maranatha*, in ABRAHAM KUYPER: A CENTENNIAL READER 224–25 (James D. Bratt ed., 1998) (emphasis original).

<sup>321</sup> Horwitz, *supra* note 285, at 127.

<sup>322</sup> *Id.* at 128.

<sup>323</sup> *Id.* (quoting KUYPER, *supra* note 316, at 107).

<sup>324</sup> *Id.* at 69 (quoting Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1704).

<sup>325</sup> *Id.* at 129.

<sup>326</sup> *Id.* at 549.

<sup>327</sup> *Id.* at 67. ("Some writers have argued that current Establishment Clause doctrine is in serious tension with a sphere sovereignty account of religious freedom.").

or to compete with the liberal state for our values and loyalties.”<sup>328</sup> If, at the same time, the state intrudes upon the role of the church or seeks to influence matters with which religion is concerned, it will, as Kuyper charged, “arm unbelief” in a way that does not promote liberty, substantive neutrality or the vibrancy of religious associations.<sup>329</sup>

Kuyper himself grappled with this during the Dutch school controversy of the late nineteenth century—an issue that was critical in his rise to political prominence and the establishment of his Anti-Revolutionary Party. Although the revised Dutch educational law called for the inculcation of “Christian and civic virtues,” the education had in the Kuyper’s, and many views, lost its distinctly Christian character.<sup>330</sup> In light of this, Kuyper believed that the requirement should be removed from the constitution and the “neutrality” or secularity of Dutch schools be acknowledged.<sup>331</sup>

But, this does not mean that he believed secular public education was within the proper sphere of the state. To the contrary, he urged the Christian School Society to establish as its goal to be the wholesale destruction of state-controlled education in favor of parentally guided education.<sup>332</sup> In 1878, when the Prime Minister proposed a series of educational reforms that would be funded only in state schools, Kuyper, in conjunction with Catholic leaders, organized opposition.<sup>333</sup>

The notions of subsidiarity and sphere sovereignty define not only the realms of mediating structures, but of the state itself. To borrow from Professor McGinnis, expansion of the domain of collective decision-making applies to what the government says as well as to what it finances.<sup>334</sup> If this expansion involves the state with matters with which alternative spheres are properly concerned, then the state has, in fact, “enter[ed] the arena on the side of one set of religious norms or another.”<sup>335</sup> It has, in Professor Horwitz’s terms “weigh[ed] in” on religious questions.<sup>336</sup>

As we have seen, that the state “weigh[s] in” without the use of theological language or by avoiding solely extratemporal subject matter does not make it otherwise. It neither softens the message of disapproval or can be expected to have no impact on “private” religious formation. Nicholas P. Wolterstorff, a prominent Kuyper scholar, explained the harm that Kuyper saw in rigorously secularized education.

<sup>328</sup> Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 799 (2001).

<sup>329</sup> Kuyper, *supra* note 320, at 224.

<sup>330</sup> See JOHN BOLT, *A FREE CHURCH, A HOLY NATION: ABRAHAM KUYPER’S AMERICAN PUBLIC THEOLOGY* 336–37 (2001).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 337 (citing BRIEFWISSELING VAN MR. G. GROEN VAN PRINSTERER MET DR. A. KUYPER, 1864–1876, at 363 (A. Goslinga, ed., Kampen: Kok 1937)).

<sup>333</sup> Nicholas Wolterstorff, *Abraham Kuyper (1837–1920)*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* 295–96 (John Witte, Jr. & Frank S. Alexander eds., 2006).

<sup>334</sup> McGinnis, *supra* note 305, at 545–46.

<sup>335</sup> *Id.* at 549.

<sup>336</sup> Horwitz, *supra* note 285, at 129.

in Kozyre's words: "Wedding a religion that is not itself willing to expression in how the community that embraces the particular religion worships. But the worldview will also come to expression in how it wants its children to be educated, in what it thinks the policy of the state should be on such matters as welfare, abortion, and international law, in what it thinks about art and business, and so forth. The right to free exercise of one's religion is thus far more comprehensive than the right to worship freely."<sup>337</sup>

This is echoed in the language of *Dignitatis Humanae* arguing that religious acts transcend "the order of terrestrial and temporal affairs" and that "[t]he social nature of man . . . itself requires that he should give external expression to his internal acts of religion: that he should share with others on matters religious; that he should profess his religion in community."<sup>338</sup> It anticipates the insights of postliberal theology on the relationship between religion and the larger society.

Indeed, looking at asymmetry through the lens of institutions and the value of the decentralized generation of norms simply underscores the problematic nature of asymmetry. It does not prevent the state from "taking sides" or "weighing in." It merely ensures that it will do so in a way that is calculated to privilege the secular and those who, because of the nature of their religious beliefs or a willingness to subordinate them to a public secularity, prefer or are content with a naked public square.

This marginalizes both the individuals who are unprotected, and the religious mediating institutions to which they belong. While it is inevitable that government speech will confer both advantage and disadvantage, an asymmetry that turns on explicitly religious language does so in a way that tilts the playing field. The "danger facing those who disagree with the state's views," one scholar has noted, "most often" is "not from any plausible fear of classic censorship—that is, overt punishment for offering views repugnant to state authorities—but, rather, from being drowned out of the marketplace by the often superior resources of the state."<sup>339</sup>

This "drowning out," runs in one direction. As Richard Garnett observes, we have become "hard-wired now to think that faith *is* non-reason" and that "religion is regarded, even by many of the religious, as an expression of subjective longings, of autonomous self-expression and direction, and of consumer preferences, rather than as a response to a set of proposed truth-claims about the meaning of life and the destiny of the person."<sup>340</sup> The predicate of religious equality is that "religion does not

<sup>337</sup> Wolterstorff, *supra* note 333, at 309.

<sup>338</sup> Pope Paul VI, *supra* note 302, at ¶ 3 (1965).

<sup>339</sup> SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 79–80 (1998).

<sup>340</sup> Richard W. Garnett, *Assimilation, Toleration and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1665 (2004).

matter, at least not in the public domain.”<sup>341</sup> Indeed, members of the Court have, from time to time, treated religious perspectives as irrational.<sup>342</sup> Once again, Chase Harper is not told to repudiate his religion, but to keep it in his car with all of those other things that are irrelevant to his role as a public citizen. He may enter the circle, but only on his terms.

Perhaps the threat is overstated. Proponents of more or less strict separation argue that the United States has remained a religious nation notwithstanding, or perhaps even because of, the separation of church and state.<sup>343</sup> This is even so, they continue, in comparison to many Western democracies that have an established church.<sup>344</sup> This argument should indeed give pause to those who seek active state promotion of their religious viewpoint.

It is also the case that the constitutional regime requiring a more rigorous separation of religion and the state is of relatively recent origin, and corresponds with an era when religious observance in the United States has, in fact, declined.<sup>345</sup> This does not mean that constitutional doctrine caused this decline, but it does militate against a facile assumption that one can empirically demonstrate the way in which that doctrine has protected religious vibrancy. Nor does it seem that the association of religious vibrancy or decline with constitutional doctrine tells us anything about whether it protects religion from the state in a way that nonestablishment was intended to secure. Even if one assumes, for example, a connection between declining religious observance and a more separationist constitutional doctrine, some would certainly argue that this is the result of the suspension of government support for religion (“evening the playing field” for irreligion) than it is of government sponsored secularism (“tilting the playing field” in favor of irreligion).

But, as we have seen, if constitutional doctrine runs the risk of affecting—or taking sides regarding—the way in which citizens view religion, it is not so much in favor of godlessness, but of certain assumptions about the relationship between religious belief and life in the larger society. If one believes the claims of scholars, such

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<sup>341</sup> Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & REL. 1, 8 (1994); *id.* at 2 (“Even as we continue to extol its private diversity, religion has become publicly generic and thereby largely insignificant.”).

<sup>342</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring) (stating “[m]oral disapproval” fails to provide a rational basis for law prohibiting homosexual, but not heterosexual, sodomy); *Romer v. Evans*, 517 U.S. 620, 621 (1996) (seeing moral disapproval of homosexuality as “animosity”).

<sup>343</sup> PEW RESEARCH CENTER, *RELIGION AND SECULARISM: THE AMERICAN EXPERIENCE* (2008), available at <http://pewresearch.org/pubs/681/religion-and-secularism-the-american-experience> (last visited Sept. 18, 2009).

<sup>344</sup> *Id.*

<sup>345</sup> BARRY A. KOSMIN & ARIELA KEYSAR, *AMERICAN RELIGIOUS SELF IDENTIFICATION SURVEY* (2008); PEW FORUM ON RELIGION AND PUBLIC LIFE (2008), available at <http://religions.pewforum.org/reports> (last visited Sept. 18, 2009).

as Alan Wolfe, religion in America has largely become nondogmatic, tolerant, and inclusive.<sup>346</sup> Perhaps this is desirable, but, if we believe our rhetoric about neutrality and nonendorsement, it ought not be facilitated by constitutional doctrine.

*D. The Impact of Asymmetry Upon Religion: A Possible Narrative*

Full consideration of the impact of state policy on religion and public secularity is beyond the scope of this article. By way of example, however, political scientist Hugh Heclo traced the twentieth century project, embodied in the Progressive movement, to secularize public education and what he called the rise of the “consumption arts” embodying an implicit philosophy of “meaning . . . constructed by individuals making a myriad of wholly self-referential consumer choices,” to include a secular public ethos, celebrating tolerance, democracy, and individual choice.<sup>347</sup>

With “God talk” set out of bounds, the young democrat undergoing such an education was invited to identify with America’s secular democratic heroes: Emerson’s “endless seeker,” Thoreau’s individual moving to the beat of a different drummer, Whitman’s singer of songs democratic to himself: “Healthy, free, the world before me / The long brown path before me, leading wherever I choose.” The all but inescapable implication was that to journey toward self-discovery, one had to leave behind the religion of churches, parents, hand-me-down doctrines, and any idea of natural law. Instead the individual is called to enter a liberated condition of being free to choose among the ideas and practices of any or no religion without being judged or casting judgments. Personal freedom is the ultimate root of moral obligations.<sup>348</sup>

This move was not always in opposition to organized religion, but interacted with it. In Heclo’s view, modern secular liberalism drew on the moral heritage of the Judeo-Christian tradition while its message to the churches was “to drop the supernatural baggage.”<sup>349</sup> Only a few—particularly within the Protestant mainline—were willing to, if not to drop it, at least to de-emphasize it.

Thus, civil society increasingly came to see that “the social ethic of equality, freedom, and justice was derived from democratic society itself, with one’s religious outlook a purely private appendage”<sup>350</sup> within the realm of private choice. This set of

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<sup>346</sup> See, e.g., ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* (2003).

<sup>347</sup> HECLO, *supra* note 308, at 93.

<sup>348</sup> *Id.* at 87–88 (internal citations omitted).

<sup>349</sup> *Id.* at 82.

<sup>350</sup> *Id.* at 87.

cultural assumptions underlies the Court's early move to strict separation.<sup>351</sup> We can see them in the Court's assumption that religion is "private,"<sup>352</sup> and what one commentator called our increasing tendency to see religion and rationality as occupying separate realms.<sup>353</sup> As Hecló observed, "[m]ore than ever before, cultural authority was a politically contested concept by Americans who no longer seemed to share the same moral universe."<sup>354</sup>

This problem is accentuated by the second move—that is, the increased involvement of the government in matters with which religion is traditionally concerned. But, as Hecló observed, this movement went beyond a mere expansion of government to the view that "the one thing of supreme importance in politics is government policy."<sup>355</sup> In a trend that he believed characterized both the political left and right, Hecló noted that "[t]o become more democratic was to become committed to a never-ending policy agenda of social problem-solving."<sup>356</sup> This expanding political agenda, moreover, included issues that went "well beyond the older economic agenda of the New Deal" to include those that "directly challenged traditional views of the family, women, sexual morality, and the self-validating quality of personal choice."<sup>357</sup>

In other words, the agenda of public policy expanded at the same time that society increasingly ceased to hold the same moral—and religious—presuppositions related to that agenda. These developments are certainly attributable, in a greater or lesser degree, to social forces other than our Establishment Clause jurisprudence. They may or may not, in and of themselves, be a good thing. But the interpretation of neutrality as a rigorous nonendorsement limited to expressly theological propositions, is anything but neutral toward them. It is undoubtedly affected by them even as it contributes to them.

#### IV. SEEKING ESTABLISHMENT CLAUSE SYMMETRY

Much of modern Establishment Clause jurisprudence and theory has reacted to the changed role of the contemporary state by expanding the reach of disestablishment as the government's role has grown. To believe that the modest governments of the late eighteenth century ought not to establish churches or prescribe religious doctrine does not necessarily imply that, if government chooses to involve itself in education

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<sup>351</sup> See *supra* Part I. A.

<sup>352</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) ("[R]eligion must be a private matter for the individual, the family, and the institutions of private choice.").

<sup>353</sup> *Id.*

<sup>354</sup> HECLÓ, *supra* note 308, at 103.

<sup>355</sup> *Id.* at 101.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1088 (1980) ("The evolution of liberalism thus can be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state.").

or social welfare, all religious messages must be excluded. But there is no logical need to do so. The expansion of the modern state reflected a change in notions regarding not just the size but the scope of government. Coming to see disestablishment as a guarantee of secularized public space or a requirement of a thoroughgoing public neutrality is a conceptual choice that is distinct and not necessarily compelled by the idea of disestablishment. Put another way, the imperative of separation may have been necessary and workable as applied to the activities of seventeenth century government.<sup>358</sup> It may be neither today.

One potential solution for Establishment Clause asymmetry would be to require that the state remain neutral among all points of view rooted in religious belief, or that it must acknowledge the presence of a religious perspective whenever some citizens feel that it is pertinent; or (and this may be compelled by that kind of neutrality), it would simply withdraw from those areas of life with which religion is concerned—that is, those areas that are committed to another sphere.

While it may be prudent and wise policy for the state to tread lightly in such areas, such a constitutional mandate would be unworkable and politically impossible. In a religiously diverse society, it could not be implemented in an evenhanded way without severely truncating the scope of government in a way that is impossible to imagine today. Such is the lesson of Establishment Clause asymmetry. Nor would it be desirable. There are certain perspectives—say those of Christian Dominionists, Islamic Jihadists or White Supremacists—that the government ought to discourage. Is there a better way to accommodate protection of religious dissidents without unduly restricting the expressive functions of government?

Again, consideration of the role and importance of mediating institutions may help us. If the objective is to ensure that the state “assists” but does not “usurp” mediating structures and that it not become Kuypers’ “octopus,” then it may be that the question of establishment is about whether the state is acting to facilitate religious liberty in the broader sense suggested by the need for vigorous religious communities. The focus would turn from a rigid jurisdictional examination (for example: has government done something “religious”) to a more consequentialist inquiry. In other words, given the scope of the government’s activities, has its efforts to acknowledge the religious life of its citizens or to express messages pertinent to religious choices unduly interfered with individual liberty and the proper sphere of religious institutions?

#### A. “No Establishment” Means . . . No Establishment

Father Thomas Curry has argued that eighteenth century establishment was understood to refer to a church which the government funded and controlled and in which

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<sup>358</sup> See, e.g., Kevin Pybas, *Does The Establishment Clause Require Religion to Be Confined to the Private Sphere?*, 40 VAL. U. L. REV. 71, 85 (2005) (asking whether “given that Jefferson’s and Madison’s views on religious liberty were part of a set of beliefs that also included belief in limited government, does it make sense to invoke the former when we have rejected the latter?”).

government used its coercive power to encourage participation.<sup>359</sup> Professor Gedicks has made the same point: a classic eighteenth century establishment was a state church supported by taxation and, to which, perhaps allegiance was either required or rewarded with concrete privileges.<sup>360</sup> But what does it mean to institutionally separate church and state, particularly in an era where neither the government, nor the church may look much like they did in the eighteenth century?

“No establishment,” however, presumes that at least some religion will express itself in institutional structures. Thus, the government ought not to be in the business of running churches. It ought not, in the words of *Lemon*, become excessively entangled in the operation of religious institutions.<sup>361</sup> It may not proclaim that Christianity is the official religion of the United States. It ought not to directly fund churches, discipline or regulate clergy, prescribe ecclesiastical rules, etc. All of this would be prohibited under current Establishment Clause doctrine.

But how far do these restrictions go? Kyle Duncan has argued, through the lens of subsidiarity, that “state authority and a religious association should never coalesce into an identical, entirely overlapping entity.”<sup>362</sup> The reason, seen in terms of intermediating institutions, is that such a coalescence will impair or even absorb the function of alternative spheres.<sup>363</sup> In terms of a substantive neutrality rooted in a concern for individual religious freedom, it will have crossed the hazy line separating acknowledgment from prescription.

I am afraid that there is no easy way to determine when that line has been crossed. We have already seen that the modern state does many things to which religious perspectives are pertinent and which may have a significant impact upon religious beliefs and the political and social status of believers. One way to define establishment might be to require a presumption that government actions have a “secular” or, perhaps more accurately, a “temporal” purpose. Government actions, in the words of Daniel Conkle, generally ought to have a “worldly” purpose: whatever its religious motivation or grounding, its actions are concerned with “non-spiritual human behavior in the physical world.”<sup>364</sup> In other words, even when engaging in religious expression, it ought to be motivated by the desire to accomplish a secular or temporal result: something other than a desire to define religious doctrine or to engage in advocacy on matters that are wholly theological or spiritual.<sup>365</sup>

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<sup>359</sup> THOMAS J. CURRY, *FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA* 37 (2001).

<sup>360</sup> Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1093–94 (2002).

<sup>361</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 668 (1971).

<sup>362</sup> Duncan, *supra* note 290, at 105.

<sup>363</sup> *Id.*

<sup>364</sup> Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & REL. 1, 12 (1994).

<sup>365</sup> This does not mean as *Zelman* and *Rosenberger* demonstrate, that government funds can never be used to subsidize religious activities through, for example, the mechanisms of

This may be a useful guidepost, but it cannot function as a “test.” There may be occasions where acknowledgment of belief—without more—ought to be permitted. There are times when government acts to acknowledge the history and culture of its citizens. Kuyper’s Anti-Revolutionary Party, for example, called for state recognition and facilitation of the Lord’s Day,<sup>366</sup> and Kuyper himself reportedly expressed admiration for the fact that Americans opened sessions of Congress and military campaigns with prayer.<sup>367</sup> This alone may not help us decide many difficult twenty-first century cases, but there are at least two other principles that may provide further guidance.

### *B. No Establishment Means No Coercion*

Concurring in *Van Orden*, Justice Thomas argued that establishment requires “actual legal coercion.”<sup>368</sup> While coercion may not always be necessary, it should certainly be sufficient.

But coercion must be properly understood. We cannot make “the social world . . . acceptable to every last individual.”<sup>369</sup> Justice Kennedy<sup>370</sup> (and Justice Jackson before him)<sup>371</sup> observed that the Constitution was not intended to and cannot protect

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

<sup>366</sup> BOLT, *supra* note 330, at 343 (citing ABRAHAM KUYPER, ONS PROGRAM 2, 71 (J.H. Kruyt 1880)).

<sup>367</sup> *Id.* at 343–44. This, too, is implied by a view of society in which the alternative spheres cooperate in tension and in which, as postliberal theologians and sociologists of religion tell us, what happens in the “secular” world is inextricably bound with what happens in the “religious” world.

<sup>368</sup> *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring); *see also* *Lee v. Weisman*, 505 U.S. 573, 640 (1993) (Scalia, J., dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”).

<sup>369</sup> JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS*, 1981–1991, 36–37 (1993).

<sup>370</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 673 (1989) (“[I]t borders on sophistry to suggest that the ‘reasonable’ atheist would not feel less than a ‘full membe[r] of the political community’ every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.”) (Kennedy, J., concurring in part and dissenting in part).

<sup>371</sup> *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 232–33 (1948) (Jackson, J., concurring) (doubting the Constitution can be construed “to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress”).

minorities from feeling like, well, minorities.<sup>372</sup> Coercion must involve the threat of a sanction.<sup>373</sup> As Jeffrie Murphy has written, “[t]rue duress [coercion], to put it crudely, requires not merely an unhappy choice but a *villain* who is responsible for creating the necessity of making that choice.”<sup>374</sup> While coercion can certainly result from psychological or social sanction—“pressure that no one could reasonably resist”<sup>375</sup>—it is also the case that psychological pressure may simply reflect the way things are—the “breaks” to use the vernacular. Distinguishing the two necessarily involves a decision about the way things should be, a theory as to which pressures are and are not legitimate.

As we have seen, it is impossible to prevent all instances in which, as a result of some state action, a person faces social pressure to remain polite and respectful when her religious beliefs require her to do otherwise. To regard the mere exposure to religious assertions, such as nondenominational prayer at graduation ceremonies, as “coercive” is to make a judgment that exposure to such prayer as a condition of attendance is unreasonable. It reflects a judgment that even very subtle pressure to act in a way—or to appear to affirm something—that is contrary to one’s religious presuppositions is illegitimate.

But, again, this is a principle that we cannot live by. In *Mozert*, as a condition of attendance, plaintiffs believed that to require their children to listen quietly to a teacher reading material that they regard as blasphemous violated religious duty.<sup>376</sup> There are those for whom standing during prayer is an affirmation of, or participation in, the prayer. But there is little reason to regard the sensibilities of the latter as different in kind from those of the former. One who stands respectfully or sits quietly during a prayer—or even during discourse that contradicts her religious beliefs—is simply standing respectfully or sitting quietly.<sup>377</sup>

Even if the state can reasonably be seen as endorsing particular religious sentiments through the sponsoring of the graduation prayer, it hardly follows that it is passing judgment on nonadherents. I teach at a Catholic law school which opens most major school events with (generally nondenominational) prayer—the content of which

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<sup>372</sup> See, e.g., Lisa Shaw Roy, Essay, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 36 (2004) (“By advocating what has occasionally been termed a ‘religion of secularism,’ defenders of the religious minority aim to transform the public square into one in which dissent is no longer required.”) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).

<sup>373</sup> Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1639–43 (2006) (noting that coercion involves a forced choice, the threat of sanction and coercive intent).

<sup>374</sup> Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 87 (1981).

<sup>375</sup> Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1219 (2008).

<sup>376</sup> *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060–61 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

<sup>377</sup> A different case might be present if a dissenter was forced to stand.

it presumably unambiguously endorses (for example, there is a God and She cares for lawyers). There are crucifixes on our walls, yet our diverse student body prospers.<sup>378</sup>

Certainly the imposition of penalties or legal disabilities upon nonadherents would amount to impermissible coercion. In such cases, as James Beattie writes, the “government is sending a sheriff, not a message.”<sup>379</sup> But for psychological pressure to constitute coercion, it must amount to something more than a reminder that one is a religious minority and that others in the community have other beliefs. It must constitute more than a perception that the government has “endorsed” or “acknowledged” beliefs that one does not share.

### *C. Nonestablishment Means Religious Tolerance*

This is not to suggest that institutional establishment or coercion is the only way in which the government can run afoul of the Establishment Clause. Disestablishment prohibits more than theocracy and inquisition. William Galston has defined “expressive liberty” as “[t]he ability of individuals and groups to live in ways consistent with their understanding of what gives meaning and purpose to life . . . .”<sup>380</sup> Nonestablishment ought to require that government refrain from placing undue pressure on the expressive liberty of religious dissenters and their ability to pursue their own beliefs and practices. In terms of intermediary institutions, the question becomes one of whether the state has used its power in a way that threatens to unduly impede, displace or corrupt the sphere of the church.

For cases that do not amount to classic establishments or legal coercion, the focus of the inquiry should shift from a series of binary questions—“does the government have an improper purpose?” or, “can a government message or practice be reasonably perceived as an endorsement of religion or as advancing or inhibiting religion?”—to a qualitative one assessing the burden placed on nonadherents.

The question ought to be whether government practices or messages with respect to religion are sufficiently hostile toward those burdened by the practice or message such that continued adherence to their beliefs (or lack of belief) would become unreasonably difficult. Government action becomes “practically coercive” when it creates a substantial threat to religious pluralism or of suppressing religious differences.<sup>381</sup> This is a form of “substantive neutrality,” but a more modest form. It seeks only

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<sup>378</sup> I acknowledge that our students knew we are a Jesuit school when they decided to come to Marquette, but it is not evident that our student body is any less diverse or that our students are “hardier” when faced with challenges to their predispositions.

<sup>379</sup> James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 CATH. LAW. 367, 402 (2004).

<sup>380</sup> WILLIAM A. GALSTON, *THE PRACTICE OF LIBERAL PLURALISM* 68–69 (2005).

<sup>381</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1516 (1990).

rough justice. While this test is necessarily subjective, there are some guiding principles that we may discern.<sup>382</sup>

As is the case today, government may take a position on secular matters that are inconsistent with those based in the religious views of some citizens. But these positions ought not to be rendered constitutionally problematic simply because the state acknowledges their religious provenance or uses religious language. Nor should these messages be free of scrutiny simply because they avoid religious language or extratemporal assertions.<sup>383</sup> These positions become constitutionally problematic, not simply when they are mixed with theological propositions, but when they can be reasonably interpreted as reading the religious group out of the political community or usurping the role of religious institutions.

In contrast to current doctrine, this model would not presume that the mere endorsement of a religious proposition renders nonadherents disfavored members of the citizens, but asks whether the particular endorsement actually does so. While I can think of no simple test for determining when this has happened, one relevant question might be whether a message with religious implications claims that adherents are not good citizens or are proper objects of public derision or ostracism. While the extent to which a government message includes theological assertions or claims of exclusivity are certainly relevant to this inquiry, they are not controlling.

Under the model proposed here, courts may not dispose of establishment claims by assuming that almost all religious claims and virtually no secular claims cause constitutional injury. Courts have been reluctant to probe deeply into religious claims, often adhering to what has been referred to as the “no religious decisions” rule. Indeed, the regime of *Smith* can be seen as driven by that reluctance. But this aversion to the assessment of religious claims has not been as absolute as claimed, and courts are not unfamiliar with assessing the magnitude of the claimed injury.<sup>384</sup> In the free exercise context (at least before *Smith*) and under the Religious Freedom Restoration Act, they have often assessed whether a government action constitutes a substantial burden on free exercise. In *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>385</sup> for example, the Supreme Court rejected a free exercise challenge to the construction of a logging road through an area of the Six Rivers National Forest regarded to be sacred by several Indian tribes. The Court rejected the claim, noting that they were not “coerced by the Government’s action into violating their religious beliefs” nor did the “governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens.”<sup>386</sup>

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<sup>382</sup> Esenberg, *supra* note 11, at 64–66.

<sup>383</sup> See, e.g., Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 838 (2009).

<sup>384</sup> See *id.*

<sup>385</sup> 485 U.S. 439 (1988).

<sup>386</sup> *Id.* at 449.

In *Navajo Nation v. U.S. Forest Service*,<sup>387</sup> the Ninth Circuit, sitting en banc, rejected an RFRA challenge to a plan to create artificial snow on a mountain regarded to be sacred by a number of tribes. Either in and of itself or by virtue of the presence of a small amount of human waste in the water to be used, the tribes argued that the plan would impair their religious practices.<sup>388</sup> Noting that the tribes retained access to the mountain for worship, the majority concluded that injury to the tribes' "subjective spiritual experience" is not a sufficiently "substantial burden" on their religious practices under the RFRA.<sup>389</sup>

Although I may not agree that constitutionally cognizable religious injury must involve "coercion" or "penalty" and cannot be "merely" subjective, characterizing a claim in this way does require a court to evaluate its nature. While there is much more to be said, assessment—not of the truth of the claim—but of the nature and extent of the injury said to flow from it is not beyond judicial competence.

#### CONCLUSION

We come to our Establishment Clause asymmetry honestly. There are, indeed, dangers from an overly close association of church and state. But as the state expands, those dangers are not avoided by a jurisprudence that turns on the facial secularity of state messages. Doctrine that seeks to protect both religion and irreligion from subtle expressive harm is unworkable and will inevitably be compromised. Our own compromises have tilted the playing field in favor of the secular state and against the social and cultural relevance of religious institutions. A new paradigm is in order.

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<sup>387</sup> 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied* 129 S. Ct. 2763 (2009).

<sup>388</sup> *Id.* at 1062–63.

<sup>389</sup> *Id.* at 1063.