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Rewriting the Establishment Clause for One Nation under (a) God

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REWRITING THE ESTABLISHMENT CLAUSE FOR ONE NATION UNDER (A) GOD

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I. INTRODUCTION

Here is one of the safest predictions in the realm of constitutional law: The departures of Justice Sandra Day O'Connor and Chief Justice William Rehnquist from the United States Supreme Court will inaugurate a new era of Establishment Clause jurisprudence. In some areas—such as those relating to the indirect government financing of religious enterprises[1]—this new era has already begun. In these areas, the two new appointees by President George W. Bush will almost certainly consolidate a jurisprudence that the Court's conservative majority has already developed, and is applying aggressively, to change the rules that had governed these matters for the previous four decades.[2] In other areas of church/state jurisprudence—such as the jurisprudence pertaining to the government's symbolic endorsement of religion—Justice O'Connor's resignation will likely signal the Court's abandonment of a separationist mandate that has been enforced with surprising consistency (especially in the public schools[3]) for over forty years.

The leitmotif of the Court's new constitutional church/state jurisprudence will be (to borrow the notorious phrase from one of the more heated recent controversies in this area) that this is "one nation under God."[4] The only real uncertainty is in the degree of the new Court's commitment to allowing the country's religious majority to wield its political power in sectarian ways. It is not yet clear how much the new Court will permit the political majority to use its control over the government to finance religious enterprises, or to infuse the government with religious dogmas and symbols. On the

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1. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding voucher program, under which government money is given to students attending religious schools).

2. For the theory of government financing prior to *Zelman*, see *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (articulating a no-aid principle).

3. *See e.g. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prohibiting state-sanctioned prayer at public school football games); *Epperson v. Ark.*, 393 U.S. 97 (1968) (holding unconstitutional a state statute prohibiting the teaching of evolution in public schools); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (holding unconstitutional state-authorized Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding unconstitutional state-mandated prayer in public schools).

4. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (challenging the recitation in a public school of the language "under God" in the official Pledge of Allegiance).

other hand, it is not at all difficult to describe the analytic tools that the new Court will rapidly jettison. In particular, the new Court is likely to abandon any pretense of pursuing Thomas Jefferson's and James Madison's principle of separation of church and state. In the new era, the Court is likely to follow Justice Scalia (who is in many ways the spiritual leader of the new Court) in rejecting the "demonstrably false principle that the government cannot favor religion over irreligion."[5]

In the new Establishment Clause era, church and state will be fellow travelers on a journey to a common destination defined by the higher morality of the religious majority. In the new constitutional order, the Establishment Clause will be reconfigured to permit the government to use religion as an "important unifying mechanism"[6] for its citizens, which will reflect the spiritual dictates of the "God whom they all worship and seek."[7] It remains to be seen what protections will linger for those who do not wish to partake of the government's efforts to achieve religious unity. Justice Scalia has at least conceded that religious dissenters retain certain protections under the Free Exercise Clause,[8] and for that reason dissenters apparently could not legally be forced to express publicly religious beliefs they do not hold. Also, the Court's new majority may not yet have the necessary fifth vote to permit government to infuse the public schools with the same unifying religiosity that will apparently now be *de rigueur* in the rest of society, since Justice Kennedy has in recent years been uncomfortable with the coercive overtones of government-sanctioned religious exultations in the public schools.[9] But putting aside the issue of religion in public schools and state-mandated religious observance, it is not clear that much will remain of the First Amendment's prohibition of laws "respecting an establishment of religion."

The purpose of this article is to describe the parameters of the new Establishment Clause by predicting what will be left of the Establishment Clause a decade from now. The basic question is this: In a constitutional regime that permits the government to overtly favor certain religions and subtly afford preferred political status to the adherents of those favored religions, what content remains in the First Amendment's prohibition of laws respecting an establishment of religion? In the spirit of this symposium, the inquiry into the new Establishment Clause regime will also address the role of future Nadine Strossens and other civil libertarians, whose predecessors fought, and won, numerous major battles for religious liberty during the last six decades, the product of which the Court is now prepared to quickly dismantle.

The discussion of these issues will proceed in three parts. The first part will compare the current Establishment Clause paradigm with its apparent successor, focusing particularly on the two paradigms' very different understanding of the role of

5. *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722, 2752 (2005) (Scalia, Thomas, Kennedy, JJ. & Rehnquist, C.J., dissenting).

6. *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, White, Thomas, JJ. & Rehnquist, C.J., dissenting).

7. *Id.*

8. *McCreary County*, 125 S. Ct. at 2756 ("The beliefs of those citizens [who do not belong to monotheistic religions] are entirely protected by the Free Exercise Clause.").

9. See *Lee*, 505 U.S. 577, in which Justice Kennedy wrote the majority opinion striking down a prayer at a public school graduation ceremony, and *Santa Fe Independent School District*, 530 U.S. 290, in which Justice Kennedy joined Justice Stevens's majority opinion striking down student-initiated prayer at a public high school football game.

religion in democratic governance. The second part will describe the doctrinal implications of the new Establishment Clause paradigm, focusing on the standards pertaining to government financing of religious enterprises, government endorsement of religious symbols and dogma, and the role of religion in public education. The third part will address the possibility that civil libertarians can propose principles that can effectively limit the damage to religious liberty that will be inflicted by the Court's wholesale abandonment of the separationist constitutional ideal.

II. THE CURRENT AND NEW ESTABLISHMENT CLAUSE PARADIGMS

Although the Supreme Court started aggressively enforcing the Establishment Clause over sixty years ago,[10] it has not always provided the lower courts with clear guidance on how to apply the Clause to particular circumstances. In retrospect, however, although the results of the Court's Establishment Clause cases have often been confused and even contradictory, the theory of the Establishment Clause articulated by the Court has been remarkably consistent. Ever since it entered the church/state arena, the Supreme Court has embraced a paradigm that describes in fairly specific ways the proper role of religion in a diverse democracy. At least at the theoretical level, the Court has followed this approach ever since 1947, when it issued its first major Establishment Clause decision in *Everson v. Board of Education*.[11] The Court outlined its theoretical approach in a famous quote in *Everson*, which is one of the most frequently cited passages from the Court's Establishment Clause jurisprudence:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[12]

Embedded in this quote are the seeds of the traditional paradigm the Court has followed for over a half-century, a paradigm the Court's new majority now seems likely to abandon. The Court's traditional paradigm includes four basic principles: first, it is improper for the government to either favor or punish religious belief or practice unless a practice causes some religiously-neutral harm; second, religion is irrelevant to the allocation of the rights and obligations of citizenship; third, religion is inherently an

10. *See Everson*, 330 U.S. at 7–8 (announcing that the Establishment Clause is incorporated into the Fourteenth Amendment's Due Process Clause and describing the principles guiding the non-establishment mandate).

11. 330 U.S. 1 (1947).

12. *Id.* at 15–16 (quoting *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878)).

individual, not a collective phenomenon; and fourth, religious liberty is defined by a national, not a local standard.[13] When read together, these four principles described a very strongly separationist framework, under which the government and religion operated in almost wholly separate spheres. Throughout the years following *Everson*, a strong majority on the Court steadfastly purported to pursue the separationist norm, although it often fell short of enforcing that norm effectively when confronted with actual disputes over the proper relationship of religion and the government. This norm is now under systematic attack, although the opponents of the traditional paradigm have not yet described the full implications of their new theory of church and state. The purpose of this section is to describe the components of the new Establishment Clause paradigm, and contrast it to the theory that has guided relationships between church and state for over a half century.

A. The Current Establishment Clause Paradigm

Although the four principles that define the traditional Establishment Clause paradigm relate to different aspects of religious liberty, each of these principles are indispensable components of the Court's modern approach to church/state issues. Remove even one of these components, and it becomes difficult to explain much of what the Court has said about church and state in the last six decades.

1. Principle One: The Neutrality and Non-coercion Mandates

The first component of the current paradigm prohibits the government from favoring a particular religious group or religion in general, and likewise prohibits government from punishing religious (or irreligious) belief or practice, unless the practice causes some religiously-neutral harm. In its most basic form, this principle prohibits all forms of governmental coercion relating to religion. This is the narrowest aspect of the current paradigm, and the one that most directly protects particular manifestations of religious liberty. The prohibition of governmental coercion is by no means the end of the Establishment Clause story. Since it first began enforcing the Establishment Clause, the Court has emphasized repeatedly that coercion is not a necessary element of an Establishment Clause violation.[14] Nevertheless, the Court has also repeatedly recognized that a government action coercing religious belief or practice constitutes a quintessential violation of the First Amendment: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[15]

In its modern Establishment Clause jurisprudence, the Court has addressed the problem of religious coercion in two ways: first, by prohibiting (at least in theory) all

13. *Id.*

14. *See Engel*, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."); *see also Comm. for Pub. Educ. & Relig. Liberty v. Nyquist*, 413 U.S. 756, 786 (1973) (same); *Schempp*, 374 U.S. at 223 (same).

15. *Lee*, 505 U.S. at 587.

forms of government financial support for religious enterprises, and second, by prohibiting government sponsorship of religious exercises or symbols, especially in schools.

The element of coercion has been one of the Court's primary focal points in its cases dealing with government financing of religious organizations. In this respect, the Court has carried forward the primary focus of the debates over church and state at the time the Constitution was framed. Like Madison, the modern Court's focus has been on the coercion of taxpayers, which is inherent in the act of government taxation for the benefit of religious organizations. The Madisonian notion that religious liberty is violated by the allocation to religious organizations of even "three pence"[16] of tax revenues is the purest example of this approach.[17]

The inconsistent application of this "three pence" principle has been the most obvious blemish on the Court's efforts to enforce the traditional paradigm of its Establishment Clause jurisprudence. In cases involving direct government aid to religion, the Court has adhered to the tax-as-coercion principle fairly consistently, because Justice O'Connor has refused to join the other religious accommodationists on the Court in abandoning the rule that the government may not directly fund the specifically religious component of religious enterprises.[18] Despite the Court's unbending insistence on adherence to the principle, however, during the modern era the Court often has been willing to bend the rule to approve a wide range of financial incentives and indirect government benefits to religious organizations and enterprises. In *Everson*, for example, the Court approved a program under which the State would pay for the transportation of children to pervasively sectarian religious schools.[19] Likewise, in *Walz v. Tax Commission of the City of New York*,[20] the Court approved the widespread practice of granting churches tax exemptions and waivers—a practice that even in the early 1970s produced tax expenditures for churches benefits worth many billions of dollars.[21] More recently, the Court held that the Establishment Clause did not prohibit state funding of a student attending a Christian college to train for a religious career,[22] and upheld a state program providing tax deductions for tuition payments, which went overwhelmingly to parents of children in religious schools.[23]

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16. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (reprinted in *Everson*, 330 U.S. at app., 65 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting)).

17. *Id.* at app., 65–66 ("Who does not see that the same authority which . . . can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?").

18. *See Mitchell v. Helms*, 530 U.S. 793 (2000). In *Mitchell*, O'Connor commented:

> I . . . disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause. Although "[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations," our decisions "provide no precedent for the use of public funds to finance religious activities."

Id. at 840 (O'Connor & Breyer, JJ., concurring in the judgment) (citation omitted, bracket in original).

19. 330 U.S. at 3 (describing New Jersey's program for transporting children to parochial schools).

20. 397 U.S. 664 (1970).

21. *Id.* at 714–15 (Douglas, J., dissenting) (describing the value of tax exemptions to churches).

22. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986).

23. *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state program providing tax exemptions for educational expenses including tuition); *id.* at 405 (Marshall, Brennan, Blackmun & Stevens, JJ., dissenting)

In its tax exemption and indirect aid cases the Court has attempted to avoid the coercion principle by reference to the constitutional mandate of neutrality and nondiscrimination.[24] According to the Court, tax exemption and indirect aid programs were permissible under the Establishment Clause because the programs were neutral and nondiscriminatory in the sense that the benefits were available to all organizations engaged in similar activities, regardless of their religious nature or affiliation.[25] The Court has even suggested that the absence of aid programs might evidence government hostility toward religious entities.[26] The problem with this argument is that it has no stopping point short of a uniform approval of all government programs aiding religion—so long as those programs include (at least as a hypothetical matter) the nonreligious as well as the religious among the potential beneficiaries. Later generations of conservatives on the Court have taken these concepts of neutrality and nondiscrimination and used them to eviscerate the core principle that the concepts were originally offered to support—i.e., the principle that the government should not use its coercive authority to support religion.[27] As discussed in the next section, what were originally ancillary arguments have now become the core of the new paradigm under which the government may use its taxing and spending authority to support the sectarian components of religious enterprises.[28]

In addition to the problem of coercion in the financing of religion, the Court's modern church/state jurisprudence has also addressed coercion in the context of cases involving the infusion of religion in governmental symbols and activities. In the public school context, the Court has been vigilant in enforcing the no-coercion principle. In the school context, the Court interprets the concept of coercion very broadly. In this milieu, the concept of coercion covers both government actions that directly coerce religious practice, as well as government actions that provide a forum in which the religious majority may apply social pressure to religious dissenters.

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.[29]

(noting that over 95% of students attending schools charging tuition attended religious schools).

24. *See e.g. id.* at 398–99 ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.").

25. *See e.g. id.* (emphasizing the neutrality of a tax deduction program); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (upholding a program granting religious groups access to public facilities on the ground that the facilities were "available to a broad class of nonreligious as well as religious speakers"); *Walz*, 397 U.S. at 669 (upholding tax deductions to churches on the ground that the program was characterized by a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

26. *Everson*, 330 U.S. at 18 (noting difficulties church schools would encounter in the absence of state-funded transportation of religious school students, and concluding 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.").

27. *See infra* nn. 76–90 and accompanying text.

28. *Id.*

29. *Lee*, 505 U.S. at 593.

This broad conception of coercion is not a recent phenomenon. Even the earliest of the Court's school prayer decisions did not involve classic coercion—i.e., mandatory participation in religious practices with which the student disagrees. Although the first school prayer decision did involve a state mandate for the inclusion of a state-authored prayer in every class, that mandate allowed dissenting students to leave the classroom during the religious exercise.[30] Thus, technically speaking, no one was ever truly coerced into participating in a religious exercise with which they disagreed. Nevertheless, the Court rejected the State's claim that the exercise was voluntary and did not interfere with the dissenting students' religious liberty.[31] The Court has adhered to the coercive-context approach to school religious exercises ever since *Engel*. In the most recent example of this phenomenon, the Court rejected a Texas school board's argument that a religious exercise at a public school football game was not attributable to the state and therefore did not violate the First Amendment if a "circuit-breaker"[32] was introduced into the system under which students could vote to authorize the religious exercise.[33] The Court ruled that the context itself provided the constitutionally significant coercive element, since the inclusion of the religious exercise required the dissenting students to either accede to the prayer or risk social ostracism in order to participate in an officially sponsored event.[34]

The Court has been remarkably consistent in applying the neutrality and anti-coercion mandates in the school cases. Outside the school context, however, as in almost every other area of the Court's modern Establishment Clause jurisprudence, the Court has applied its neutrality and anti-coercion mandates imperfectly. With regard to the coerced accession to majority religious practices, the Court has been much less vigilant in policing such coercive exercises with regard to adults than it has with regard to school-age children. The Court has upheld the recitation of an officially sanctioned prayer in a state legislature,[35] and just last Term upheld (in at least some circumstances) a state's erection of a monument containing explicitly religious dictates issued by "the LORD thy God."[36] The Court has also upheld several versions of holiday displays containing overtly religious symbols.[37]

But it is perhaps at least a backhanded testament to the importance of the first element of the current paradigm that in each of these cases the Court had to construct an elaborate pretense that the government was in no way endorsing the religious symbol, and that there was no actual coercion of religious dissenters. In these cases the Justices

30. *Engel*, 370 U.S. at 423 (noting that children or their parents could avoid the official prayers if they did not want to participate).

31. *Id.* at 431 (noting that "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain").

32. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 305 (internal quotation marks and footnote omitted).

33. *Id.*

34. *Id.* at 311–12.

35. *Marsh v. Chambers*, 463 U.S. 783 (1983).

36. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (upholding a monument containing one version of the Ten Commandments on the lawn of the Texas State Capitol); *id.* at 2873 (Stevens & Ginsberg, JJ., dissenting) (describing the inscription on the monument, which begins "I AM the LORD thy God").

37. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (upholding the constitutionality of an official holiday display including a menorah outside a county building); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that the Establishment Clause did not prohibit the erection of a crèche as part a city's holiday display).

who provided the crucial votes for the majority argued that various factual or historical elements effectively negated any message of official endorsement of religion,[38] and in all the cases the Court argued that no one was coerced by the State's religious activity because the activity would not be construed as an official endorsement of a particular religious message.[39] The fact that in these cases the Court felt the need to explain away coercion or endorsement as a factual matter (however implausibly) at least implicitly recognized that as a legal matter coercion and official endorsement of religion remains highly significant. Thus, the first principle remains intact even as the Court occasionally averted its glance to violations of that principle.

2. Principle Two: The Irrelevance of Religion to Citizenship

In decisions involving classroom and graduation prayer, the Court's prohibition of religious coercion operates to protect religious liberty directly by freeing religious dissenters from being forced to participate unwillingly in the religious practices of the religious majority. The Court's prohibition of religious coercion by the government has another function, however—protect the public sector from the corruption that naturally follows from the joinder of church and state. The theory here is not that religious ideas are inherently pernicious or that churches are corrupt, but rather that the conjunction of religion and political power undermines the proper functions of both the church and the government. Joining church and state corrupts the church by shifting the institution's focus from the salvation of adherents' souls, to the coercive regulation of nonadherents' conduct, and corrupts the government by allowing political majorities to use their power to interfere with the lives of dissenters in ways that are pernicious in a diverse democracy. This corruption, in turn, leads to social division along religious lines, which has the potential to destroy the entire political structure. As the Court once summarized this point: "[P]olitical debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the Religion Clauses were] intended to protect."[40] These assertions are neither radical nor new; they would be quite familiar to the author of

38. *See County of Allegheney*, 492 U.S. at 635 (O'Connor, Brennan & Stevens, JJ., concurring in part and concurring in the judgment) (arguing that by erecting a display including a menorah and a Christmas tree "the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season"); *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (arguing that "evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols," which did not convey an official endorsement of religion); *Marsh*, 463 U.S. at 792 (arguing that the Founding Fathers "did not consider [legislative] prayers as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view'").

39. *County of Allegheney*, 492 U.S. at 620 (noting the overall context of the menorah display and concluding that "it is not 'sufficiently likely' that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an 'endorsement' or 'disapproval . . . of their individual religious choices'" (ellipses in original)); *Lynch*, 465 U.S. at 680 ("When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message."); *Marsh*, 463 U.S. at 792 ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure." (citations omitted)).

40. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

the Establishment Clause.[41]

In the traditional Establishment Clause paradigm, separation of church and state prevents the corruption of both institutions by protecting each institution from the other. To enforce the separationist ideal, participation in the political structure has to be insulated from any suggestion that piety and fealty to religious ideals are a condition of citizenship. Article VI of the Constitution enforces one aspect of this principle by prohibiting religious tests as a qualification for office.[42] The Court has reinforced this direct protection against religious tests by interpreting the First Amendment as prohibiting the "historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept."[43]

Although the protection against the direct conjoining of religion and citizenship is important, in the modern era the threats to religious liberty and political participation have come in more subtle forms. The Court has responded to these subtler threats by going beyond the prohibition of religious tests to protect against indirect linkages of religion and politics. Under the modern paradigm, the Court has done this in two ways. First, the Court has required that all government actions and policies be motivated by a secular purpose. This requirement is part of the so-called "*Lemon* test." This test was derived from factors applied in a series of decisions in the 1960s,[44] which were compiled into a three-part test in *Lemon v. Kurtzman*.[45] Although subject to almost constant critique from opponents of the separationist paradigm since its inception,[46] the *Lemon* test has been the defining feature of Establishment Clause jurisprudence for more than three decades. The *Lemon* test requires every government action or legislation to have a

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41. Madison has commented:

> During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.

Madison, *supra* n. 16, at ¶ 7 (reprinted in *Everson*, 330 U.S. at app., 67–68 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting)).

42. U.S. Const. art. VI (stating "no religious test shall ever be required as a qualification to any office or public trust under the United States").

43. *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961) (footnote omitted) (holding unconstitutional Maryland's religious test for public office).

44. *See Epperson*, 393 U.S. at 106 (applying the secular purpose and effects test); *Schempp*, 374 U.S. at 222 (same).

45. 403 U.S. 602 (1971).

46. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia & Thomas, JJ., concurring in the judgment) (lamenting that *Lemon* had not been interred, and claiming that "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school [board] attorneys."); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (asserting that the *Lemon* test "has no basis in the history of the [First Amendment] it seeks to interpret, is difficult to apply and yields unprincipled results"). Even the author of the opinion that contained the *Lemon* test tried to weaken the test by arguing that the three *Lemon* factors should not be rigorously enforced, but "should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

secular purpose, a secular effect, and be free of extensive entanglements between church and state.[47]

For purposes of protecting against the linkage of political participation and citizenship, the secular purpose requirement is the significant part of the *Lemon* test. The secular purpose requirement essentially prohibits religious proponents from using the government to enforce some aspect of their theological or moral agenda, unless the proposed legislation or action also can be justified to nonadherents as advancing a secular goal. This provides important protection for the political process, because it structures political discussion in a manner that ensures that everyone in society can participate, regardless of their different metaphysical points of view, religious affiliations, and conceptions of ultimate goods. Political arguments (and their ultimate legal products) must always be cast, to use John Rawls's terminology, in the form of "public reason."[48] These arguments and decisions must, in other words, be cast in terms that are equally accessible to everyone in society. Assertions by the political majority that "God said so, and therefore you must obey" are meaningless to those who do not worship the same God or worship no God at all. Political discussions conducted on those terms are therefore not discussions at all, but rather the raw exercise of political muscle. Once a democracy reaches this stage, it has already evolved into another kind of political animal. By requiring the government to explain all of its actions by reference to a secular rationale, the Court has attempted to structure political discussions in a way that avoids the disintegration of the democratic project.

The second way in which the Court has enforced the second principle of the separationist paradigm is by prohibiting all government endorsements of religion. This is one of Justice O'Connor's major contributions to modern Establishment Clause jurisprudence, and she specifically based her endorsement analysis on the need to ensure that everyone in society felt fully enfranchised without regard to their religious affiliation or lack thereof. Justice O'Connor argued that the government should be prohibited from endorsing religion because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[49] According to O'Connor, the government may not "make religion relevant, in reality or public perception, to status in the political community."[50]

The proposition that status in the political community should be unrelated to religious affiliation seems unexceptionable, and indeed it is difficult to conceive of a non-theocratic democracy that did not include some form of this constitutional command. The devil, as usual, is in the details. Justice O'Connor, in particular, had a

47. *Lemon*, 403 U.S. at 612–13 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'" (citations omitted)).

48. John Rawls, *The Idea of Public Reason Revisited*, in John Rawls, *The Law of Peoples* 131–32 (Harv. U. Press 1999).

49. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). A portion of this passage is also quoted in *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

50. *Lynch*, 465 U.S. at 692.

difficult time reconciling her principle with her willingness to approve all manner of subtle linkages between the majority's religious beliefs and the government. Justice O'Connor not only approved of official religious displays,[51] she also spoke out in favor of the religious component of the Pledge of Allegiance.[52] In that controversy, Justice O'Connor came up with several reasons why urging public school children to pledge allegiance to a nation "under God" did not violate the Establishment Clause. Many of these reasons—such as the fact that instances of "ceremonial deism"[53] are ubiquitous throughout the country's history[54]—seem more like an obvious reason to overturn the religious component of the Pledge than a reason to uphold it. In fact, these insignificant, but omnipresent, instances of religiosity are precisely the sorts of official religious endorsements that undermine the Court's attempt to sever the rights of citizenship from the perception of mandatory obeisance to the majority's faith.

That the Court never realized the ideal of secularizing citizenship and political participation, however, does not undercut the importance of articulating the principle itself. The notion that the government must maintain an agnostic position with regard to all religious ideas is central to the separationist ideal, and indeed central to the notion of a religiously diverse democracy. Abandoning this principle in favor of an overtly theocratic notion of citizenship is probably the single most important aspect of the shift from the current Establishment Clause paradigm to the new.

3. Principle Three: Religion as a Private Affair

The third principle that characterizes the current Establishment Clause paradigm follows naturally from the second. If, as posited by the second principle, citizenship is not tied to religious faith or lack thereof, and if the government must remain agnostic with regard to religion and must provide secular reasons for all its activities and policies, then religion is by definition not part of the public sphere occupied by the fields of politics and law. Under the current Establishment Clause paradigm, therefore, religion is assigned to the private realm, where it is both protected from public (in all but exceptional cases) and prohibited from using the apparatus of the state to advance its goals. As the Court once summarized this point: "The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."[55]

This conception of religion is one of the most grating aspects of the current paradigm to those who would abandon the Madisonian model of church/state relations. According to critics of the separationist paradigm, the privatization of religion is a way of rendering religion irrelevant in the world. Stephen Carter once famously maintained that this approach to religion threatened to turn religious belief into "a kind of hobby: something so private that it is as irrelevant to public life as the building of model

51. *See County of Allegheny*, 492 U.S. at 622–37 (O'Connor, Brennan & Stevens, JJ., concurring in part and concurring in the judgment); *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

52. *See Newdow*, 542 U.S. at 33 (O'Connor, J., concurring in the judgment).

53. *Id.* at 37 (internal quotation marks omitted).

54. *Id.*

55. *Lemon*, 403 U.S. at 625.

airplanes."[56] Others, such as Richard John Neuhaus, have equally famously argued that leaving religion precepts and practitioners out of discourse over public policy effectively creates a "naked public square,"[57] in which the Court has "systematically excluded from policy consideration the operative values of the American people, values that are overwhelmingly grounded in religious belief."[58] In a more subtle vein, Richard Garnett has recently argued that it is inaccurate to argue that religion belongs entirely in the private sector because "the content of religious doctrine and the trajectory of its development might instead be matters to which even a liberal, secular, and democratic state reasonably could, and perhaps should, attend."[59]

The current paradigm rejects all of these claims. It would take an entire article to fully explore the debate over the principle that government should be completely a purely secular institution and religion should be an entirely private affair. For present purposes, the basic dispute can be summarized as relating to three matters: disagreements about the nature of religious concerns, disagreements about the relationship of religious morality and public policy, and disagreements about the effects on religion of the secular government model.

With regard to the proper scope of religious concerns, the current Establishment Clause paradigm is in no way intended to diminish the importance or influence of religion in modern affairs. The modern paradigm does, however, assume that the primary concern of religion will be different from the primary concerns of government. Under the modern paradigm, government and religion operate in different realms. The modern paradigm allocates temporal matters to the government, and reserves eternal matters to religion. Spirituality, eternal salvation, metaphysics, and sin are simply not matters that can be addressed coherently by collective political bodies in a country as diverse as this one. These are not matters that can be debated with the intent of reconciling differences in a manner that can lead to policies that can be enforced by law. Any attempt to address these matters through politics will lead to divisiveness, social dislocation, and (eventually) the blunt assertion of power by the religious faction that dominates the political majority. The modern paradigm takes the reality that different religious approaches will never be reconciled through politics or law, and forecloses the effort from the outset.

None of this means that religion is irrelevant, or a "hobby," or doomed to disappear into social irrelevance. Under the modern paradigm, religion is intended to thrive (and, judging from the vibrant religious culture that characterizes the United States, the modern paradigm has realized this objective). Matters of personal spirituality and the eternal questions of life and death do not become less important if they are addressed in the private sector, away from the crass machinations of the political culture. Nor, for that matter, does religion become ultimately irrelevant in political debates.

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56. Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 Duke L.J. 977, 978 (1987).

57. Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* 37 (2d ed., Wm. B. Eerdmans Publg. Co. 1984).

58. *Id.*

59. Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. Rev. 1645, 1649 (2004).

As Neuhaus and others have argued, the personal values arising from religious faith will inform the political positions of adherents. Nothing in the modern paradigm would prevent this from occurring. All that is required under the modern paradigm is that religious adherents accept from the outset that they are part of a culture in which everyone has the same right to decide ultimate questions free of political coercion. Private morality cannot be translated into public policy unless some explanation can be given that comports with the spiritually diverse nature of the culture. Certain issues are taken off the table in a constitutional democracy, because otherwise, everyone would have to fight to the death to take control of the table.[60]

Finally, proponents of the modern Establishment Clause paradigm do not agree with the routine allegation that the privatization of religion is bad for religion. Religion and religious adherents are protected in numerous ways by a constitutional regime in which government must stand aside from religious matters. The religious views and practices of those who do not belong to the dominant faith are protected because the religious and political majority cannot force them to adhere to the precepts of the dominant faith. Under the modern paradigm, members of the majority cannot use their control over the public schools as a means of converting the children of religious dissenters. And, under the modern paradigm, religious institutions are allowed to conduct their internal operations virtually unregulated by the government.[61] Religious institutions get political insulation and independence in exchange for giving up the right to use the government for their sectarian ends. The only logical opposition to a secular regime in which religious minorities and dissenters are protected from the consequences of political powerlessness, would come from members of a sect who believe, in the face of all historical evidence to the contrary, that their particular sect will dominate the culture forever.

4. Principle Four: Religious Liberty as a Matter of National Concern

The final component of the modern Establishment Clause paradigm is the principle that religious liberty is a constitutionally protected component of civic nationalism. According to this principle, religious liberty is a function of membership in a presumptively diverse national political culture, regardless of the fact that many citizens

60. This also answers Professor Garnett's argument that the government is, and should be, concerned and directly involved with the direction of religious doctrine. The examples he cites for this proposition include things like antidiscrimination laws, the criminalization of polygamy, laws preventing sexual abuse of minors, and state actions intended to encourage the development of "moderate" versions of Islam. *Id.* at 1678–82. These examples arguably do not involve religious doctrine at all, as that term is understood in light of the modern Establishment Clause paradigm. Rather, these examples involve the epiphenomena of religion—social implications of religious doctrine, which have consequences beyond the community of the faithful. Insofar as religious doctrine has implications in the broader society, government will necessarily become involved to protect others from antagonistic actions motivated by religious faith. But there is an important difference between controlling actions based on religion, and attempting to intervene in the development and dissemination of the religious doctrine itself. It is one thing to say that the government can act to prevent a religious fundamentalist from sect X from blowing up a building to kill adherents of sect Y; it is quite another to say that religious fundamentalists from sect X may not believe (and openly teach) that adherents of sect Y are going to hell.

61. *See Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Meml. Presbyterian Church*, 393 U.S. 440 (1969) (holding the courts are prohibited from adjudicating ecclesiastical disputes among church members); *Watson v. Jones*, 80 U.S. 679, 735 (1871) (same).

may live in religiously homogeneous localities. In one sense, this principle is merely a natural consequence of the incorporation of the First Amendment into the Due Process Clause of the Fourteenth Amendment,[62] which subjects local government actions affecting religious liberty to national rules, but the implications of religious demographics make the incorporation of the Establishment Clause even more crucial than the nationalization of some other components of the Bill of Rights.

The presumption of religious nationalism will have a greater impact in some areas of the country than it will in others. In many areas of the country, the Establishment Clause is merely a constitutional backstop to the natural checks and balances of the political process. In many major urban centers, for example, the melting pot is a demographic reality and many different cultures coexist easily. In these areas, no one religious sect is likely to use the government to impose its symbols, ideals, and sectarian moral precepts on everyone else because no sect can muster the kind of unchecked political power that would be necessary to achieve that objective.

Outside of major urban centers in cosmopolitan states, however, the reality of religious demographics tends to be very different. In many states, one sect dominates the culture to such an extent that in the absence of constitutional constraints, no political check would stop the dominant sect from imposing its values in virtually every aspect of life—especially in the public schools, and government symbols and activities. It is impossible to calculate precisely how much of the country would be susceptible to this extent of religious dominance. The best statistics are available on a statewide basis. Even if one considers only the religious demographics of entire states (as opposed to particular areas within states), religious dominance is a real concern in a significant part of the country. It would seem that approximately 30% of the country is characterized by the kind of sectarian domination that could lead the dominant sect to exercise unchecked political power in the absence of constitutional constraints.[63] The phenomenon of local

62. *See Everson*, 330 U.S. at 7–8 (noting the incorporation of the Establishment Clause into the Fourteenth Amendment).

63. This estimate is based on the statistics compiled in a recent study published by the Graduate Center of the City University of New York. Barry A. Kosmin, Egon Mayer & Ariela Keysar, *American Religious Identification Survey*, http://www.gc.cuny.edu/faculty/research_briefs/aris/aris_index.htm (last accessed Jan. 29, 2006) [hereinafter *ARIS Survey*]. I am defining "sectarian domination" to include states in which more than 35% of the population identifies with one sect, and no other sect has identification rates that come within twenty percentage points of the dominant sect. Using this definition, according to the *ARIS Survey*, fifteen may be described as subject to sectarian domination. *Id.* at ex. 15, http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm (compiling religious identification statistics for forty-eight states and the District of Columbia, excluding Hawaii and Alaska for reasons of cost). These states include Alabama, Arkansas, Georgia, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, and Vermont. *Id.* Other factors mitigate the influence of the dominant sect in some of the non-southern states. In Vermont, for example, 38% of the population identifies itself as Catholic, while only 6% of the population identifies with the next largest sect (Congregationalist/United Church of Christ). *Id.* This domination is mitigated by the fact that an extraordinarily large percentage of the population within Vermont (22%) identifies itself as "nonreligious," which will probably serve as something of a check on the activities of the dominant religious sect. *Id.* A similar phenomenon limits the influence of the dominant Catholic population in New York and New Jersey, both of which are nonreligious and non-Christian populations. *ARIS Survey*, *supra*, at ex. 15, http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm.

On the other hand, many states that fall short of satisfying the criteria as subject to "sectarian domination" may well fit the definition in actuality. In Kentucky, for example, the dominant Baptists represent 33% of the population (short of the 35% line that demarcates domination), but the nonreligious and Catholic

sectarian domination may be more extensive than the statewide statistics indicate. In many states that appear religiously diverse, the diversity may be centered in the state's urban centers, with concentrations of sects in outlying rural and exurban areas.

Local or regional sectarian domination has serious implications for religious liberty. Individuals who belong to vastly underrepresented religious sects—or who choose not to be religious at all—already have to face the possibility of ostracism, or even subtle discrimination in the private sector. The impact on the religious practices of religious minorities would be infinitely worse if they also had to enter the political fray to protest the use of the government to advance the religious majority's ideals. This impact would compound when children attend public schools, which are also under the control of the local religious majority. The current Establishment Clause paradigm takes all this into account and removes from local political groups the right to use their political power locally to advance their religious interests.

This approach is not the only one that could be taken under the mantle of democracy. It is possible to argue (as the proponents of the new paradigm do) that democracy depends on the largely unfettered exercise of power by political majorities in the relevant jurisdiction, and the plight of religious dissenters can be ameliorated by the right to travel to other states whose populations reflect a different religious mixture. The existing paradigm rejects this view of democracy as a recipe for religious tyranny, Balkanization, and perhaps even eventual civil war. From the perspective of the current paradigm, therefore, Justice Brandeis's "laboratories for experimentation"[64] justification for federalism has no place.

B. The New Establishment Clause Paradigm

If the current Establishment Clause paradigm were summed up in one overweening theme, it is that religion and democratic politics do not mix. The current paradigm's approach to religion is not only countermajoritarian, it is counterpolitical. Under the current paradigm, religion is outside the scope of political action altogether. Religion may inform the values of the electorate in a way that eventually translates into political action, but the Constitution prohibits political action that is about religion per se.

Perhaps the best way of distilling the differences between the new Establishment Clause paradigm and the current paradigm is to note the antagonism that proponents of the new paradigm express toward a simple metaphor. That metaphor, of course, is the image Jefferson borrowed from Roger Williams regarding a wall of separation between

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population is relatively small (less than 15% each) and the non-Christian population does not even register 1%. *Id.* Moreover, if the portion of the population in Kentucky identifying itself as Baptist is combined with those identifying themselves as generically Christian (8%), Methodist (5%), Pentecostal (4%), Church of Christ (3%), Assembly of God (1%), and "nondenominational" (1%), then Protestant sects comprise over half the population. *Id.* Indeed, throughout the South, Protestants dominate in ways that effectively foreclose any competition from other sects if religious issues were subjected to unfettered political competition. Over 75% of the respondents of the *ARIS Survey* identify with some Protestant Christian sect in Alabama, Arkansas, Georgia, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and West Virginia. *Id.* The "Bible Belt" is a very real phenomenon and, if constitutional constraints were removed, the extent of religious liberty in these states would be imperiled in ways that it would not be in other, more diverse areas of the country.

64. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

church and state.[65] Although a great deal of ink has been spilled criticizing this metaphor,[66] Jefferson's latter-day antagonists have rarely described in detail the full implications of their proposed alterative to the separation of church and state, which logically must entail the integration of church and state. The main objective of the new Establishment Clause paradigm is to break down Jefferson's wall, and allow the government to become infused with religion. Indeed, the central defining feature of the new Establishment Clause paradigm is the premise that American politics is, always has been, and should be, infused with religion. The new paradigm adopts the view long professed by Michael McConnell and others, who argue that democracy is an empty vessel without the support of "mediating institutions" such as churches.[67] According to this view, religion provides the mechanism "by which the citizens in a liberal polity learn to transcend their individual interests and opinions and . . . develop civic responsibility."[68] Justice Scalia has made the same point recently, although in originalist fashion he places the words in the mouths of the Framers: "Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[69]

Much of this would be less controversial if all believers in this society adhered to a universal religious construct. But when it comes to religion, the devil, so to speak, is in the details, and history has witnessed countless long, bloody conflicts among believers who dispute those details. Thus, the new paradigm will have to accommodate the fact that competing religious factions who vie for control of the political process are also vying for the authority to pick and choose among these contentious sectarian details. The reality is that under the new paradigm, there is nothing to prevent an aggressively religious majority from moving beyond the bland, benign, and uncontroversially generic notion of "civic religion," in favor of adopting "*a* religion" (or "*some* religions") to give the society a unifying social ethos.

According to the new paradigm, the particular form of religion that will define American politics will be determined through the exercise of political power within the framework of undiluted majoritarianism. As Justice Scalia has pointed out in defending

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65. *See* Roger Williams, *Mr. Cotton's Letter: Examined and Answered*, in *The Complete Writings of Roger Williams* vol. 1, 313, 392 (Russell & Russell, Inc. 1963).

66. *See e.g. Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting) (then-Justice Rehnquist exasperated and lamented that "the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years"). In addition to using Jefferson's metaphor as a means of criticizing the concept of separation itself, as Justice Rehnquist did, some critics have argued that modern commentators have misread Jefferson's metaphor as intended to separate *religion* and state, as opposed to *church* and state. *See e.g.* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 973–74 (1989). Others have argued that Jefferson's metaphor was only intended to refer to the relationship between the federal government and religion, and was never intended to apply to state establishments of religion. *See e.g.* Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (NYU Press 2002). Still others have argued that Jefferson did not originally intend to convey an intent to separate church and state, and when he eventually came to that position in the nineteenth century, his arguments cut against the broad social consensus. *See e.g.* Philip Hamburger, *Separation of Church and State* 19 (Harv. U. Press 2004).

67. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 S. Ct. Rev. 1 (1985).

68. *Id.* at 17.

69. *McCreary County*, 125 S. Ct. at 2749 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

this approach, there are "legitimate *competing* interests"[70] that justify favoring the values of the religious majority over the values of religious minorities and other dissenters.[71]

> On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.[72]

There are several interesting things about this quote, starting with Justice Scalia's unremarked extirpation of the Constitution's countermajoritarian function. In Justice Scalia's scheme of religious liberty, the Religion Clauses apparently serve primarily to assist the religious majority in advancing its sectarian mores as a sort of political just deserts. On a more basic level, Justice Scalia's conflation of the majority's right to impose its will on the minority with the minority's right to be free of such imposition is reminiscent of Herbert Wechsler's infamous comment about the competing constitutional rights at issue in *Brown v. Board of Education*.[73] In response to *Brown*, Wechsler thought that the white students' freedom not to associate with black students counterbalanced the black students' equal protection claim.[74] Under the new Establishment Clause paradigm, the religious majority's right to use its control over the government to advance its religious views counterbalances the religious minority's right to pursue its own religious path free of governmental interference and coercion. In both instances, the majority's right cancels out the minority's, and the concept of constitutional equality does little more than provide the purely formal assurance that both the rich and the poor are prohibited from sleeping under bridges.[75] Under such schemes, any pretense of political equality on the part of minorities is buried under the weight of the new constitutional majoritarianism.

1. The Implications of the New Paradigm: The Transformation of the Neutrality and Coercion Mandates

The particular components of the new Establishment Clause paradigm can be described easily as the opposite of the four main principles that define the current

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70. *Id.* at 2756 (emphasis in original).

71. *Id.*

72. *Id.* (emphasis in original, footnote omitted).

73. Herbert Wechsler commented:

> But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion.

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 34 (1959) (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)) (footnote omitted).

74. *Id.*

75. *See* Anatole France, *The Red Lily* 95 (Boni & Liveright, Inc.) ("[T]he face of the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread.").

Establishment Clause paradigm. As noted above, the centerpiece of the new paradigm is the opposition to the basic notion of separation of church and state. Proponents of the new paradigm staunchly oppose separationism as inherently discriminatory, in that it forecloses religious adherents from participating in politics in the same way as everyone else in society. According to the proponents of the new paradigm, religious individuals and groups should be able to act politically in precisely the same way as all other groups—by fighting for political power in the hopes of incorporating their most basic values into law and enforcing them on everyone else in society.

The consequence of this rejection of separationism is the abandonment of the religious neutrality constraint on the government. There is no logical way of avoiding this consequence. Once it is recognized that religious activists have the right to make their religious dictates an aspect of their political agenda, and once the nature of the government is redefined to be historically bound up with religion, then the notion that the government must be neutral between religion and nonreligion (or between powerful religions and weak religions) simply makes no sense. Politics either may be religious or it may not; there is no middle ground. If politics may be religious in nature, then religious activists may use their political victories to pursue religious ends, and once religious ends are accepted as legitimate governmental pursuits, then the concept neutrality is already abandoned. None of this should be a controversial extrapolation of the new paradigm. Justice Scalia has written extensively of this brave new world, and has drawn exactly the same conclusions:

> With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that "'the First Amendment mandates governmental neutrality between . . . religion and nonreligion,'" and that "[m]anifesting a purpose to favor . . . adherence to religion generally," is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. . . . And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion. . . . And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.[76]

Under the new paradigm all but the most direct and egregious forms of governmental coercion of religious minorities (and certainly nonreligious minorities) are logically permissible. Thus, one person can be forced to sit through religious exercises as a condition of partaking in government functions,[77] and religious minorities and members of religious groups who oppose any form of state support for churches can nevertheless be forced to pay for the religious majority's religious activities (in the form

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76. *McCreary County*, 125 S. Ct. at 2750–51 (Scalia & Thomas, JJ. & Rehnquist, C.J., dissenting) (emphasis, first and second ellipses, and bracket in original; citations omitted).

77. *See Lee*, 505 U.S. at 646 (Scalia, White, Thomas, JJ. & Rehnquist, C.J., dissenting) (arguing that the Constitution does not protect dissenting students from state-sponsored prayer at public school graduation ceremonies on the ground that "To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.").

of governmental payments to religious organizations).[78] Under the new paradigm, the Court's focus on financial aid to religion cases will no longer be on the coercion of the taxpayer who pays the bill, but rather the direct governmental coercion of those who receive the governmental services—and even then, it is not clear whether the Court's new majority will exercise much control over the newly enriched religious enterprises. The plurality in *Mitchell v. Helms*[79] probably spoke for the Court's new majority when it dismissed the coercive implications of direct government financing of religious indoctrination:

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.[80]

Under this analysis, a government program directly financing churches would not constitute coercion in violation of the Establishment Clause so long as all churches are allowed to partake of the government's largess, and no one is forced to attend the government-financed church service.

The consequences of the abandonment of governmental neutrality in matters of religion will be far-reaching. As we move into the era of the new Establishment Clause paradigm, we can expect more opinions like the recent Fourth Circuit decision in *Simpson v. Chesterfield County Board of Supervisors*.[81] This case involved the policy of a local board of supervisors in a suburb near Richmond, Virginia, under which the board expressly authorizes invocations at its public meetings.[82] The invocation is given by various religious leaders from the community who are invited to participate by the board's clerk.[83] Most of the invitees are Christian, although there were "several" Muslim and Jewish invitees as well.[84] The plaintiff was a resident of the county and also a leader of a local Wiccan group.[85] She requested that the county add her to the list of religious leaders who could be invited to give invocations before the board meetings, but was told by the board's clerk that she was not eligible because she was not monotheistic.[86] According to the clerk: "'Chesterfield's non-sectarian invocations are

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78. *See Zelman*, 536 U.S. at 643–44 (upholding indirect government financing of religious schools); *Mitchell*, 530 U.S. at 801, 820 (plurality opinion). *Mitchell* upheld direct government financing of religious schools, and permitted the schools to divert government money to financing specifically religious activities:

> So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content," and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern.

530 U.S. at 820 (citation omitted).

79. 530 U.S. 793 (2000).

80. *Id.* at 809–10 (plurality).

81. 404 F.3d 276 (4th Cir. 2005).

82. *Id.* at 278.

83. *Id.* at 279.

84. *Id.*

85. *Id.*

86. *Simpson*, 404 F.3d at 280.

traditionally made to a divinity that is consistent with the Judeo-Christian tradition,' a divinity that would not be invoked by practitioners of witchcraft."[87]

The Fourth Circuit held that the board's decision to exclude the Wiccan leader did not violate the Establishment Clause.[88] The court applied the sort of illogic that will become more common in the new era. According to the court, by excluding the Wiccan the board was demonstrating its religious inclusiveness:

> To ban all manifestations of [civic] faith would needlessly transform and devitalize the very nature of our culture. When we gather as Americans, we do not abandon all expressions of religious faith. Instead, our expressions evoke common and inclusive themes and forswear, as Chesterfield has done, the forbidding character of sectarian invocations.[89]

The problem with this explanation is that it was used to uphold an explicitly sectarian refusal to permit polytheists to participate in the official invocations. Thus, religious exclusion is described as religious inclusion, and religious neutrality is a term used to justify religious partisanship.

This is the inverted world in which we will soon be living: The government's sectarian preference for the majority's faith will be deemed "common and inclusive," which in the spirit of the new paradigm means that dissenters will be invited to join the religious majority in celebrating its "common" faith. Religious liberty will be preserved, presumably, by the fact that if the religious minorities decide to join in the majority's celebration of itself, then the majority will be happy to include them in the festivities.

In such a world, legal language is corrupted as much as constitutional principles. The courts cannot admit that their new system is not neutral, because the nominal expectation of neutrality has become embedded in our sense of constitutional fair play. So the courts will simply conscript constitutional terms like "neutrality," denude them of meaning, debase them, and then use them to describe a phenomenon whose characteristics are precisely the opposite of the term's ordinary meaning. As George Orwell once said of political speech and writing, legal language under the new paradigm will lose its precision, and "consist largely of euphemism, question-begging and sheer cloudy vagueness."[90]

2. The Implications of the New Paradigm: The Linkage of Religion and Citizenship

It follows from the majoritarian premises of the new Establishment Clause paradigm that citizenship and religion will become increasingly intertwined. Participation in the political process will not be limited by religion, but political success will be. If, as the proponents of the new paradigm argue, history demonstrates that mainstream religion is part of the country's political heritage, and if religion provides the civic values that are the necessary underpinning for the entire political culture, then

87. *Id.*
88. *Id.* at 288.
89. *Id.* at 287.
90. George Orwell, *Politics and the English Language*, in *The Penguin Essays of George Orwell* 354, 362 (Penguin Bks. 1984).

access to political power will (and should) effectively be limited to those who accept and publicly identify with the beliefs of the religious majority. Those who step outside the religious mainstream are not just religious dissenters, they are also political outsiders.

From the perspective of the new paradigm, Justice O'Connor's explanation for the endorsement analysis was factually accurate, but theoretically flawed. Justice O'Connor argued that official endorsement of religion was unconstitutional because it "'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[91] From the perspective of those supporting the new paradigm, there is nothing wrong with teaching nonadherents that they are outsiders because as a practical matter they *are* outsiders. This is the implicit message behind all the various opinions written by Justices and commentators who advocate the new Establishment Clause paradigm, and in recent opinions the message has increasingly been made explicit. "With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[92] There is no other way to interpret Justice Scalia's blunt assertion of religious hegemony over various categories of heretics and apostates, other than to recognize that under the new paradigm, religion will be one of the primary bases for identifying favored and disfavored citizens.

The consequences of this sea change in the Court's approach toward the proper relationship of citizenship and religion can be extended far beyond the realm of Establishment Clause cases. Once religion is understood as a legal matter to be directly relevant to the development and dissemination of political values, then religious devotion also will logically be perceived by the public as relevant to a political candidate's qualifications. This undoubtedly already happens, although it usually occurs in unspoken ways. In most parts of the country, an avowed atheist or agnostic who has the bad judgment to announce that fact will have no chance of winning a political contest. In many parts of the country, an avowed Muslim, Hindu, Buddhist, or Wiccan will suffer the same fate. Under the new paradigm, this is as it should be. If one takes seriously the new paradigm's central understanding that religious values provide the basis for the political culture, then *which* values are being advanced by a political candidate should be a crucial part of the debate in each campaign. The detailed religious views of everyone—including atheists and other religious pariahs—may be (and should be, according to the logic of the new paradigm) made the subject of every political campaign. This scheme is virtually an invitation to social division along religious lines, and the lessons of the formal legal doctrine can be expected to filter back into broader social attitudes and political discourse.

91. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

92. *McCreary County*, 125 S. Ct. at 2753 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

3. The Implications of the New Paradigm: Religion as a Public Affair

A third implication of the new Establishment Clause paradigm is that religion is a public, rather than a private affair. The first sense in which that principle will apply will be in government-operated public ceremonies such as public school graduations. The premise in this context is that the Nation's history and culture demands that the religious majority be permitted to pay deference to its God in public as well as in private. Any attempt to forestall such public obeisance would in effect suppress one of the most important components of the majority's religiosity. As Justice Scalia has phrased this point: "Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the 'protection of divine Providence,' as the Declaration of Independence put it, not just for individuals but for societies."[93]

The implications of recognizing religion as a public as well as a private matter will go beyond simple ceremonial religious observations. Again, one of the central premises of the new paradigm is that in the American political scheme religious values and political values are intertwined. If so, then the development of socially beneficial religious values should be a legitimate concern of the government. Thus, the development and preservation of proper religious values, like their political counterparts, should be a legitimate matter for government action.

This corollary of the new Establishment Clause paradigm will play itself out in the public schools. At the most basic level, if the Court's new reading of the Constitution is predicated on a historical understanding that the country's political structure has always been extensively imbued with religion,[94] that "the government's invocation of God . . . is unobjectionable,"[95] and that religion is the source of the country's civic values,[96] then it is hard to fathom why the government's schools should not be able to incorporate all these themes in their curriculum and urge the students in the class to adopt the society's chosen values as their own. In a sense, this is the core of the debate over the religious language in the Pledge of Allegiance.[97] In fact, in that case some of the proponents of the new Establishment Clause paradigm have already agreed that the schools should be allowed to recognize that "our Nation was founded on a fundamental belief in God."[98] It is difficult to find a logical limit once one accepts this basic notion. If the public schools can "acknowledge" the country's grounding in one contestable religious proposition, then it is not a large step to do the same with other equally contestable religious propositions—all of which will be chosen according to the religious views of the political majority in mind.

As with the abandonment of the concept of neutrality, the courts are unlikely to admit that they are permitting the schools to engage in proselytizing on behalf of the

93. *Lee*, 505 U.S. at 645 (Scalia, White, Thomas, JJ. & Rehnquist, C.J., dissenting).

94. *See McCreary County*, 125 S. Ct. at 2751–52 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

95. *Id.* at 2756.

96. *See supra* n. 63 and accompanying text.

97. *See Newdow*, 542 U.S. at 26–33 (Rehnquist, C.J., concurring in the judgment) (arguing that public schools should be able to incorporate religious references in the official Pledge).

98. *Id.* at 31 (internal quotation marks omitted).

religious majority. But their avoidance of the obvious will take the absurd form of claiming that an official endorsement of "God" is "in no sense . . . an endorsement of any religion,"[99] and the equally absurd proposition that an officially sanctioned exercise involving an act of daily obeisance to God "is a patriotic exercise, not a religious one."[100]

In the end, the burden of this aspect of the new paradigm will fall on religious minorities to take the protection of their idiosyncratic faiths into their own hands. Under the new paradigm, the government will be allowed to embrace a position ascribed by Justice Kennedy to the Connecticut school in *Lee v. Weisman*:[101] "The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise."[102] Justice Kennedy concluded this description by noting that "This turns conventional First Amendment analysis on its head."[103] This is an accurate description of the new paradigm as a whole, but with the possible exception of the cases involving religion in the public schools, Justice Kennedy appears to have joined in turning the First Amendment upside-down.

4. The Implications of the New Paradigm: Religion as a Matter of Local Concern

The final aspect of the new constitutional paradigm is the assertion that religion is largely a matter of local, rather than national concern. This principle derives from the argument that the Establishment Clause was intended—and should currently be interpreted—to apply only to limit the federal government's interference with the religious activities of the states. This interpretation would effectively nullify the Establishment Clause, insofar as the Clause would cease to protect any individual right at all; the Establishment Clause would become merely a specialized version of the newly revived Tenth Amendment.[104]

This is the only one of the four general principles defining the new paradigm that will not yet have majority support in the reconstituted Supreme Court. Only Justice Thomas has thus far embraced this argument, although Justice Scalia has also hinted that he finds some merit in this interpretation.[105] In Justice Thomas's version of the

99. *Id.*
100. *Id.*
101. 505 U.S. 577 (1992).
102. *Id.* at 596.
103. *Id.*
104. For examples of new Tenth Amendment protections of state sovereignty, see *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government may not enlist state executive officials to carry out federal law), and *New York v. United States*, 505 U.S. 144 (1992) (holding that the federal government may not commandeer state legislatures to carry out federal policies).
105. *See Lee*, 505 U.S. at 641 (Scalia, White, Thomas, JJ. & Rehnquist, C.J., dissenting). Justice Scalia is not, however, so enamored of federalism when the shoe is on the other foot. In *Locke v. Davey*, he dissented to the majority's holding that the State of Washington had the authority to withhold state funding from a college student seeking a degree in order to enter the ministry. 540 U.S. 712 (2004). Justice Scalia (who was joined by Justice Thomas—the other purported advocate of strong federalism on these matters) argued that this state nonestablishment rule violated the neutrality requirement of the Free Exercise Clause. *See id.* at 726 (Scalia &

argument, "[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."[106] The only concession to the religious liberty-protecting function of the Establishment Clause is that "[a]s a textual matter, this Clause probably prohibits Congress from establishing a national religion,"[107] but it does not reach any further. Put simply: "The Establishment Clause does not purport to protect individual rights."[108] Under this interpretation, the Establishment Clause not only fails to prohibit state establishments of religion, it also would bar any branch of the federal government from interfering with state establishments.[109]

Whether a majority of the Supreme Court is willing to go this far toward abandoning all constitutional constraints on state establishments is doubtful. But in the end it will not matter. Having eviscerated the other protections of the Establishment Clause, the states can do almost everything they want to advance the majority's religious ideals, even if the Clause still supposedly applies beyond the federal government. The federalism interpretation is simply one way of reaching the destination of permitting the integration of religion into government—a goal that other members of the Court can reach quite easily via other routes. A quick perusal of the doctrinal implications of the new paradigm will illustrate this point.

III. THE DOCTRINAL IMPLICATIONS OF THE NEW ESTABLISHMENT CLAUSE PARADIGM

One of the few pieces of good news about the coming change in the Supreme Court's church/state jurisprudence is that it will probably clarify what has become one of the murkiest areas of modern constitutional doctrine. In recent years, there have been no fewer than ten different Establishment Clause standards that have commanded the allegiance of one or more Justices on the Court. The situation was made worse by the fact that some Justices have supported more than one standard, and some Justices have interpreted the same standards differently than other Justices. All of this has left lower courts in the uncomfortable position of trying to reconcile standards that by their nature often point toward different constitutional conclusions.

The new majority on the Court will undoubtedly prune the available options for adjudicating matters of church and state under the Establishment Clause. This does not mean that the other standards will disappear from the pages of the United States Reports. The four remaining supporters of the separationist ideal will attempt to preserve some or all of the old standards for posterity. But the lower courts (which are themselves increasingly populated by judges who have no great love for Madison and Jefferson) can treat these dissenting opinions with the same deference they afford to law review

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Thomas, JJ., dissenting). Thus is the theory of neutrality transformed from a shield against establishments of religion, to a sword assisting in the advancement of state establishments.

106. *Newdow*, 542 U.S. at 49 (Thomas, J., concurring in the judgment).

107. *Id.* at 50.

108. *Id.*

109. *Id.* at 51 (arguing that the incorporation of the Establishment Clause into the Fourteenth Amendment "would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion" (emphasis in original)).

articles—a largely irrelevant academic sideshow carried on largely for the entertainment of the authors, while the real law is being made elsewhere.

The easiest way to describe the doctrinal effects of the new religious majoritarianism is to weed through the standards that are now scattered among the Court's modern church/state decisions. It is easy to identify the standards that will be quickly abandoned under the new regime, and also relatively easy to identify the standards that will now come to the fore. The only question arises in the context of the cases involving religion in public school. In recent years, Justice Kennedy has expressed reservations about applying to religion-in-school cases the logic of the standards he applies outside the school context.[110] In all other contexts, however, it will become much simpler to explain—if not to justify—the government's new ability to embrace, endorse, and finance the majority's religious symbols and institutions.

A. Lemon *and the Other Carcasses of the Current Paradigm*

It is almost certain that the new majority on the Supreme Court will abandon five of the standards currently used by some members of the Court. These standards are all associated to some degree with the goal of separating church and state, and therefore will have no place in the new constitutional universe of religious majoritarianism. The standards to be renounced include the three-part *Lemon* test, Justice O'Connor's endorsement analysis, the theory of substantive neutrality, Justice Breyer's new concern with religious divisiveness, and Justice O'Connor's and Breyer's notions that Establishment Clause cases can be decided in an ad hoc manner, ensuring on a fact-specific basis that the government is doing nothing to associate itself too closely with religion.

Lemon will likely be the first casualty of the new Establishment Clause paradigm. As noted above,[111] the *Lemon* test requires every government action to be justified by a secular purpose, to have a secular effect, and to be free of entanglements between church and state.[112] If applied rigorously, these requirements would guarantee a Jeffersonian-style strict separation between church and state. For this reason, the *Lemon* test has been the *bete noire* of the Court's conservatives ever since it was adopted by the Court in 1971 as the primary standard governing Establishment Clause cases. Ever since then, it has been reviled by those on the Court who take a more benign view of the joinder of church and state.[113] The secular purpose requirement of *Lemon* certainly will have no place in a regime governed by the new paradigm. Indeed, since the proponents of the new paradigm view the Establishment Clause as primarily motivated by the desire

110. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (joining the majority in applying the *Lemon* and endorsement analyses to hold unconstitutional a "voluntary" prayer at a public high school football game); *Lee*, 505 U.S. 577 (applying a broad coercion theory to strike down prayer at a public high school graduation ceremony).

111. *See supra* nn. 44–47 and accompanying text.

112. *See Lemon*, 403 U.S. at 612–13.

113. *Lemon*'s most colorful critic has been Justice Scalia, whose pique at *Lemon*'s resilience could usually be ascertained from his overheated metaphors: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school [board] attorneys." *Lamb's Chapel*, 508 U.S. at 398 (Scalia & Thomas, JJ., concurring in the judgment).

to permit the government to *advance* religion, the *Lemon* secular purpose analysis—which specifically prohibits the government from doing anything with the intent of advancing religion—is directly contrary to the spirit of the new era. In Justice Scalia's explanation of this theme,

> [t]hose responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.[114]

For much the same reason, the *Lemon* secular effect analysis also is contrary to the basic theme of the new Establishment Clause paradigm, which posits that religious effects constitute an overall social and political good. The proponents of the new paradigm will not have to spend time dispensing with the final, entanglement prong of *Lemon* since they have already effectively euthanized that requirement by subsuming it into the secular effect analysis.[115] As the secular effect requirement goes, therefore, so goes entanglement.

The second standard that will be quickly abandoned in the new Establishment Clause regime will be Justice O'Connor's endorsement analysis. This analysis is a modification of the first two prongs of *Lemon*, focusing on whether the "government's actual purpose is to endorse or disapprove of religion [and] whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid."[116] Since the endorsement analysis builds on *Lemon*, the Court's new majority will have no trouble simultaneously casting aside both standards. But the new majority will have another reason for abandoning endorsement, which is that the endorsement analysis is intended to forestall the use of religion to determine the status of political insiders and outsiders.[117] This will no longer be a matter of constitutional concern under the new paradigm. As Justice Scalia has bluntly pointed out, the new version of the Establishment Clause will permit the government to "disregard . . . polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[118] In light of this harsh new religious realpolitik, Justice O'Connor's concern that the government should not send the message that some religious practitioners are political insiders and other religious practitioners are political outsiders seems like little more than a quaint artifact of a bygone, gentler time.

Three other constitutional standards will also be abandoned quickly once the Court adopts the new Establishment Clause paradigm: the divisiveness standard, the ad hoc analysis, and the substantive neutrality requirement. Divisiveness has become a major concern of Justice Breyer. Justice Breyer has been increasingly concerned with the

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114. *McCreary County*, 125 S. Ct. at 2758 (Scalia, Thomas, Kennedy, JJ. & Rehnquist, C.J., dissenting) (emphasis in original).

115. *See Zelman*, 536 U.S. at 668 (O'Connor, J., concurring) (noting that "we [have] folded the entanglement inquiry into the primary effect inquiry").

116. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

117. *See supra* nn. 40–54 and accompanying text.

118. *McCreary County*, 125 S. Ct. at 2753 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

possibility that the government's activities on behalf of religion will foster in society a dangerous divisiveness along religious lines. In *Zelman*, Justice Breyer cited the avoidance of religious strife and divisiveness as a central objective of a separationist Establishment Clause:

> In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits.[119]

In *Van Orden v. Perry*,[120] Justice Breyer seems to have elevated the divisiveness concern to an actual Establishment Clause standard. He once again described the purpose of the Religion Clauses as "[seeking] to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[121] He then applied this concern to the Ten Commandments display outside the Texas state capitol, and ruled that the display was constitutional because "as a practical matter of *degree* this display is unlikely to prove divisive."[122]

It is unclear what measure of divisiveness Justice Breyer would require before striking down a state action as a violation of the Establishment Clause. In any event, Justice Breyer's linkage of divisiveness with the separation of church and state is enough to ensure that divisiveness will not be a focal point in the new Establishment Clause era. Indeed, several members of the Court's new majority have already rejected any attempt to derive a constitutional standard from the fear of religious division. It is unclear, they argue, "where Justice Breyer would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find 'divisive.' We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs."[123] This conclusion should not be surprising. If the new Establishment Clause paradigm assumes[124] that religion is now a legitimate basis for political disputes, then divisiveness along religious lines will inevitably ensue as a natural consequence of the newly politicized religious atmosphere. The apparent solution to the problem of religious divisiveness in the new society is effective political domination by the strongest sects.

By the same token, the new majority will have little patience with Breyer's embrace of a flexible, ad hoc approach to Establishment Clause cases, since this approach leaves open the possibility that the Court would strike down some examples of government favoritism toward religion. In *Van Orden*, Justice Breyer combined his newfound concern with religious divisiveness with a renunciation of any attempt to define a unified standard for adjudicating Establishment Clause disputes. He stated: "While the Court's prior tests provide useful guideposts . . . no exact formula can dictate

119. *Zelman*, 536 U.S. at 725 (Breyer, Stevens & Souter, JJ., dissenting).
120. 125 S. Ct. 2854 (2005).
121. *Id.* at 2868 (Breyer, J., concurring in the judgment).
122. *Id.* at 2871 (emphasis in original).
123. *Zelman*, 536 U.S. at 662 n. 7 (majority).
124. *See supra* pt. II.

a resolution to such fact-intensive cases."[125] In this respect, Justice Breyer seems to have adopted the ad hoc approach to Establishment Clause cases suggested several years earlier by Justice O'Connor. Justice O'Connor urged the Court to avoid seeking a "Grand Unified Theory that would resolve all the cases that may arise under [the Establishment Clause],"[126] in favor of a series of individual tests covering "narrower and more homogeneous" areas.[127] From the perspective of the proponents of the new paradigm, the problem with this ad hoc approach is that its proponents persist in their unwillingness to forego the pursuit of the separation of church and state. So long as those principles continue to serve as the guidepost for any standard or set of standards, then even a flexible mechanism for applying those principles will be inconsistent with the thrust of the new paradigm.

The final standard that will be quickly abandoned under the new paradigm is the concept of substantive neutrality. As Justice Souter has pointed out, the term "neutrality" has been used in a variety of different ways over the years by different members of the Court.[128] The theory of substantive neutrality, as once defined by Douglas Laycock, is the theory that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[129] In recent years, Justice O'Connor occasionally seems to have been drawn to the notion of substantive neutrality. Her endorsement analysis seems directed, in part, at requiring the government to do nothing that would link political participation with religion in a way that would encourage or discourage religious belief. Some notion of substantive neutrality may have also been behind Justice O'Connor's rejection of the theory of formal neutrality in circumstances involving the ability of religious organizations to divert government funds to specifically religious purposes.[130] It seems clear, however, that any appeal to substantive neutrality is inconsistent with the new Establishment Clause paradigm. As Justice Scalia and others have made clear in their opinions in the school prayer, Ten Commandments, and Pledge of Allegiance cases, the new paradigm does not prevent the government from encouraging religious belief, practice, and observance. As Justice Scalia recently summed up the perspective of the new paradigm, "the Court's oft repeated assertion that the government cannot favor religious practice is false."[131] The requirement of substantive neutrality, therefore, like the *Lemon* secular purpose and effect requirements, is inconsistent at its core with the majoritarian spirit of the new Establishment Clause, and will be abandoned in the new regime.

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125. *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment) (citations omitted).

126. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

127. *Id.* at 721.

128. *See Mitchell*, 530 U.S. at 878–79 (Souter, Stevens & Ginsburg, JJ., dissenting) (describing various different ways in which the Court has used the term neutrality).

129. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990) (footnote omitted).

130. *See Mitchell*, 530 U.S. at 837 (O'Connor & Breyer, JJ., concurring in the judgment) (objecting that the plurality's theory of formal neutrality "comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs").

131. *McCreary County*, 125 S. Ct. at 2748 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).

B. *The Doctrinal Framework of the New Paradigm*

So what is left in the way of constitutional standards under the new paradigm? There are four standards that will dominate discussions of the Establishment Clause jurisprudence. One of these—the nonincorporation standard, which asserts that the Establishment Clause should never have been incorporated into the Fourteenth Amendment and applied to the states—has been discussed above.[132] Justice Thomas (and possibly Justice Scalia) will undoubtedly continue to press this theory, but there is no indication that a sufficient number of other Justices will join them in pressing for this most radical of approaches to the deconstitutionalization of church/state relations. In fact, it does not matter, because the other standards the Court will adopt to apply the new Establishment Clause paradigm will have the same effect of permitting the states (and the federal government, for that matter) to do pretty much whatever they want to advance religion in various ways.

The standards the Court will use have already been articulated by the existing proponents of the new paradigm. The two most prominent standards are the formal neutrality standard and the narrow (or legal) coercion analysis. The formal neutrality standard is the standard the new paradigm proponents apply in the government financing cases. Under this analysis, government aid to religious institutions does not violate the Establishment Clause if it is distributed in a program whose terms are formally neutral, i.e., permit both secular and religious applicants to receive the aid.

The specific applications of this standard have already been incorporated and worked out in recent cases involving government financing of religious activities. Where the aid is given to religious institutions indirectly (for example, through parents participating in a voucher program), the government aid program does not violate the Establishment Clause "where [the] 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."[133] Where the aid is given to the religious institutions directly, it does not violate the Constitution if the government program "determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content."[134] The proponents of the new paradigm have emphasized that it does not matter if the overwhelming proportion of government aid is given to religious institutions,[135] and it does not matter if a religious institution receiving direct grants of government funds diverts those funds to specifically religious purposes.[136] Under such a lax standard, virtually any amount of government financing of religion will be permissible, so long as

132. *See supra* nn. 105–109 and accompanying text.

133. *Zelman*, 536 U.S. at 652.

134. *Mitchell*, 530 U.S. at 829.

135. *See Zelman*, 536 U.S. at 647 (noting that 96% of the students receiving government voucher money attended religious schools).

136. *See Mitchell*, 530 U.S. at 824 ("[W]e fail to see how indoctrination by means of (i.e., diversion of) such [government] aid could be attributed to the government.").

the government is careful to craft its funding program in a way that parrots the pretense that the religious uses of the government funds are not attributable to the government.

In cases other than funding cases—such as cases in which the government embraces religious symbols or doctrine—the standard that will be used to apply the new paradigm is the narrow coercion analysis. Under this analysis, the government violates the Constitution only if it "[coerces] religious orthodoxy and . . . financial support by force of law and threat of penalty."[137] This standard would apparently apply only when the government literally mandates that an individual join a particular church or participate in its worship service. Justice Scalia's example of impermissible coercion refers to the pre-Revolutionary Virginia practice, under which "ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches."[138] Any government action that falls short of this extreme example is apparently constitutional.

A third standard that may be cited by the Court's new Establishment Clause majority is the nonpreferentialist standard, which then-Justice Rehnquist advanced several decades ago as an alternative to *Lemon* and the other separationist standards. Under this analysis, "nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion."[139] The nonpreferentialist analysis would replace the Court's longstanding principle that the Court has "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."[140] Justice Scalia seems to have something like the nonpreferentialist analysis in mind when he asserts bluntly that "the Court's oft repeated assertion that the government cannot favor religious practice is false."[141]

The question with regard to the nonpreferentialist analysis is not whether the Court's new majority would go so far as to suggest that the government can favor religion over nonreligion—they have clearly indicated that they will. The question, rather, is whether the new majority will go beyond nonpreferentialism to adopt the even more radical proposition that the government may favor particular religions (or groups of religions), in addition to favoring religion generically over nonreligion. Justice Scalia has already arrived at this more radical destination. In his *McCreary County* dissent, Justice Scalia specifically embraced the notion that the government can favor monotheistic religions over polytheistic religions, agnosticism, and atheism.[142] He justified this by reference to the country's "historical practices,"[143] and by reference to the fact that the overwhelming number of people in the country belong to monotheistic faiths.[144] He first noted that "[t]he three most popular religions in the United States,

137. *Lee*, 505 U.S. at 640 (Scalia, White, Thomas, JJ. & Rehnquist, C.J., dissenting) (emphasis omitted).
138. *Id.* at 641.
139. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).
140. *Schempp*, 374 U.S. at 216.
141. *McCreary County*, 125 S. Ct. at 2748 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting).
142. *Id.* at 2753.
143. *Id.*
144. *Id.*

Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic."[145] He then added that the religious beliefs at issue in that case (i.e., that the Ten Commandments were given by God to Moses) "are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint."[146]

These are exceedingly strange claims. First, it is unclear why the government ceases to be endorsing a religious viewpoint simply because the viewpoint it is endorsing is widely held. Second, it is unclear why Justice Scalia does not even see fit to count as affected parties those who do not have any religious point of view. According to the same source that Justice Scalia relies upon as the basis for his claim that 97.7% of believers are monotheistic,[147] another 14.1% of the population describes itself as nonreligious,[148] and another 5.4% refuse to respond to the question about their religious affiliation.[149] Thus, the activity that Justice Scalia describes as not "reasonably understood as a government endorsement of a particular religious viewpoint"[150] is actually an activity that is disavowed by between 16.4% (the number of nonbelievers and polytheists)[151] and 21.7% (a number that includes the unresponsive)[152] of the population. If the government can endorse a religious viewpoint that roughly 20% of the population rejects, it is difficult to see why the government would be constitutionally prohibited from endorsing a viewpoint that 49% of the population rejects. When considered in light of Justice Scalia's other comments to the effect that the government can "disregard" polytheists, "believers in unconcerned deities," agnostics and atheists,[153] then the system framed by the new Establishment Clause paradigm is revealed as embodying the rankest kind of sectarian hegemony and discrimination. The only remaining question is whether the conservatives on the Court will follow Justice Scalia down this dark path.

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145. *Id.* (citing U.S. Census Bureau, *Statistical Abstract of the United States: 2004–2005*, http://www.census.gov/prod/2004pubs/04statab/pop.pdf, at tbl. 67 (124th ed., U.S. Census Bureau 2004) (relying on the *ARIS Survey*, *supra* n. 63)).

146. *McCreary County*, 125 S. Ct. at 2753 (Scalia, Thomas, JJ. & Rehnquist, C.J., dissenting) (footnote omitted).

147. *See supra* n. 145 and accompanying text.

148. *ARIS Survey*, *supra* n. 63, at ex. 1, http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm.

149. *Id.*

150. *McCreary County*, 125 S. Ct. at 2753 (footnote omitted).

151. The *ARIS Survey* cites the percentage of nonbelievers at 14.1%; 97.7% are monotheistic based upon the three most popular religions in the United States, leading to the conclusion that 2.3% are polytheistic. *See supra* nn. 145–148 and accompanying text. When added together, the percentages of nonbelievers and polytheistic sum to 16.4%.

152. The same *ARIS Survey* cites the percentage of those not responding to the survey at 5.4%. Together with 16.4% of nonbelievers-polytheists, 21.7% of the population disavows the activity described by Justice Scalia. *See supra* nn. 149–151 and accompanying text.

153. *McCreary County*, 125 S. Ct. at 2753.

C. *Justice Kennedy and the Residue of the Current Paradigm*

In at least one area of frequent Establishment Clause litigation, it appears that the Court's new religious majority may not hold its fifth vote. Since he wrote the majority opinion striking down the graduation prayer in *Lee v. Weisman*,[154] Justice Kennedy has voted with the remaining separationists on the Court in cases involving religion in the public schools.[155] He has, however, refused to embrace constitutional standards such as *Lemon* and the endorsement analysis, choosing instead to rely on a broad conception of coercion to prevent the public schools from endorsing religion or foisting the majority's religious symbols and ideas on unwilling students. This is the tenth and final test currently used on the Court, and it will survive largely as one Justice's check on the Court's willingness to adopt a standard giving the government virtually unconstrained authority to engage in activity advancing the majority's religious beliefs and institutions.

The theory is deemed "broad coercion" because it views the concept of coercion to include more than formal legal penalties or sanctions. In the context of the graduation prayer at issue in *Lee v. Weisman*, Kennedy concluded, the concept of coercion required a recognition of the peer group pressure that necessarily attended the prayer at the graduation ceremony: "The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands."[156] Thus, even though the State did not write the prayer, *or* dictate the prayer's content, *or* force dissenters to participate in the prayer as a condition of receiving their diploma, the Establishment Clause still prohibited the exercise.

There is no reason to suspect that Justice Kennedy will not continue to exhibit the same sensitivity to the concerns of religious dissenters in the atmosphere of a public school. It is interesting that he does not extend the same sensitivity to dissenters outside the school context. He has written opinions objecting strenuously to the imposition of constitutional limits on state-sanctioned religious displays outside the school context,[157] and joined the opinions of the Court authorizing the transfer of large amounts of state funds to religious schools, both indirectly[158] and directly.[159] In these opinions, he has joined the other proponents of the new paradigm in advancing an almost purely majoritarian notion of church/state relations. This position contrasts starkly with his vivid insistence in *Lee* that the "sense of history" that motivated those who wrote the Establishment Clause was the lesson that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[160] It is difficult to

154. 505 U.S. 577 (1992).

155. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (joining the majority opinion was Justice Kennedy, holding unconstitutional a "voluntary" prayer at a public high school football game).

156. *Lee*, 505 U.S. at 596.

157. *See County of Allegheny*, 492 U.S. at 670 (Kennedy, White & Scalia, JJ. & Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

158. *See Zelman*, 536 U.S. at 641.

159. *See Mitchell*, 530 U.S. at 801.

160. *Lee*, 505 U.S. at 591–92.

reconcile the view of the constitutional universe articulated by Justice Kennedy in the school cases, in which the Constitution continues to tie the hands of an aggressive religious majority, and the view he expresses, or accedes to, in the non-school cases, in which the same aggressive religious majority can do pretty much as it sees fit. Perhaps the internal contradictions in his approach to the Establishment Clause will resolve themselves as Justice Kennedy begins to see the implications of removing constitutional constraints, but so far there is no sign that this process of reconciliation has even started.

IV. THE REMAINS OF RELIGIOUS CIVIL LIBERTIES UNDER THE NEW ESTABLISHMENT CLAUSE PARADIGM

Aside from Justice Kennedy's willingness to join the Court's remaining separationists in enforcing a broad view of religious coercion in public school cases, the future looks bleak for the proponents of the Madisonian perspective on the Establishment Clause. What avenues are left for the defenders of religious dissent once the Court's new majority renounces the view that the government should be a secular entity, announces that the religious majority can incorporate its views into law and its symbols and invocations into official ceremonies and activities, and strips away all constitutional standards that in any way effectively protect religious dissenters from the pervasive imposition of the majority's faith? The answer is: precious little. Those attempting to defend the religious minority from the religious majority under the new regime would seem to have only three options.

The first option is to try to put some content into the concept of coercion. The problem with this option is that the narrow coercion analysis that the new majority will utilize outside the school context will almost never come into play with regard to any governmental program written with the assistance of a legal staff. In the new era it will be very easy for government to avoid imposing an overt legal sanction (which is the only way to violate the narrow coercion analysis), while still effectively advancing the religious interests of the political majority. It is frankly difficult to fathom how anything short of an actual legal mandate to attend church would violate the narrow coercion analysis. Any attempt to rely on the narrow coercion analysis to prevent governmental impositions on the religious liberty of dissenters is unlikely to succeed.

One way in which the existence of a narrow coercion limit on government advancement of religion may have an indirect impact on religious liberty litigation is through a requirement that individuals be allowed to opt out of any government-sponsored religious exercise. This opt-out requirement could be important in several different contexts. In the endorsement context, the Constitution should mandate that adults be allowed to opt out of any religious component of official ceremonies. The Court has already implicitly assumed that adults have the right to opt out of such exercises by noting that adults in such circumstances are "not readily susceptible to 'religious indoctrination,' or peer pressure."[161] That assumption should be made an explicit constitutional mandate, in the sense that in the absence of an opt-out

161. *Marsh*, 463 U.S. at 792 (upholding officially sanctioned prayer in a state legislature) (citations omitted).

right, the government is in effect forcing the participant to engage in a religious exercise on pain of giving up the right to participate in government activities—which looks like the coercion of religious orthodoxy "by force of law and threat of penalty."[162]

An even more important application of the opt-out requirement would be in the growing area of faith-based educational and social services. The government should be required to provide an opt-out in such programs in order to avoid direct coercion of religion in government-financed religious educational and social service programs. In the broad form of this argument, the government should be obligated to give aid recipients the option of receiving social services or educational benefits from an equally convenient and qualified secular provider. In the narrow form of this argument, the First Amendment should require the religious provider of government financed services to provide a mechanism for aid recipients to opt out of any religious component of the program.[163] If protecting the religious independence of aid recipients is a foremost concern, the narrow form of the opt-out argument will be far less satisfactory than the broad form of the argument, in the sense that the narrow form of the argument would allow the government to force some aid recipients to submit to a pervasively religious atmosphere in order to receive the benefits to which they are entitled. Nevertheless, some form of an opt-out requirement can be viewed as a logical extension of the narrow coercion standard, and in fact may be the only remaining protection under that standard.

A third option for protecting religious liberty under the new Establishment Clause paradigm is to abandon attempts to enforce the Establishment Clause altogether and focus instead on attempting to enforce the protections of religious dissenters under the Free Exercise Clause. There are several problems with this approach. The main problem is that the Free Exercise Clause is far less protective today than it was a decade ago. Under *Employment Division v. Smith*,[164] the Free Exercise Clause does not prevent the government from applying to religious practitioners a "'valid and neutral law of general applicability.'"[165] The Court may apply such laws even in the absence of a compelling interest to support the law.[166] This concept of "general applicability" contains a neutrality requirement that, in its free exercise form, takes the form of an anti-discrimination principle. As the Court summarized the rule in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*:[167] "[I]if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is

162. *Lee*, 505 U.S. at 640 (Scalia, White, Thomas, JJ. & Rehnquist, C.J., dissenting) (emphasis omitted).

163. For a consideration of the opt-out requirement in the context of various different types of government aid programs, see Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & Pol. 539, 575–83 (2002). In the educational context, the Cleveland voucher program upheld by the Court in *Zelman* did not include an opt-out provision. *See Zelman*, 536 U.S. 639. The statute authorizing a similar program in Wisconsin prohibiting private schools receiving government funds "from requiring 'a student attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities.'" *Jackson v. Benson*, 578 N.W.2d 602, 609 (Wis. 1998).

164. 494 U.S. 872 (1990).

165. *Id.* at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n. 3 (1982)).

166. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

167. *Id.*

invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[168]

The question is whether this anti-discrimination principle can be used to challenge legislation adopted under the new, lenient Establishment Clause principle that the government has the authority to act in ways that advance a particular brand of religion. The answer is almost certainly "no." Governmental actions that endorse religion or finance religious activities and institutions do not target specific actions of the nonadherent or the nonreligious in ways that would bring those actions within the scope of the Free Exercise Clause. The spirit of such actions is largely indistinguishable from the spirit of the City of Hialeah's attacks on the Santerian practitioners in *Hialeah*,[169] but in the absence of specific legislation targeting specific acts of the disfavored religious groups, the Free Exercise Clause will be just as useless as the empty husk of the Establishment Clause.

V. CONCLUSION

One of the surprising things about the proponents of the new Establishment Clause paradigm is how honest they have been about their objectives. In earlier attacks on the concept of separation of church and state—which is the cornerstone of the existing Establishment Clause paradigm—the argument was that the separation principle inhibited the religious liberty of the faithful, and therefore should be abandoned in favor of a regime in which the government may openly and willingly accommodate religion.[170] Under the more recent attempts to defend the new paradigm, however, the pretense of universal religious liberty has been dropped. The new rationale for abandoning the separationist ideal is an unabashed claim that the religious majority should have the authority to use the government to advance its interests though both official endorsements of its symbols and ideals, as well as government financing of its sectarian activities. Likewise, the mechanism for pursuing this end has gone beyond simple accommodation, in favor of a theory that would allow the government to advance the religious majority's goals outright.

From a purely self-interested perspective, only someone who is certain that they will always belong to the religious majority would sensibly advocate the sort of extensive government entwinement with religion proposed by the new Establishment Clause paradigm. The campaign for the new paradigm is advanced primarily by Christians, whose religious institutions will undoubtedly enjoy the fruits of their legal successes for the indefinite future. Under the new paradigm, the government is likely to become even more imbued with Christian ideals than it already is. Assuming that the recipients of government aid will mirror the numbers of adherents in society, the new streams of government funds that will soon be available to religious organizations will also—at least for the immediate future—largely operate to finance activities associated with various Christian sects.

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168. *Id.* at 533.

169. *See id.* at 524–28.

170. *See* Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 Utah L. Rev. 639, 640–41 (1999).

But the country is not standing still, and religious demographics are rapidly shifting. It is difficult to foresee what the country will look like in fifty years. The largest "religious" group in the western states is now comprised of people who say they are nonreligious.[171] Meanwhile, the fastest growing organized religious sect in the country is Islam—which has its own millenarian adherents and many now-familiar fundamentalist strains that could use extra sources of government funds to help them grow.[172] At the same time, the nature of Christian religious worship is itself being changed by the migration of adherents away from a traditional form of devotion to a particular sect and toward a "consumerist" grazing among generic megachurches.[173] For the foreseeable future, the country's traditional organized Christian sects will benefit from the elimination of barriers to using the government for their own ends. But it does not take much imagination to understand that their descendants may live to regret their current victories.

171. *See ARIS Survey*, *supra* n. 63, at ex. 15, http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm.

172. According to the *ARIS Survey*, the number of individuals identifying themselves as Muslim grew 209% from 1990 to 2001, while during the same period the number of individuals identifying themselves as members of a Christian sect only grew approximately 5%, and the number identifying themselves as Jews actually went down approximately 10%. *Id.* at ex. 1, http://www.gc.cuny.edu/faculty/research_briefs/aris/key_findings.htm.

173. *See* Neela Banerjee, *Going Church to Church, Teenagers Seek Faith that Fits*, 155 N.Y. Times A1 (Dec. 30, 2005).