WHEN IS RELIGIOUS SPEECH NOT "FREE SPEECH"?

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Advocates of religious speech have strategically used the First Amendment's Free Speech Clause to undermine the limitations on speech in the First Amendment's Establishment Clause. In the face of these constitutional challenges, courts confronting the issue of religious free speech rights throughout the country have come to divergent conclusions. Because limits on religious speech are necessary to promote religious liberty, Professor Gey argues that religious speech should be treated differently than other types of speech under the First Amendment. Specifically, he suggests that courts confronting Establishment Clause issues should adopt an "opt-out" rule, whereby private religious expression at a government forum violates the Establishment Clause if the court finds that an individual must opt out of a government benefit to avoid participating in the religious expression.

Professor Gey points out that the opt-out rule would not bar all private religious expression from government forums; it would only bar private religious speech that dominates the forum such that nonadherents must forgo access to the forum or be forced to participate in the religious exercise. This rule, he argues, would be consistent with the limitations that the Supreme Court has set forth in Windmar v. Vincent *and* Board of Education v. Mergens*. Thus, local officials may permit private religious expression when it is offered in a manner that allows parties who are predisposed to participate to opt into the religious exercise. Yet it also imposes a duty on public officials to prevent private individuals from using a government forum to impose religious pressure indirectly by creating a gauntlet for religious dissenters.*

During the last two decades, courts throughout the country have confronted a variety of cases involving disputes over the free speech rights of religious practitioners. These disputes occur in many different contexts. For example:

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— In New Jersey, a federal court, "in the spirit of protected speech,"[1] overturned a local school board decision permitting graduating high school students to include a prayer in their graduation ceremony.

— In Dickson, Tennessee, public school officials refused a student permission to submit a paper on "The Life of Jesus Christ" as the subject of a research paper in a ninth-grade English class.[2]

— In Denver, Colorado, public school authorities ordered a fifth-grade teacher to remove religious books from a classroom library and directed the teacher to keep his Bible out of sight and refrain from silently reading it during a class reading period.[3]

— In Albuquerque, New Mexico, administrators of a city-owned senior center prevented a church from showing a two-hour movie urging the adoption of the Christian faith.[4]

— In Columbus, Ohio, a city parks board refused an applicant permission to erect a Latin cross to celebrate Christmas in a plaza next to the state capitol.[5]

— In Roslyn, New York, a school board applied a religious discrimination regulation to prohibit a student group from restricting officers of the group to "'professed Christians' and those who have 'accepted Jesus Christ as savior.'"[6]

The religious practitioners in all six of these cases argued that the restrictions violated their free speech rights. The courts rejected the free speech claims in the first three cases and upheld similar claims in the last three cases. It is difficult to explain the divergent results. The lower court decisions certainly fail to do so, and the Supreme Court's occasional efforts in the area of religious free speech are muddled and contradictory.

The protection of religious speech under the First Amendment is complicated by the background of strategic litigation against which free speech claims are now being raised. In some cases involving religious speech, the free speech claims appear to represent legitimate responses to attempts by overzealous officials to freeze even innocuous religious speech out of public forums. In other cases, however, free speech arguments are being used as part of a concerted effort to reduce or eliminate Establishment Clause restrictions on the intermingling of church and state. Jay Sekulow, chief counsel for Pat Robertson's American Center for Law and Justice, specifically cited this strategy in a recent interview with *The New York Times*.[7] Sekulow told the *Times* that "the free speech strategy has proven effective with judges across the ideological spectrum

1. ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1475 (3d Cir. 1996).
2. *See* Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995).
3. *See* Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990).
4. *See* Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996).
5. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).
6. Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839, 850 (2d Cir. 1996).
7. *See* Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at A1.

against opponents who rely on the First Amendment's clause against the establishment of religion."[8] This strategic use of free speech arguments has been especially prominent in efforts by Pat Robertson's group and others to reintroduce prayer into public schools. The free speech claim is also a major factor in cases in which religious groups seek to engage in religious exercises—including weekly worship services[9]—in public parks and buildings. In many of these cases—including some decided by the Supreme Court—Establishment Clause concerns regarding state endorsement of religion have been avoided or minimized simply by treating the cases as indistinguishable from cases involving political, social, or artistic speech.

This article challenges the routine assumption that religious speech should always be treated the same as other types of speech under the Free Speech Clause of the First Amendment. This challenge is based on the conclusion that the presence of the Establishment Clause in the First Amendment requires courts to treat religious speech differently than other types of controversial speech when that speech occurs on government property or in some other context that associates the religious speech with the government. In other words, the First Amendment itself limits the extension of free speech protection to religious speech whenever that protection would undermine the separation of church and state that the Establishment Clause requires. Although this premise may initially seem both unusual and hostile to the central First Amendment goal of protecting religious liberty, in reality the Supreme Court itself has recognized that religious speech poses special dangers for a pluralist democracy. This recognition has often motivated the Court to permit greater restrictions on religious speech than on speech pertaining to nonreligious matters. The paradox is that these restrictions are necessary precisely to preserve the essential conditions in which religious liberty may flourish. This article explains that paradox and attempts to define its scope.

The first part of the article outlines the key constitutional concerns raised by religious speech on public property and reviews the Supreme Court's meandering approach to the issue of First Amendment protection of religious speech. The second part analyzes the constitutional treatment of public employees' religious speech, the most obvious context in which individual expression will be associated with the government. This part also addresses the overlap between religious free speech arguments on behalf of government employees and the countervailing limits imposed on such speech by the longstanding Establishment Clause prohibition of government policy motivated by a religious purpose.

8. *Id.*

9. *See* Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) (upholding a school board's refusal to permit weekly religious services in the auditorium of a public middle school).

The third part analyzes the much more difficult issue of constitutional protection for the religious speech of private persons on government property. In a society where most communities will be dominated by one or a very limited number of faiths, when should the courts attribute private religious speech to the government? Putting the question another way, does the Establishment Clause somehow limit the constitutional protection of private religious speech under the Free Speech Clause in situations where religious dissenters are likely to attribute the private speech to the government? Contrary to the implications of several recent Supreme Court decisions, in many contexts where private speakers use government property to communicate a religious message, dissenters will logically attribute that message to the government. In such contexts, permitting unfettered use of government property to engage in religious speech would undermine both secular political values and religious liberty by linking the government with impermissible religious goals and activities. Widespread use of government property to communicate religious messages would also create a risk (already realized in many jurisdictions) that an aggressive religious majority could effectively dominate the use of public facilities and forums, thus undermining the central Establishment Clause requirement of government neutrality regarding religious matters. The third part of the article concludes with some suggestions as to how the Establishment Clause treatment of private religious speech should be adjusted to take account of this reality.

The fourth part is a brief reminder of why the Constitution treats religion differently than every other type of idea the expression of which is protected by the First Amendment. This part defends the view that religious influence over the political structure is antidemocratic in the sense that religion is contrary to three basic aspects of democratic governance. First, religion relies on unquestioning faith rather than logic, skepticism, and critical judgment; second, religion seeks to identify absolute and everlasting truth rather than accommodate itself to the fluid, preliminary, and temporary reconciliation of fundamentally inconsistent values; and third, religion locates the primary source of authority over individual behavior outside the human sphere rather than depending (as democratic government must) on the preeminence of human agency. The discussion in part four elaborates on these traits and asserts them as the main reason the Constitution imposes restrictions on religious speech whenever that speech has the effect of consolidating or furthering the dominance of religion over the secular prerequisites of democratic politics.

I. THE SUPREME COURT'S UNCERTAIN APPROACH TO RELIGIOUS SPEECH

For many years, the Supreme Court has been of two minds about the First Amendment treatment of religious speech. On one hand, absolute statements about the need to treat religious speech no differently

than speech on any other subject are scattered throughout the Court's decisions concerning both the Establishment and Free Exercise Clauses. The Court has summarized the tone of its cases in this way:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing.[10]

This quote suggests, and the Supreme Court elsewhere has expressly held,[11] that the equal treatment of religious speech extends to actual worship as well as to more informal varieties of religious expression.

By providing an independent secular purpose and effect, the equal-treatment principle overrides the Establishment Clause-based concern that a bystander observing an instance of private religious expression on government property might perceive that the government endorses the religious expression. In the public university context, for example, the Supreme Court has held that religious speech in university facilities "does not confer any imprimatur of state approval on religious sects or practices" because an observer would understand that the First Amendment obligates university administrators to permit all nondisruptive speech, including religious speech.[12] The Court has also held in the public secondary school context that "prohibition of discrimination on the basis of 'political, philosophical, or other' speech as well as religious speech is a sufficient basis for meeting the secular purpose [requirement of the Establishment Clause]."[13] The theme of all these decisions is that "[t]here is

10. *Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

11. *See* Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) (expressing the view that there is "no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts . . . than for religious worship by persons already converted").

12. *Id.* at 274.

13. Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (upholding the federal Equal Access Act, creating a "limited open forum" in secondary schools, and prohibiting discrimination against the use of school facilities for religious expression). The secular purpose requirement is part of the so-called *Lemon* test. The *Lemon* test is derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which defined a three-part test that has dominated all subsequent discussions of the Establishment Clause. Under the *Lemon* test, the Establishment Clause requires that a statute or government activity "[f]irst, have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; [and third, it] must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612–13.

It is no longer clear whether a majority of the Supreme Court supports the consistent application of the *Lemon* test. Four current Justices have criticized *Lemon* and likely would support abandoning *Lemon* altogether. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397–98 (1993) (Scalia, J., joined by Thomas, J., concurring in the judgment); County of Allegheny v. ACLU, 492 U.S. 573, 655–56 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 108–13 (1985) (Rehnquist, J., dissenting). Justice O'Connor might provide the necessary fifth vote for such a decision. Although Justice O'Connor is the primary proponent

a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[14]

The strong equal-treatment language in the religion cases is bolstered by the Supreme Court's staunch and consistent opposition to government regulation of either the content or viewpoint of speech. "The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."[15] In the modern constitutional era, the Court has insisted that "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."[16] The Court has been especially vigilant where the government seeks to suppress particular points of view, as opposed to regulating all viewpoints about a particular subject matter. Governmental efforts "to exclude the expression of certain points of view from the marketplace of ideas . . . are so plainly illegitimate that they would immediately invalidate the [First Amendment]."[17] Viewpoint regulations are "thus an egregious form of content discrimination"[18] and are essentially unconstitutional per se.

These broad statements seem to leave little room for arguments that the First Amendment permits (and sometimes requires) different treatment of religious speech. And yet treating religious speech differently than other types of speech is precisely what a majority of the Court has always done. The Court would not have decided the school prayer[19] and school Bible-reading[20] cases if religious speech were not more constitutionally problematic than other types of speech. If private religious speech is protected to the same extent as nonreligious speech, then why did all but one member of the Supreme Court hold unconstitutional a

of an endorsement analysis that is adapted from *Lemon*, *see Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring), she has also suggested that the Court should abandon *Lemon*'s "unitary approach" in favor of an ad hoc approach to different Establishment Clause problems. *See* Board of Educ. v. Grumet, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring). To further complicate matters, while this article was in press, six members of the Supreme Court relied on the *Lemon* secular purpose analysis to strike down a Santa Fe, Texas policy permitting public school students to vote to include prayer at high school football games. *See* Santa Fe Indep. Sch. Dist. v. Doe, No. 99-62, 2000 U.S. LEXIS 4154, at *42 (June 19, 2000). Justices Kennedy and O'Connor were part of this six-member majority. The majority's decision led Chief Justice Rehnquist to object in his dissent that the Court had applied "the most rigid version of the oft-criticized test of *Lemon v. Kurtzman*." *Id.* at *50 (Rehnquist, C.J., dissenting). For further consideration of the arguments for and against the secular purpose prong of *Lemon*, see *infra* notes 85–155 and accompanying text.

14. *Mergens*, 496 U.S. at 250 (O'Connor, J., concurring).

15. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

16. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

17. City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

18. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

19. *See* Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting prayer in public school classrooms).

20. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional state statutes permitting students to read Bible verses over the intercom at public schools).

school board's decision to allow students to individually select and read ten Bible verses over the public address system at a public school?[21] The Supreme Court devoted precious time and resources to deciding the school prayer and Bible-reading cases only because an overwhelming majority of the Court recognized that religious speech creates dangers for a political democracy different from the dangers posed by any other type of speech. The religious subject matter alone made the speech in these cases problematic. The differential treatment of religious speech in these cases was not inadvertent. Justice Stewart's lone dissent in the school prayer case specifically rested on the argument that the majority decision improperly attributed private speech to the state: "I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."[22]

The differential treatment of religious and nonreligious speech that first appeared in the school prayer cases has been reaffirmed repeatedly in more recent cases. In *County of Allegheny v. ACLU*,[23] for example, the Court held unconstitutional the placement of a privately owned crèche inside a public courthouse, even though the religious display contained a sign noting that a Roman Catholic organization owned the crèche.[24] The Court held that the private nature of the religious speech did not negate the constitutional violation, ruling that "the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations."[25]

Likewise, in *Capital Square Review and Advisory Board v. Pinette*,[26] five members of the Court explicitly rejected the four-Justice plurality's theory that "[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[27] As Justice O'Connor noted in response to the *Pinette* plurality opinion, "our prior cases do not imply that the endorsement test [for Establishment Clause violations] has no place where private religious speech in a public forum is at issue."[28] Thus, "we have on several occasions employed an endorsement perspective in Establishment Clause cases where private religious conduct has intersected with a neutral governmental policy providing some benefit [to religious speakers]."[29] In

21. *See id.*
22. *Vitale*, 370 U.S. at 445 (Stewart, J., dissenting).
23. 492 U.S. 573 (1989).
24. *See id.* at 600.
25. *Id.*
26. 515 U.S. 753 (1995).
27. *Id.* at 770 (plurality opinion).
28. *Id.* at 775 (O'Connor, J., concurring).
29. *Id.* at 774.

short, "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism."[30]

In sum, the Court insists in some cases in nearly absolute terms that religious speech is constitutionally indistinguishable from every other type of private speech, yet in other cases a majority of the Court resoundingly rejects this concept. What explains these apparent contradictions in the Supreme Court's attitude toward limitations on private religious speech on public property or in other contexts where some relationship exists between the government and the private speaker? What leads Justice O'Connor to note that she is unlikely to hold private religious speech unconstitutional "where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly,"[31] while simultaneously insisting that the Establishment Clause may prohibit precisely that? The explanation for this contradiction lies, I believe, in the Court's inability to reconcile its recently more favorable attitude toward permitting religious speech in public places[32] with two central elements of Establishment Clause jurisprudence that the Court cannot explain away or abandon without fundamentally altering the basic structure of its church/state jurisprudence. These two elements are: (1) the phrasing of the First Amendment itself and (2) the fear that (at least in many parts of the country) one or a small number of dominant religious factions will seize control of the apparatus of public discourse if permitted to operate unfettered in an atmosphere of ostensible governmental neutrality toward religious speakers. A closer examination of the Court's own recognition of these factors provides a framework for explaining why religious and nonreligious speech must be treated differently under the First Amendment.

Justice Kennedy acknowledged the problem posed by the First Amendment's phrasing in his opinion for the majority in the graduation prayer case, *Lee v. Weisman*.[33] In *Lee*, the Supreme Court held unconstitutional the inclusion of a prayer given by a local rabbi in a public high school graduation ceremony.[34] The high school defended the prayer on free speech grounds, arguing that:

> exclusion of speech because of its religious content would seem to violate the free speech and free exercise rights of the speaker and his audience. . . . Similarly, depriving students who are religious of this kind of expression at their graduation solely because it is relig-

30. *Id.*

31. *Id.* at 775.

32. For examples of the Court's recent tendency to permit religious speech on public property, see *id.*; Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

33. 505 U.S. 577 (1992).

34. *See id.* at 597.

ious signals a government disapproval of religion that is also contrary to the Establishment Clause.[35]

In response, Justice Kennedy emphasized the special treatment of religion within the text of the First Amendment itself, and he noted that the school board's argument overlooked "a fundamental dynamic of the Constitution."[36] Justice Kennedy then explained this special dynamic:

> The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, 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.[37]

At least this much of Justice Kennedy's message in *Lee v. Weisman* is clear: the government cannot facilitate private prayer in circumstances that force dissenters to assent to that which they do not believe. The fact that much of the peer-group pressure on Deborah Weisman to abide the prayer was imposed by nongovernmental actors (i.e., her classmates and their parents) did not eliminate the constitutional offense. As the Court held, "the government may no more use social pressure to enforce orthodoxy than it may use more direct means."[38]

The reference in Justice Kennedy's *Lee* opinion to "the lesson of history that was and is the inspiration for the Establishment Clause"[39] refers to the second key element of Establishment Clause jurisprudence—the persistent fear that one religious faction will seek to dominate society in ways that diminish the religious freedom of those who do not belong to the dominant faith. This fear was a central theme of public discourse about religious liberty even before the First Amendment was written. The tendency of religious factions to accumulate and then abuse power is what James Madison had in mind when he wrote that "it is proper to

35. Brief for Petitioners at 44 n.42, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014).
36. *Lee*, 505 U.S. at 591.
37. *Id.* at 591–92 (citations omitted).
38. *Id.* at 594.
39. *Id.* at 591.

take alarm at the first experiment on our liberties"[40] to avoid the inevitable results of religious establishments. Madison also enumerated what those results were likely to be: "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."[41]

Madison's observations place the matter in a harsh light, but the general point is not controversial. In *Lee*, Justice Kennedy recognized that:

> [t]he lessons of the First Amendment are as urgent as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.[42]

The question is not, therefore, whether religious establishments constitute a threat to religious liberty but rather whether the term "state-sponsored religious exercises" covers private religious speech that takes place on government property or is facilitated by government resources. Justice Kennedy's own shifting stance illustrates how nettlesome this issue can be. In *Lee*, Justice Kennedy wrote a strongly worded opinion rejecting the argument that prayer by a private individual at a public high school graduation ceremony constituted a permissible public expression of private religious faith.[43] In *Pinette*, on the other hand, Justice Kennedy joined Justice Scalia and two other Justices in arguing that private religious speech on public property could never constitute an impermissible establishment of religion if the public property is deemed a public forum.[44] And in *Rosenberger v. Rector and Visitors of the University of Virginia*,[45] Justice Kennedy wrote the majority opinion requiring the University of Virginia to use state-collected student activity fees to pay the publication costs of a private student religious magazine.[46] These unsatisfactory opinions present in microcosm the full Court's confused conclusions about the general permissibility of private religious speech in contexts in which that speech is associated with the government.

This article is an effort to address issues of religion and free speech in a more systematic manner than can be seen in the Supreme Court's own opinions. The remainder of the article discusses several specific con-

40. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 65 (1947).

41. *Id., reprinted in Everson*, 330 U.S. at 67.

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

43. *See supra* notes 33–41 and accompanying text.

44. *See* Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763–70 (plurality opinion).

45. 515 U.S. 819 (1995).

46. *See id.* at 843–44.

texts in which private religious speech can become associated with the government in a way that creates the same danger of factional domination and persecution as religious action undertaken overtly by the government itself. This article asserts that the phrasing of the First Amendment, coupled with the factionalism concern that has always characterized Establishment Clause jurisprudence, dictates that courts should treat religious speech differently than nonreligious speech in assessing free speech claims on government property or in other contexts where the danger of church/state association is prominent.

This approach to religious free speech issues can be illustrated briefly by noting a case that is discussed more fully in part III.[47] In *Jones v. Clear Creek Independent School District*,[48] the Fifth Circuit Court of Appeals upheld a graduation prayer that was analogous in most respects to the prayer the Supreme Court held unconstitutional in *Lee v. Weisman*. The single significant difference between the two cases is that in *Jones*, the graduating students at a public high school were allowed to vote on whether to have one of their members present a prayer at graduation, whereas in *Lee*, the school authorities made the decision to invite a member of the adult community to present the graduation prayer. The Fifth Circuit emphasized this distinction in upholding the "voluntary" prayer.[49] According to the Fifth Circuit, the decision to have a graduation prayer in *Jones* was a private and not a governmental decision.[50] Students who objected to the prayer could not complain about an Establishment Clause violation, the court held, "because a graduating high school senior who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer will understand that any religious references are the result of student, not government, choice."[51] The court also held that the vote had eliminated the element of coercion the Supreme Court had found in *Lee*. "[A]fter having participated in the decision of whether prayers will be given, [the losing students] are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy."[52] This analysis led the court to conclude that "[b]y attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards."[53]

47. *See infra* notes 188–243 and accompanying text.

48. 977 F.2d 963 (5th Cir. 1992).

49. *See id.* at 968–69.

50. *See id.*

51. *Id.* at 969 (emphasis omitted).

52. *Id.* at 971 (emphasis omitted).

53. *Id.* at 972. The continuing vitality of the *Jones* rule is highly doubtful after the Supreme Court's decision in *Santa Fe Independent School District v. Doe*, No. 99-62, 2000 U.S. LEXIS 4154 (June 19, 2000). In *Santa Fe*, the Supreme Court rejected a Texas school district's arguments that a student vote to include prayer before public school football games rendered the prayer a matter of private speech not subject to Establishment Clause restrictions. *Id*. at *21–*25.

This conclusion is difficult to reconcile with Justice Kennedy's caveat in *Lee* that "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever . . . to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[54] Justice Kennedy's point (reinforced in other parts of *Lee*, in which he emphasizes the significance of "private" peer group pressure on dissenters)[55] is that a constitutional violation is possible even if the state itself is not the direct agent of the religious exercise. State inaction is just as important as state action if that inaction can reasonably be perceived as an endorsement of religious beliefs. The Fifth Circuit directly flouted this concept when it denied the constitutional claims of religious dissenters on the ground that the intolerance directed at them at a public school graduation was that of "the community" rather than "the government." In contexts such as public high school graduation, "the community" is indistinguishable from "the government" when "community standards" take a religious form, and the adherents of a particular faith overwhelmingly dominate a government-owned or -operated forum.

Relying on false distinctions between "the community" and "the government" to permit otherwise unconstitutional religious exercises encourages the government to "contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself."[56] This does not mean that the Establishment Clause requires religious expression to be totally excluded from public forums where the religious presence is insignificant or the circumstances are such that claims of government endorsement are otherwise implausible. But recognizing that insignificant examples of religious speech in a public forum are unlikely to communicate governmental endorsement does not diminish the larger principle that the Establishment Clause is intended to prevent a religious majority from using its political power to dominate the lives of nonadherents to the majority faith. Having government actors impose the majority's faith is one way in which this political power can manifest itself, but it is not the only way. The next two parts will investigate the various ways in which private religious exercise implicates Establishment Clause restrictions. Part II addresses Establishment Clause limitations on religious speech by government employees. Part III addresses the much more difficult issue of Establishment Clause limitations on speech by private individuals on government property.

54. Lee v. Weisman, 505 U.S. 577, 592 (1992).

55. *See id.* at 589–90.

56. Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment).

II. RELIGIOUS SPEECH BY GOVERNMENT EMPLOYEES: FREE SPEECH AND THE "SECULAR PURPOSE" REQUIREMENT

It should not be difficult to articulate the rules regarding religious speech by government employees. After all, the Supreme Court routinely prohibits government action endorsing religion,[57] and public employees are the human face of government. Thus, if the government may not endorse religion, neither may government employees. This means that the speech of government employees will necessarily be limited when that speech touches on religion; "endorsement of religion" is nothing more than the intent or effect of communicating the message that the government favors religion,[58] and the clearest way to communicate that message is through religious speech by government employees. The prohibition of endorsement, therefore, inevitably entails the prohibition of religious speech by government employees. But these employees

57. *See, e.g.*, *Lee*, 505 U.S. 577 (1992) (prohibiting prayer at a public school graduation ceremony); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (prohibiting the placement of a religious display in a public building); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (prohibiting student Bible reading over public school intercom); Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting state-sanctioned prayers in public schools).

58. Justice O'Connor is the main proponent of the endorsement analysis. According to Justice O'Connor, the endorsement analysis requires the courts to assess (1) "whether government's actual purpose is to endorse or disapprove of religion" and (2) "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

At least four other Justices also maintain that the Establishment Clause prohibits state endorsement of religion, although the Justices vary in their articulation of the constitutional test for endorsement and in how rigorously they would apply the endorsement prohibition. *See* Agostini v. Felton, 521 U.S. 203, 242 (1997) (Souter, J., dissenting) (noting, in an opinion joined by Justices Stevens and Ginsburg, that "[t]he State is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement"); *Pinette*, 515 U.S. at 799–800 n.5 (Stevens, J., dissenting) (asserting that "[i]f a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display" and disagreeing with Justice O'Connor about the application of the "reasonable person" analysis to ascertain impermissible endorsements); *Pinette*, 515 U.S. at 818 (Ginsburg, J., dissenting) (noting that a disclaimer to a religious display in a public park "failed to state unequivocally that Ohio did not endorse the display's message").

Justice Breyer has not written separately in support of the endorsement analysis but has joined several opinions employing that analysis, including Justice Souter's concurrence in *Pinette*, in which Justice Souter specifically challenged Justice Scalia's attempt to limit the application of the endorsement analysis. *See id.* at 787 (Souter, J., concurring) ("[The] endorsement test cannot be dismissed, as Justice Scalia suggests, as applying only to situations in which there is an allegation that the Establishment Clause has been violated through 'expression by the government itself' or 'government action . . . discriminat[ing] in favor of private religious expression.'").

In the text accompanying this note, and throughout this article, I focus on speech that favors religion because this is the context in which religious free speech claims tend to arise. Like Justice O'Connor, however, I assume that the Establishment Clause prohibition of speech favoring religion would also apply to speech denouncing religion or advocating atheism. In the final analysis, the Establishment Clause simply requires the government to remain silent on issues of God, sin, the existence of a hereafter, and other religious issues. Thus, the restrictions proposed in this article should not be construed as hostility toward religion but merely recognition that religious discussions in the modern world properly should take place in the private sphere, outside the control and influence of government and the political process. For more on the characteristics of modern religion that support this conclusion, see part IV, *infra*.

have lives outside their jobs, and those lives are often deeply religious. So lines must be drawn between the employee's private life, which enjoys the same constitutional protection as every other private citizen, and the employee's role as a representative of government, which is bound by the limitations of the Establishment Clause.

The line between permissible and impermissible religious speech often depends on the function of the government employee in question. If the government employee is an executive or administrative official, for example, questions usually arise when the employee introduces religion directly into a job that is otherwise entirely secular in nature. These cases often involve public school teachers who introduce religion into their presentations of secular subjects.[59] More complicated issues arise when a public employee uses his or her office to promote religion in more subtle ways—by attending prayer services, publicly espousing religious beliefs, or otherwise symbolically incorporating religion into the official's public persona. Although the speech may take place during off-duty hours or on private property, the employee's role in government nevertheless creates the risk that the public will perceive an official endorsement of religion.

These problems are potentially even greater when the government official in question is responsible for making policy, rather than simply enforcing it. If a policy-making official explicitly relies on religious grounds as a justification for proposing or supporting a particular policy, this action in itself commingles religion and government action in direct violation of the Establishment Clause. There has been much academic debate over whether and how much policy-making officials should be permitted to base policy choices on their religious views; this debate will be discussed briefly below. But the central focus of this article is somewhat different than the arguments presented in other academic treatments of the matter. This article focuses on the question of whether religious expression receives the same protection under the Free Speech Clause as nonreligious speech. The short answer to this question with regard to the religious speech of executive and administrative public employees is that such employees receive some free speech protection for their purely private religious expression unless that speech is attributable to the government. The short answer with regard to policy-making public employees is that the Free Speech Clause provides no protection whatsoever for their ability to use religion as the basis for devising public policies. The following two subparts elaborate on these conclusions.

59. The term "executive or administrative official" in this section simply designates an official who is not involved in the making of policy. Thus, although public school teachers are not technically executing or administering the law in the same manner as a policeman or a cabinet officer, they nevertheless fall within this classification since their job does not involve policymaking.

A. Religious Speech by Government Administrators

Disputes over the free speech protection of religious speech by government administrative or executive officials arise in two contexts. The first involves government employees who express religious views while undertaking the duties of their government jobs. This is the easiest context to address, because personal religious expression or activity will never be relevant to the duties of a government job (since government agents are prohibited by the Establishment Clause from engaging in religious activity as part of their official duties) and will usually be incompatible with the legitimate duties of that job. Thus, as explained more fully below, the Establishment Clause imposes a virtually absolute rule prohibiting government employees from engaging in religious expression while on the job.

The second context in which these issues arise is more complex. This context involves public religious speech by government administrative or executive officials acting off government property and during their off-duty time. The rules regarding this type of government-employee religious speech cannot be as rigid as the rules regarding speech by government employees on the job, but Establishment Clause rules prohibiting government endorsement of religion still require limitations on after-hours religious speech by government officials when the official's rank is so high that the official's speech will be attributed to the government or when a lower-level official's speech becomes part of a specific religious faction's pattern of political domination. The next two subparts discuss the different rules that should apply to on- and off-duty religious speech by government administrative or executive employees.

1. Religious Speech by Government Administrators on the Job

Most examples in the case law of on-the-job religious speech by government administrative employees involve public school teachers who have expressed their personal religious views in the classroom during official class time. The cases usually arise after a teacher has been sanctioned for injecting religion into class discussions after warnings by school officials not to do so. Some of the cases involve flagrant violations of Supreme Court precedents prohibiting the inculcation of religion in public school classrooms. For example, in one case a teacher was removed from the substitute teacher list after several complaints that he had "proselytized in his classes by reading the Bible aloud to middle and high school students, distribut[ed] Biblical pamphlets, and profess[ed] his belief in the Biblical version of creation in a fifth grade science class."[60] In cases like this, the courts have little choice but to reject the teacher's claim that the sanction violated the teacher's First Amendment free

60. Helland v. South Bend Community Sch. Corp., 93 F.3d 327, 329 (7th Cir. 1996).

speech rights. Existing precedents prohibiting official prayer[61] and Bible reading[62] in public schools would be unenforceable if state employees could circumvent these precedents simply by presenting their personal religious views in a public school classroom. Likewise, courts have no choice but to reject free speech challenges to public school directives requiring teachers to teach only secular perspectives on science or other subjects.[63] The Supreme Court has held that state legislatures may not mandate the inclusion of religious doctrine in a public school curriculum as part of a democratically enacted policy;[64] certainly a public school teacher cannot avoid these rulings by injecting the forbidden material into the curriculum via individual fiat.

These easy cases are not difficult to reconcile with current free speech doctrine. The Supreme Court has developed an increasingly restrictive approach to the free speech rights of public employees in recent years,[65] and the lower courts have aggressively applied this law to public school teachers.[66] The modern standard for public employee speech balances the interests of a public employee in speaking about a matter of public concern against the government's interest in avoiding disruption in the workplace and promoting the efficient provision of public services.[67] Other precedents provide public school officials extensive authority to dictate the contents of the public school curriculum and regulate any other "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[68] Under current law, public school authorities may, therefore, regulate or even prohibit certain student and teacher speech "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[69]

61. *See* Engel v. Vitale, 370 U.S. 421 (1962).

62. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

63. *See* Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994) (rejecting a teacher's claim that the school system had violated his free speech rights by requiring him to teach the theory of evolution).

64. *See* Edwards v. Aguillard, 482 U.S. 578, 597 (1987) (overturning a Louisiana law requiring "equal time" for creationism whenever evolution is taught in a public school); Epperson v. Arkansas, 393 U.S. 97 (1968) (overturning an Arkansas law prohibiting the teaching of evolution).

65. *See infra* note 67 and accompanying text.

66. *See infra* note 69.

67. *See* Connick v. Myers, 461 U.S. 138, 146 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

68. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

69. *Id. Hazelwood* involved restrictions on student speech, but the case has been cited by lower courts to justify regulation of teacher speech as well. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998) (citing *Hazelwood* in rejecting a teacher's complaint that the school system had violated her First Amendment rights in retaliating against her selection of a controversial play for a high school acting class); Miles v. Denver Pub. Schs., 944 F.2d 773, 775 (10th Cir. 1991) (citing *Hazelwood* to uphold discipline of a teacher for in-class comments concerning rumors about student sexual activities at school); Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 801 (5th Cir.

With regard to nonreligious subjects, there is abundant cause for concern that these recent cases have unnecessarily limited the speech of public school teachers and students and limited if not negated the Supreme Court's long-standing dictum that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[70] But these concerns are significantly diminished when the speech is religious in nature because a majority of the Supreme Court continues to hold that the First Amendment's Establishment Clause itself imposes on government a constitutional obligation to avoid endorsing religion.[71] This mandate necessarily requires public school personnel to avoid certain types of speech—for example, speech communicating favoritism toward a particular religion or religion in general—and this mandate cannot be carried out without limiting the religious speech of individual government employees such as teachers. Moreover, this mandate is absolute; it amounts to a structural bar on all religious favoritism, without regard to the immediate effect such favoritism has on students (that is, for example, without regard to whether the teacher's speech coerces any particular student into changing his or her religious views).[72] The government interest in limiting on-the-job employee speech in religion cases is, therefore, much stronger, clearer, and more definitive than the flimsy evidence of disruption that often characterizes the nonreligious government employee and student speech cases.[73]

1989) (citing *Hazelwood* to reject a teacher's First Amendment claim where the teacher's contract was not renewed after he used an unapproved supplemental reading list in his history class). Therefore, in the lower courts, *Hazelwood* has been combined with *Connick* to provide school authorities with extensive authority to regulate all aspects of the educational curriculum and atmosphere.

70. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); s*ee also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

71. *See supra* note 55.

72. Several Justices, including Justice Scalia and Justice Kennedy, have proposed abandoning the structural limitations of the *Lemon* test and the endorsement analysis in favor of an empirical Establishment Clause analysis that would focus on whether a government action resulted in actual coercion of religious belief or practice. The exact parameters of this analysis are unclear even to its proponents, as illustrated by Justice Kennedy's shifting position on the question of what constitutes "coercion." *See* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 490–510 (describing Justice Kennedy's shifting definition of "coercion" and explaining the dispute between Justices Scalia and Kennedy on that subject). For present purposes, however, it is enough to note that although no Establishment Clause analysis commands a majority of the present Court, it is at least clear that a majority of the Court has rejected the coercion analysis in favor of retaining structural limits on government establishments of religion that do not depend on factual proof that a given government action has resulted in measurable changes in individual religious conduct or belief. Thus, a majority of the Court adheres to the basic theoretical commitment to church/state separation that has been the foundation of modern Establishment Clause decisions since 1947. *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (the first modern Establishment Clause decision, in which the Court set forth a separationist theory of the First Amendment); *see also supra* note 58 (describing a majority of the Justices' support for constitutional prohibition of government endorsement of religion).

73. Neither *Connick* nor *Hazelwood* involved speech that created actual disruption. *Connick* involved the termination of an employee whose offending speech involved the distribution to 15 other employees (all lawyers) of a questionnaire soliciting their views on various office policies. *See* Connick v. Myers, 461 U.S. 138, 141 (1983). *Hazelwood* did not involve even the allegation of disruption. In that case, a high school principal barred student journalists from publishing two stories in the school

The nature of the constitutional mandate in these cases requires a rule that goes beyond simply prohibiting a rogue teacher from openly flouting the constitutional limits on classroom behavior in obvious ways. To be effective, the rule must extend to more subtle but equally problematic behavior by state officials acting in their official capacities. Several examples of this sort of behavior exist in the case law. For example, in *Roberts v. Madigan*,[74] a teacher at a public elementary school was barred from subtly communicating his religious views to his students.[75] The teacher did this in several ways. He kept a Bible on his desk throughout the school day; he read from the Bible in front of the students during a daily fifteen-minute silent reading period; he kept a poster in the classroom with the caption "You have only to open your eyes to see the hand of God;" and he kept two Christian religious books on the shelves of his classroom library.[76] In *Bishop v. Aronov*,[77] an exercise physiology professor at a public university made a series of religious remarks to his class (including the statement "I personally believe God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness"), and during final exams, the professor organized an after-class meeting on religious topics, which was attended by several of his students.[78] In *Peloza v. Capistrano Unified School District*,[79] a high school biology teacher denied the theory of "evolutionism" that was a central component of the school's science curriculum and discussed his religious views with students during the school day.[80]

In each case where the schools ordered the teachers to cease their religious activities, the teachers responded by filing a lawsuit premised on claims of free speech, and the courts rejected those claims and ruled in favor of the schools. These decisions, from three different federal circuits, indicate that the rules regarding on-the-job religious speech by public school teachers are already quite strict. In *Roberts*, the teacher did not even speak to his students but rather communicated his religious

newspaper after the principal concluded that certain aspects of the stories were inappropriate. *See Hazelwood*, 484 U.S. at 263. In another school speech case where disruption was an issue, the Court upheld sanctions against a student speaker who had given a student government campaign speech that contained some mild double-entendre. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986). The full text of the speech is reprinted in Justice Brennan's opinion. *See id.* at 687 (Brennan, J., concurring in the judgment). The "disruption" that justified the sanction in *Fraser* involved nothing more than predictable responses of the speaker's student audience. According to the record in the case, several members of the audience "hooted and yelled," and others "appeared to be bewildered and embarrassed" by the student's speech. *Id.* at 678.

74. 921 F.2d 1047 (10th Cir. 1990).
75. *See id.* at 1059.
76. *Id.* at 1049.
77. 926 F.2d 1066 (11th Cir. 1991).
78. *Id.* at 1068–69.
79. 37 F.3d 517 (9th Cir. 1994).
80. *See id.* at 519–20, 522.

views through silent, though clearly religious actions.[81] In *Bishop*, the professor prefaced his remarks by labeling them his "personal 'bias,'"[82] thus denying any implication of institutional endorsement. In *Peloza*, the teacher objected most strenuously to his school's orders that he not discuss his personal religious views with students even at lunch break and even if the students initiated the discussion.[83] Each of the teachers in these cases was careful to avoid attributing their personal religious views to their schools and thus ostensibly avoided the state-endorsement issue. Nevertheless, the courts rejected the teachers' free speech claims, adopting instead a virtually absolute rule prohibiting public school teachers from engaging in religious speech while on the job. No matter how vociferously the teachers disavow official sanction of their views, the courts imply, the students and the public will see the link anyway, and the Establishment Clause is, therefore, violated. Perception is the key to all endorsement claims, and the perception that a teacher's religious views represent an official position is inevitable.[84]

In sum, the constitutional rule with regard to cases such as those discussed above is simple and virtually absolute. In general, on-duty religious speech by public employees is impermissible. Although the lower courts that decided the cases discussed above did not state the rule so bluntly, this is the rule they all seem to have applied. As noted at the beginning of this section, these are the easy cases involving religious free speech rights. Until a majority of the Supreme Court abandons its insistence that official endorsement of religion is constitutionally problematic, a strict rule prohibiting on-the-job religious speech by public employees is unavoidable. In addition to the logic of the endorsement analysis, the practical politics of modern religious activism also supports such a strict rule. In many parts of the country, a weaker rule would permit widespread disobedience of the Supreme Court's school prayer precedents by allowing public school officials to permit teachers to disguise religious speech as "individual" religious speech. In such cases, the public would clearly (and often correctly) perceive that the teachers were

81. *See Roberts*, 921 F.2d at 1049.

82. *Bishop*, 926 F.2d at 1068.

83. *See Peloza*, 37 F.3d at 522.

84. The *Peloza* court spelled out this implication in detail:

> While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in *Lemon v. Kurtzman*.

Id. (citation omitted).

fulfilling the unstated desires of government officials who are prohibited from officially endorsing the community's dominant faith.[85]

The only open question about the strict rule prohibiting on-the-job religious expression by public employees concerns the application of that rule to the most innocuous forms of religious expression. This question arises, for example, when public school teachers wear to work small religious emblems or paraphernalia, such as a crucifix or a yarmulke. On the one hand, these symbols clearly communicate religious adherence in a context where a verbal communication of the same message would be clearly impermissible. (A public school teacher would not be permitted, for example, to begin each class day with the statement "I am a Catholic and believe that Jesus was crucified for my sins.") On the other hand, attempts to regulate even the smallest and least obtrusive religious symbols may be unnecessary to enforce the Constitution's nonendorsement principle.[86] The individual use of personal religious emblems may have be-

85. Sometimes the official encouragement of such violations is not even surreptitious. Public officials in states like Alabama do not hesitate to announce in public their support for the religious majority (and their opposition to federal constitutional law). Fob James, former governor of Alabama, recently stated his intent to resist a federal district court's order invalidating the state's school prayer statute and requiring public schools in several Alabama counties to cease a wide range of Establishment Clause violations. *See* Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997), *aff'd in part and vacated in part*, 180 F.3d 1254 (11th Cir. 1999), *cert. granted and judgment vacated*, 68 U.S.L.W. 3391 (2000). The governor's full explanation of his position was posted on the state's official web site. *See* Fob James, Jr., How the Justices of the U.S. Supreme Court Think They Are More "Deliberate" and "Rational" than the "People of the United States" (1998) (unpublished manuscript, on file with the *University of Illinois Law Review*). The gist of the governor's position was that the First Amendment did not apply to the states, the Supreme Court had intentionally misinterpreted the Constitution (and defied God) to reach a contrary result, and the governor's oath of office "which commands obedience to the Constitution must also command opposition to the unrelenting lawlessness of any branch of government, including the Supreme Court." *Id.* (manuscript at 32).

Governor James was not the only state official in Alabama willing to communicate openly his view of current Establishment Clause law. The state legislator who sponsored the school prayer statute later held unconstitutional by the federal court requested from the state's attorney general an opinion providing "the strongest, clearest constitutional language which Alabama might enact restoring student prayer to public schools." *Chandler*, 958 F. Supp. at 1564 (emphasis omitted).

Students at the schools affected by the federal court's injunction followed the governor's lead in renouncing the limitations the First Amendment imposed. *The New York Times* reported that in one school, 500 of the 636 students left class to hold an impromptu prayer vigil on the school's tennis court. *See* Kevin Sack, *In South, Prayer is a Form of Protest*, N.Y. TIMES, Nov. 8, 1997, at A9.

86. The Supreme Court has upheld against a Free Exercise Clause challenge a military policy prohibiting members of the military from wearing visible religious apparel while on duty. *See* Goldman v. Weinberger, 475 U.S. 503 (1986). The military's justification in *Goldman* that it needed strict rules against religious expression to "subordin[ate] personal preferences and identities in favor of the overall group mission," *id.* at 508, has no direct application to the rules regarding the behavior of civilian government employees. Justice Stevens's concurrence in *Goldman* noted, however, that the rules prohibiting all visible religious apparel—rather than a rule prohibiting only obtrusive religious apparel—also were beneficial in avoiding religious discrimination by preventing base commanders from making difficult distinctions between, for example, a Catholic wearing a small crucifix and a Sikh wearing a turban. *See id.* at 512–13 (Stevens, J., concurring). Whether a particular religious symbol is unobtrusive will depend on the religious point of view of the observer, and it is plausible that administrators belonging to the religious majority will be more likely to view their own religious symbols as unobtrusive and benign and will conversely view the symbols of a minority sect as obtrusive and disruptive. To this extent, the *Goldman* holding is relevant to civilian disputes over public employee re-

come so commonplace that they blend into the fabric of everyday life in such a way that they will not communicate official endorsement of religion—in much the same way that Justice Brennan once suggested the national motto "In God We Trust" and other instances of "ceremonial deism" have ceased to convey an obvious religious message.[87] In contrast, where the religious speech is obtrusive and does convey an obvious religious message, the Establishment Clause requires that the employee refrain from engaging in that expression while representing the state.

Courts will be unable to avoid some line drawing to distinguish trivial from nontrivial religious speech. In most cases, however, innocuous personal religious expression will be relatively easy to distinguish from the sort of barely cloaked proselytizing evident in the plaintiffs' activities in cases like *Roberts*, *Bishop*, and *Peloza* or from even more obvious efforts by employees to use religious symbols or clothing in a manner that undermines longstanding precedents and introduces religion into public school classrooms via the teacher's personal expression.[88] The key

ligious speech and would militate in favor of limiting to the most innocuous and insignificant religious expression the exception discussed in the text accompanying this note.

87. In *Lynch*, Justice Brennan argued:

> While I remain uncertain about these questions, I would suggest that such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

88. In Orlando, Florida, for example, public school officials permitted teachers to celebrate "Friday Spirit Day" by wearing to class t-shirts inscribed with the phrase "Champions in Christ" on the front and a New Testament verse on the back. *See* Mark I. Pinsky, *Christian Groups Seek Converts at Schools; A Friendlier Legal Environment Finds at Least Five Outreach Groups Active in Area Public Schools*, ORLANDO SENTINEL, Sept. 14, 1997, at A1. The school officials bowed to the obvious Establishment Clause problems inherent in this activity simply by circulating a memo "explaining that the shirts 'are purely the private expression of that teacher or staff member and do not reflect the policy of or endorsement from the high school.'" *Id.*

In addition to illustrating how not to handle incidents involving overtly religious speech by public school teachers during the school day, the Orlando example also highlights a widespread problem that has arisen since the Supreme Court ruled that student religious groups must be given greater access to public school facilities to conduct religious meetings. *See* Board of Educ. v. Mergens, 496 U.S. 226, 233 (1990) (upholding the federal Equal Access Act, 20 U.S.C. § 4071(a), which prohibits schools from denying student groups, including religious groups, "equal access" to "limited open forums" on school premises); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university must give religious groups access to facilities open for general use by students). These decisions have led to a proliferation of religious clubs in public schools. Depending on the context, permitting individual students to participate in these private student groups on school property may or may not impinge on Establishment Clause values. *See infra* notes 170–98 (discussing general limitations on student religious speech in public schools). More importantly, the groups provide an avenue by which sympathetic public school teachers can serve as faculty sponsors for religious students, which greatly increases the opportunity for public employees to intermingle their private religious views with their public duties. The religious groups also provide a focal point for subtle teacher endorsement of sectarian activities. This was the case in Orlando, where the teachers donned their t-shirts in support of the Fellowship of Christian Athletes. *See* Pinsky, *supra*.

The Fellowship of Christian Athletes is a national organization, with a $34 million annual budget, more than 480 national staff members, and a recently announced $7 million plan to double the size of its national headquarters in anticipation of increasing its staff to 650 employees by the year 2001. *See* Randy Covitz, *Christian Fellowship Has $7 Million Expansion Plan*, KANSAS CITY STAR, June 2, 1998,

is that no employee expression should be permitted if that expression would link the state with a religious perspective that the Establishment Clause prohibits the state from endorsing.

Identifying the link between employee speech and the state is the crucial aspect of all the religious free speech cases discussed in this article, including those involving public employees. The religious speakers must deny that such a link exists. In assessing this denial, courts must keep in mind the cultural dynamics that continue to define the relationship between religion and the state in many parts of the country, especially in the area of public education. The undeniable fact is that many public school officials and state legislatures—especially in the South—continue to resist complying with decades-old precedents prohibiting religious activity in public schools.[89] Permitting religious speech by public employees would provide recalcitrant school officials with a handy method to skirt constitutional rules many of them continue to oppose. The strength of the Establishment Clause rules governing religious speech by public employees should reflect this reality. Thus, public employees—especially teachers—should be afforded little or no First Amendment free speech protection for engaging in personal religious expression while on duty.

2. Off-Duty Religious Speech by Government Administrators

In theory, the rules regarding the religious speech of government executive officials and administrators (including teachers) off the job should be the exact converse of the rules regarding the speech of such officials on the job. In other words, although the Establishment Clause prohibits even noncoercive, subtle, and unobtrusive religious speech of public officials on the job, the Free Speech Clause permits such officials

at C1. The organization is typical of the new generation of well-organized and well-funded religious groups actively cultivating students at public schools, often by involving public-school coaches and teachers in activities of dubious constitutionality. *See* Carol-Faye Ashcraft, *Christian Faith Central for Teen Group*, ORLANDO SENTINEL, Sept. 13, 1991, at 1 (describing the activities of public school coaches and teachers who keep Fellowship banners in classrooms, invite students to attend meetings, and generally encourage participation in the group's religious activities).

89. In the words of one reporter covering the recent Alabama dispute over school prayer:

> In this part of Alabama, prayer has remained as common as pop quizzes in many schools, despite decades of Federal court rulings against the practice. Until [Federal District Court Judge] DeMent issued his injunction, sectarian prayers were commonly recited over public address systems at the beginning of the day, and at athletic events, assemblies and commencement ceremonies, said a number of school administrators and students.

Sack, *supra* note 85, at A9. Like the Alabama school prayer controversy, disputes over clear state violations of longstanding Establishment Clause rules continue to generate litigation throughout the South. *See, e.g.*, Chandler v. James, 958 F. Supp. 1550 (M.D. Ala. 1997) (invalidating an Alabama school prayer statute and enjoining religious activities already occurring at Alabama schools), *aff'd in part and vacated in part*, 180 F.3d 1254 (11th Cir. 1999), *cert. granted and judgment vacated*, 68 U.S.L.W. 3391 (2000); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274 (5th Cir. 1996) (invalidating a Mississippi school prayer statute); Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902, 908 (N.D. Miss. 1995) (enjoining a school system from broadcasting Christian devotionals and prayers every morning over its school intercom system).

to engage in even overt, sectarian, and aggressively exclusionary religious speech once the work day ends and the employee leaves government property. The latter part of this statement must stand without supporting citation from the case law, because no court has even suggested that the truly private religious expression of government employees can be limited to protect against potential Establishment Clause violations, and there does not even seem to have been any serious litigation over the off-duty religious speech of government administrative or executive employees. The absence of any judicial dispute over the issue suggests that everyone concedes the broad protection for off-duty government employees' religious speech.

This seemingly universal recognition of expansive religious freedom for government employees during their private time is laudable, but two caveats are necessary. First, it is important to emphasize that the strength of the off-duty government employee religious speech protections is directly related to the strength of the Establishment Clause restrictions of on-duty religious speech. If Establishment Clause rules governing a government employee's personal religious expression on the job were less absolute—that is, for example, if government employees such as teachers were allowed to express their religious views on the job, limited only by a prohibition on coercing students to join their faiths—the public would legitimately be much more concerned than they are now about the precise nature of each teacher's religious views. This increased concern would in turn lead to greater religious factionalism and greater religious discrimination, both overt and surreptitious. If Establishment Clause rules for on-duty employee religious speech were relaxed, for example, parents who belong to the religious majority (and the school board members they elect to run the public schools) would be much more reluctant to hire public school teachers who belong to minority faiths. Likewise, parents who belong to minority faiths would be more reluctant to subject their children to the social pressure and/or ostracism of the vocally majoritarian religious culture that would permeate the public schools.

Aside from social pressures and subtle discrimination against religious minorities, a more lenient on-duty Establishment Clause religious speech standard based on a coercion analysis (as opposed to an endorsement analysis) would also introduce into the system of public employment overt discrimination against members of aggressive or absolutist faiths whose doctrines require their members to attempt to convert all nonadherents with whom they come into contact. Discrimination would occur because the religious speech of members belonging to these more aggressive faiths would be far more likely to run afoul of the coercion analysis (since direct overtures to students urging them to confess error or convert are directly coercive). Members of these faiths, therefore, would either have to alter their usual method of proselytizing or be ex-

cluded from government jobs, especially in the public schools. On the other hand, a more lenient on-duty Establishment Clause standard would not restrict the religious speech of public employees who belong to religious groups that rely on acculturation rather than direct appeals or aggressive proselytizing to extend the influence of their sects. Thus, although religious expression in the private sector ostensibly would be unaffected by permitting some mainstream religious expression by public employees at their jobs, in reality this system would skew the private religious sector by permitting members of mainstream faiths to present their views at government workplaces such as schools, while prohibiting some minority faiths from engaging in their more aggressive religious speech.

The religious discrimination inherent in any proposal to reduce restrictions on public employee religious speech at the workplace would be especially prevalent in the public school context. This is because the favored placement of mainstream faiths in public schools would have the effect of presenting those faiths to impressionable students as religious role models, thus subtly educating public school students to view mainstream faiths as the norm and minority faiths as unusual and disfavored. In contrast, the present constitutional regime does not discriminate among religious sects (because all religious expression must take place in the unregulated private sector), and, therefore, no sect is able to use the schools or other public institutions as forums for religious indoctrination. Likewise, under the present system, parents should not care if their child's teacher holds religious views contrary, or even antagonistic to, the parents' beliefs, because the teacher is absolutely barred from introducing those views into the classroom.[90] With these rigid rules in place, public schools and other government institutions can serve as common ground for hostile religious factions because public employees agree to check their religious views at the schoolhouse (or courtroom or city hall) door. Ironically, this constitutionally mandated "no-religion" zone creates the very conditions of political security and mutual tolerance that provides all citizens (including off-duty government employees) the political self-assurance to express even their deepest and most unpopular religious feelings openly.

The second caveat to the general rule that government employees should enjoy an unfettered right to express their religious faith during their private time recognizes that in a few extraordinary circumstances, a public employee's off-duty religious speech will directly affect that employee's ability to function effectively (that is, constitutionally) on the job. There are two such extraordinary circumstances: (1) when a public employee expresses the opinion that his or her religious faith makes it impossible for that employee to respect the Establishment Clause

90. *See supra* notes 60–85 and accompanying text.

boundaries set forth in the previous subsection; and (2) when an administrative or executive official rises to a sufficiently high level of authority that the official effectively serves in a policy-making role. Officials falling into the second category will be subject to the secular purpose requirement of the *Lemon* test[91] (or the modified secular purpose analysis in Justice O'Connor's endorsement analysis),[92] which applies to all government policymakers. The secular purpose requirement, and examples of official actions that violate this requirement, will be discussed in part II.B;[93] therefore, discussion of this justification for restricting off-duty public employee religious speech will be deferred until then.

The first circumstance justifying restrictions on off-duty religious speech is more straightforward and can be illustrated by two examples. Suppose a public school teacher is a part-time minister and gives a sermon in church on Sunday in which the teacher announces that "I intend to defy the Supreme Court by calling the name of Jesus Christ every day in my classroom, regardless of what the Supreme Court says." Or suppose the same teacher gives a sermon in which he derides members of other faiths and nonbelievers as evil sinners and argues vehemently that such people should be converted "by whatever means necessary and with any tool at our disposal." Suppose the teacher then drives the point home by singling out by name as potential converts the only two Jewish students in his class. Should these statements, without more, constitute an Establishment Clause violation? After all, the teacher is on his own time, and the speech is, therefore, presumptively protected private religious expression. If the statements had been made by someone other than an employee of the government, the statements would be protected by the First Amendment. Does the fact that the statements are made by an off-duty government employee reduce this protection?

The answer may depend on the social, political, and religious context in which the speech takes place. In the abstract, these examples involve the verbal announcement or encouragement of illegal action and civil disobedience, content that is broadly protected in the nonreligious context,[94] even to some extent with regard to government employees.[95]

91. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

92. *See supra* note 52.

93. *See infra* notes 100–87 and accompanying text.

94. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982) (overturning a civil damages award against speakers who had threatened physical violence against individuals who refused to honor a boycott); Hess v. Indiana, 414 U.S. 105, 110 (1973) (overturning a disorderly conduct conviction of a protester who urged crowd to "take the fucking street later"); Watts v. United States, 394 U.S. 705 (1969) (overturning the conviction of a protester who had given a speech hyperbolically threatening to shoot the president); Bond v. Floyd, 385 U.S. 116 (1966) (prohibiting a state from refusing to seat a state senator who had signed a statement sympathizing with draft evaders).

95. *See* Rankin v. MacPherson, 483 U.S. 378, 381 (1987) (prohibiting a county constable from firing an employee for responding to the attempted assassination of Ronald Reagan by remarking, "if they go for him again, I hope they get him"); Keyishan v. Board of Regents, 385 U.S. 589 (1967) (holding unconstitutional a New York State University loyalty oath prohibiting the appointment of persons who belong to the Communist Party).

But in this, as in other free speech contexts, the particular problems posed by the Establishment Clause alter the usual free speech analysis. The free speech precedents protecting speech that advocate illegality or civil disobedience all rest on the assumption that the government possesses the will and adequate means to enforce the law that the speaker attacks. Thus, for example, if a speaker announces that he intends to shoot the president, the threat is plausible, and the speaker possesses the means to carry out the threat, the government has both the authority and the inclination to arrest the speaker to prevent the illegal action.

When an off-duty government employee advocates religious civil disobedience, in contrast, the typical free speech scenario is altered in a significant way. Civil disobedience advocacy usually occurs in an atmosphere where the speaker and the government are natural adversaries (because the speaker is resisting obeying the government's commands); thus, we can assume that the government has an incentive to prevent the speaker from actually disobeying the law (or punishing the speaker if he does so). In the religious context, on the other hand, the government and the speaker are not always on opposing sides of the issue. In many communities where these issues arise, the speaker (who is a government employee) and the speaker's supervisors often silently agree about the relevant law that the speaker advocates disobeying. In these situations, there is legitimate cause for concern that the government will not act to prevent the illegal action threatened by the off-duty employee. The problem is most compelling in small, religiously homogeneous communities, where protecting the private speech of government employees will often have the effect of facilitating lawbreaking by the government itself. Recent episodes in Mississippi and Alabama provide examples of situations in which the private religious speech of off-duty government employees may be difficult to distinguish from the policy of the government itself.[96] In cases such as these, there is good reason for engaging the protection of the Establishment Clause by attributing to the government an off-duty

96. *See Principal in a School Prayer Dispute is Reinstated*, N.Y. TIMES, Dec. 17, 1993, at A33 (describing a Mississippi school board action reinstating—but temporarily suspending—public high school principal Bishop Knox, who had been fired by the school superintendent for allowing students to pray over the school's loudspeaker during the school day in direct violation of *Abington School District. v. Schempp*, 374 U.S. 203 (1963)); *see also* Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 277 (5th Cir. 1996) (overturning a statute permitting "nonsectarian, nonproselytizing student-initiated voluntary prayer," which the Mississippi legislature passed in response to the Bishop Knox incident); Sack, *supra* note 85 (describing pervasive violations of the Establishment Clause in Alabama public schools before a federal court order prohibiting such activities and also noting near uniformity of opposition to the court order by government officials and private citizens).

Mississippi and Alabama are by no means alone in resisting—both privately and through the actions and speech of various state officials—the enforcement of longstanding federal law on religion in public education. The approach of many state officials toward permitting illegal prayer in public schools, especially in the South, seems similar to that expressed to a *New York Times* reporter by a member of the Louisiana Board of Elementary and Secondary Education: "You know how it is in Louisiana, . . . [w]e do things and just don't discuss it. In other states people argue, but in Louisiana they just go ahead and do things until they get sued." Peter Applebome, *Prayer in Public Schools? It's Nothing New for Many*, N.Y. TIMES, Nov. 22, 1994, at A1.

employee's religious speech of the sort described in the examples cited at the beginning of this subsection.[97] This is not to say that the free speech provisions of the First Amendment become irrelevant. The proper remedy for this unique type of Establishment Clause violation should incorporate the proper respect for the employee's First Amendment right of religious exercise and expression, perhaps by avoiding judicial orders directly limiting the employee's off-duty speech, and instead taking the form of an injunction requiring the employee's supervisors to ensure that the employee does not carry out his or her illegal intentions. Respect for the employee's religious speech is crucial, but it is equally crucial that respect for the employee's private right of expression should not undermine the judicial enforcement of the Establishment Clause in situations where the employees literally *are* the government, and the government (through these human mouthpieces) announces that it has no intention of obeying the law.

There are many good reasons why the First Amendment should protect private citizens from unconstitutional government overreaching against speakers who disagree with the government, but these reasons do not apply where the speech being addressed itself provides evidence of a government actor's intended violations of the First Amendment. The fact that the speaker in these examples is a government employee makes a narrow free speech limitation less unusual than it otherwise would be; the courts have frequently limited government employee speech that interferes with the employee's official duties, even where that speech does not involve religious issues or the Establishment Clause.[98] The more difficult issues arise when the same principle—that the Establishment Clause sometimes requires limits on ostensibly private religious expression—is applied to private religious speech by individuals who are not employed by the government. This issue will be addressed in part III[99] after a discussion of Establishment Clause limits on the religious expression of a second major category of government employees: government policymakers.

97. Context will always be crucial in determining whether the employee's speech should be subject to the Establishment Clause limitations described in the text. These limitations may not be necessary if the employee's speech is less confrontational than the examples given at the beginning of this subpart or if the employee is a low-level worker lacking authority or ability to violate Establishment Clause rules while on duty. *See Rankin*, 483 U.S. at 388–89 (overturning the firing of an employee who made comments ostensibly praising the attempted assassination of President Reagan; the Court emphasized that the employee made the comments to a friend out of earshot of the public and, therefore, did not undermine the integrity of the office or interfere with the employee's duties); Sims v. Metropolitan Dade County, 972 F.2d 1230, 1232–38 (11th Cir. 1992) (upholding sanctions against a member of the county's department of community affairs, who, as a part-time preacher made racially inflammatory remarks; the court emphasized that sanctions against the employee's speech were permissible only because they directly conflicted with the specific purpose of his job, which was to promote harmonious relations among the county's ethnic groups).

98. *See supra* note 69 and accompanying text.

99. *See infra* notes 188–314 and accompanying text.

B. Religious Speech by Government Policymakers

In one sense, the analysis of free speech protection for government policymakers should be much less problematic than the analysis of free speech protection for government administrative and executive officials. The free speech concerns of policy-making officials should be less controversial because there are fewer questions about the existence of state action when a policymaker makes a public pronouncement about anything within the ambit of the official's authority. A policy-making official's statement about his or her religious views on a matter falling within that official's area of authority is obviously relevant to that official's duties (even when the statement is made off-duty or in a private forum), and the public will assume that the official's religious views have an impact on whatever policy the official ultimately supports. Consider, for example, a congressman who gives an impassioned testimonial at a religious service on Sunday in which he cites the Bible in support of the proposition that abortion is sinful, and then on Monday the same congressman introduces legislation severely restricting abortion. Most members of the public will justifiably assume that the official's legislative actions are motivated by his religious beliefs. Unlike most government administrators—whose public roles are strictly circumscribed by the narrow parameters of their jobs and by their accountability to supervisors and courts—there is no clear line between a policymaker's private life (in which the public expression of strong religious views should be constitutionally protected) and the policymaker's public function (in which the Constitution demands that the official refrain from acting to advance a religious agenda). Certainly even policymakers retain a broad area of purely private belief and behavior in which they may express their religious views. (No one would suggest that the Establishment Clause should permit examination of a politician's statements in the confessional, for example.) But at the very least, the Establishment Clause should support limitations on policymakers' prominent public expression of religious motivations for their official actions.

This would have been a relatively easy position to defend a few years ago. But Establishment Clause theory has fallen into disarray in recent years, and the basic Establishment Clause principles that limit policymakers' authority to write their religious views into law have come under sustained attack. To defend the limitations suggested here, it is, therefore, necessary to address recent attacks on the core of modern Establishment Clause theory.

Since 1971, discussions of Establishment Clause doctrine have been dominated by the three-part test that the Supreme Court set forth in *Lemon v. Kurtzman*.[100] According to the so-called *Lemon* test, the Establishment Clause requires government actions to satisfy three criteria.

100. 403 U.S. 602, 611–12 (1971).

"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.'"[101] All three aspects of *Lemon* have been the subjects of constant and vociferous debate ever since the Court adopted the test.[102] This debate has led some Justices and commentators to advocate abandoning *Lemon* in favor of a coercion analysis,[103] a historical analysis,[104] a nonpreferentialist analysis,[105] a heavily modified *Lemon* analysis focusing on the message of endorsement sent by a particular government action,[106] or a completely fact-driven, ad hoc Establishment Clause jurisprudence stripped of any overriding standard.[107] In the midst of such flux, it is no longer clear what constitutional analysis a majority of the Supreme Court uses, and it seems that a majority cannot agree on any one standard.[108] It is not my desire to replay the debate over *Lemon*

101. *Id.* (citations omitted).

102. *See infra* notes 103–07 and accompanying text.

103. For opinions and articles supporting a coercion theory of the Establishment Clause, see generally *Lee v. Weisman*, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 660–63 (1989) (Kennedy, J., concurring in part and dissenting in part); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993). For critical assessments of the coercion analysis, see generally Gey, *supra* note 72; Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991).

104. *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers, without applying *Lemon*, based on the historical practice of the first Congress).

105. *See* Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (arguing that the Framers did not intend to prohibit government action favoring religion, so long as the action did not favor a particular sect); Robert L. Cord, *Church-State Separation: Restoring the "No-Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 171–72 (1986) (same). For criticism of this theory and the historical interpretation that supports it, see generally LEONARD LEVY, THE ESTABLISHMENT CLAUSE (1986); Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

106. *See County of Allegheney*, 492 U.S. at 592 (O'Connor, J., concurring in part and concurring in the judgment) ("In recent years, we have paid particularly close attention [in Establishment Clause cases] to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence."); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (arguing that Establishment Clause analysis should focus on government endorsements that "send[] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").

107. *See* Board of Educ. v. Grumet, 512 U.S. 687, 721 (1994) (O'Connor, J., concurring) (arguing in favor of a "less unitary approach" to Establishment Clause issues).

108. Chief Justice Rehnquist has proposed a nonpreferentialist analysis, *see supra* note 105, but has also joined Justices Scalia and Thomas in advocating a very narrow coercion analysis. *See Lee*, 505 U.S. at 602 (Scalia, J., dissenting). Justice Kennedy also once advocated a narrow coercion analysis, *see County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part), but more recently interpreted "coercion" in a more separationist fashion. *See Lee*, 505 U.S. at 586–99; Gey, *supra* note 72, at 497–504 (discussing inconsistencies between Justice Kennedy's early and late interpretations of "coercion").

Justice O'Connor has proposed an endorsement analysis (that builds on *Lemon*) but has also supported a standardless, ad hoc approach, *see supra* note 13, and joined an opinion by former Justice Blackmun favorably applying the principles of *Lemon*. *See Lee*, 505 U.S. at 602 (Blackmun, J., concurring). Justice Stevens also joined Justice Blackmun's opinion and along with Justices Souter, Ginsburg, and Breyer, supports a separationist interpretation of the Establishment Clause that is consistent with a strong *Lemon* standard. *See* Agostini v. Felton, 521 U.S. 203, 240 (1997) (Souter, J., dissenting) (ob-

here or to settle the issue of what constitutional standard the Supreme Court uses (or should use) in modern Establishment Clause cases. But because much of the argument in this subpart depends on the existence of constitutional limits on government actions undertaken for religious purposes, it is necessary to address briefly the secular purpose aspect of the *Lemon* test.

The secular purpose requirement of *Lemon* has come under attack from various quarters and for various reasons. These attacks can be distilled into two themes. The first theme focuses on the pragmatic argument that there is no such thing as one definitive legislative purpose for any legislation. Critics who take this approach argue that the *Lemon* requirement that courts identify a predominant legislative purpose (to ensure that it is sufficiently secular) inevitably leads to judicial dishonesty and overreaching. Justice Scalia's attack on the *Lemon* secular purpose requirement in the second creationism case is the best example of this line of attack.[109] The second theme is a broader, more theoretical argument that requiring legislatures to rely only on secular purposes as the basis for public policy effectively skews political discourse and government action against religion, eliminates a primary source of civic virtue, and thus creates what Richard John Neuhaus famously termed "the naked public square."[110] This second theme is a fixture of attacks on *Lemon*'s secular purpose requirement, not only by religious conservatives[111] but also by several commentators not commonly associated with the religious right.[112]

jecting to the majority's weakening of Establishment Clause limits on government financing of religious activity, joined by Justices Stevens, Ginsburg, and Breyer); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting) (objecting to the majority's decision to require a university to finance a religious magazine, joined by Justices Stevens, Ginsburg, and Breyer). Thus, although five Justices agree that under some analysis the Establishment Clause prohibits government endorsement of religion, see *supra* note 58, no Establishment Clause test has the support of more than four current Justices, and the theory of some Justices is difficult to discern. This chaotic state of affairs has left the lower courts with no option but to justify their Establishment Clause decisions by applying many different tests to the Establishment Clause cases that come before them. *See, e.g.*, Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278–80 (5th Cir. 1996) (applying the *Lemon*, endorsement, and coercion tests); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966 (5th Cir. 1992) (concluding that five different tests have been used by the Supreme Court and analyzing a graduation prayer under all five); Murray v. Austin, 947 F.2d 147, 153–58 (5th Cir. 1991) (applying the *Lemon*, historical, coercion, and endorsement tests). By happy coincidence, in these cases the courts have found that all the tests lead to the same conclusion.

109. *See* Edwards v. Aguillard, 482 U.S. 578, 610–40 (1987) (Scalia, J., dissenting). *Edwards* is discussed *infra* at notes 149–58 and accompanying text.

110. RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

111. *See, e.g.*, Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 682–84 (1992) (criticizing the secular purpose requirement and using it to illustrate the Supreme Court's—and the American culture's—hostility to religion); Paulsen, *supra* note 103, at 803 (attacking the secular purpose requirement as "serv[ing] no legitimate function, and several illegitimate ones"); M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square—The Supreme Court,* Lemon*, and the Myth of the Secular Society*, 4 WM. & MARY BILL RTS. J. 223, 240 (1995) (criticizing "the lack of historic validity or just plain common sense" for the secular purpose component of *Lemon*); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Pro-*

The theoretical critique of the secular purpose requirement by religious conservatives is merely one part of a much broader attack on the ideal of separating church and state—which is the underpinning of the secular purpose requirement and *Lemon* as a whole. The conservative critique of the secular purpose requirement is, therefore, usually combined with proposals to abandon present forms of judicial oversight of Establishment Clause issues in favor of a more lenient coercion analysis.[113] These proposals are premised on the claim that the separation of church and state is inherently hostile to religion and inconsistent with a proper interpretation of the First Amendment speech and religion clauses.[114] The conservative critique thus seems concerned much more broadly with the separationist theoretical foundation of *Lemon*, rather than the pragmatic details of the secular purpose requirement. For this reason, discussion of the conservative position on this subject will be deferred until part IV,[115] which addresses the reasons for separationist limits on religious expression. The remainder of this section will consider the more moderate theoretical and pragmatic arguments against a *Lemon*-style secular purpose limitation on the religious expression of government actors.

1. The Theoretical Argument Against the Secular Purpose Requirement

Aside from the comprehensive conservative attacks on *Lemon* and the secular purpose requirement, there are also narrower theoretical critiques of the secular purpose requirement, made from within a constitutional theory that accepts the need for some degree of constitutionally mandated separation between church and state.[116] These narrower cri-

fessor Perry, 76 IOWA L. REV. 1067 (1992) (reviewing MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991) and criticizing Perry's defense of the secular purpose requirement).

112. *See generally, e.g.*, Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977 (criticizing the Supreme Court's reliance on secular purpose analysis to strike down a Louisiana creationism statute); Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996) (criticizing the *Lemon* secular purpose requirement); Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061 (1992) (reviewing PERRY, *supra* note 111 (criticizing the *Lemon* secular purpose requirement)).

113. *See, e.g.*, McConnell, *supra* note 103; Paulsen, *supra* note 103.

114. *See* Gedicks, *supra* note 111, at 673 (arguing that "religion seems uniquely disabled in public life by the Supreme Court's construction of the Establishment Clause"); Robertson, *supra* note 111, at 224 (arguing that the Supreme Court has misinterpreted the Establishment Clause by secularizing the government and asserting that the clause should not mean "that government is (or should be) disabled from generally endorsing, promoting, or encouraging religious belief and practice, from acknowledging God, or even from giving certain forms of aid (including financial) that advance the cause of religion"); Smolin, *supra* note 111, at 1078 (describing one version of the secular purpose requirement as designed to exclude "the religious groups most active in trying to displace the cultural hegemony of America's highly secularized elites").

115. *See infra* notes 316–45 and accompanying text.

116. Three examples include Stephen Carter, Sanford Levinson, and Douglas Laycock. Although Professor Carter disavows any theoretical common cause with religious conservatives, his work shares much of the broader conservative concern with *Lemon* and will, therefore, be considered in part IV.

tiques are often based on claims that the secular purpose requirement interferes with the protection of a religious legislator's speech under the First Amendment Free Speech Clause. Within that framework, some of the more interesting criticisms of the secular purpose requirement have come from Douglas Laycock.[117] This criticism is interesting because Professor Laycock has tended to take a separationist view of Establishment Clause matters. He wrote one of the most succinct responses to proposals that the Establishment Clause should be reduced to a mere statement of "nonpreferentialism" among religious sects,[118] opposes limiting the scope of the Establishment Clause to state action that directly coerces religious exercise,[119] recently testified against the proposed "Religious Equality Amendment,"[120] and has even argued that "the government should not put 'In God We Trust' on coins [and] should not open court sessions with 'God save the United States and this honorable Court.'"[121] Despite Professor Laycock's generally separationist tendencies in his other writings about the Establishment Clause,[122] he has been downright dismissive toward proposals to limit religious justifications for government action: "It is obvious that intelligent and important people think that these are important questions, but I must confess that I have never understood why that is. I wish that this enormous array of talent had spent less time on these questions and more time on other things."[123]

See infra notes 325–32 and accompanying text. Professor Laycock's work is discussed in detail below. *See infra* notes 118–48 and accompanying text. Professor Levinson's contribution to this debate can be found in Levinson, *supra* note 112.

117. *See, e.g.*, Laycock, *supra* note 105.

118. *Id.*

119. *See* Laycock, *supra* note 103.

120. *See Religious Liberty: Hearings Before the Senate Comm. On the Judiciary*, 104th Cong. 66 (1995) (statement of Douglas Laycock).

121. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 8 (1986).

122. Professor Laycock's separationism is moderated by his attempt to combine the separation model of the Establishment Clause with a model he calls "substantive neutrality"—i.e., 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." Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) [hereinafter Laycock, *Formal, Substantive Neutrality*]. Thus, although I apply the term separationist to Professor Laycock because he opposes many recent efforts to erode the Establishment Clause protections against the use of government to pursue religious goals, Professor Laycock believes that the term is "misleading" for reasons that he would probably apply to the approach set forth in this article. *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 47 (1997) [hereinafter Laycock, *Separation and Neutrality*] (describing separation as a "misleading metaphor" and describing a "certain faction" of Establishment Clause theorists that are responsible for this misinterpretation of the term: "[T]hat faction may call itself separationist; but its defining commitment seems to be to secular supremacy and religious subordination, or at least to religious marginalization"). In any event, Professor Laycock's own attempt to combine two very different approaches to Establishment Clause interpretation may itself be doomed by the inherent incompatibility of the two theories. For the view that the separation and neutrality models are incompatible, see generally Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

123. Laycock, *supra* note 112, at 793.

This dismissive attitude leads Professor Laycock to be somewhat cursory in setting out his objections to the secular purpose requirement, but even so, he presents all the major components of the moderate objection to limits on the expression of religious justifications for government action. Unfortunately, there are subtle contradictions and inconsistencies in Laycock's case—in particular with regard to the reconciliation of governmental religious action and the free speech protections of the First Amendment—that underscore why the *Lemon* secular purpose requirement (or some similar limitation on religious justifications for public policy) continues to serve an important function in the Court's Establishment Clause jurisprudence.

There are three main components to Professor Laycock's rejection of the secular purpose requirement. His first objection is based squarely on the First Amendment protection of political speech. Laycock argues that proposals to limit the extent to which political actors may express religious reasons for supporting particular policies constitute "viewpoint discrimination, plain and simple."[124] The "essence of the Free Speech Clause," Laycock argues, is that "[a] speaker in an American political debate, in all but the most extraordinary cases, is entitled to make any substantive argument that she wants to make."[125] This is a very broad claim. It amounts to an assertion that the government must be allowed to enact and enforce religiously based policies to protect the free speech rights of individual public officials.

Professor Laycock's second argument is a sort of discrimination claim. He argues that proposals to exclude religious rationales from the list of available justifications for public policy are "futile attempt[s] at a coûp d'état, in which secularists would get to silence everybody on the religious side of the spectrum."[126] Those who would prohibit religious reasons for legislation are, therefore, doing so for partisan political reasons and are committed to "secular supremacy and religious subordination, or at least to religious marginalization."[127]

Professor Laycock's third reason for defending religious justifications for government action is an affirmative argument for the benefits of religiously based public policy. He asserts that religion is a prime source of civic virtue and national unity, necessary even in a pluralist democracy.[128] He argues that critics of religious involvement in politics often focus on "a small range of political positions they reject"[129] and cites the abolitionist and civil rights movements as examples of the positive role

124. *Id.* at 798.

125. *Id.*

126. *Id.* at 799.

127. Laycock, *Separation and Neutrality*, *supra* note 122, at 47.

128. *See* Laycock, *supra* note 112, at 808 ("[A]ppeals to the best in religious traditions can be powerfully moving and unifying for large numbers of believers, and such appeals can also resonate with analogous expressions of the same or similar values in other religions and in secular thought.").

129. *Id.* at 800.

religion can play in politics. Religion arguments "often speak to fundamental values. Democracy would be impoverished without them."[130]

The basic problem with Professor Laycock's first argument (and to some extent the other two as well) is that it misconstrues the parameters of the secular purpose requirement adopted by the Court in *Lemon* and advocated here. Contrary to Laycock's implication, the secular purpose requirement does not prevent a private citizen from expressing a religious perspective on matters of public policy; rather, the secular purpose requirement applies only to the expressed or implied purposes of government actors in adopting legislation or otherwise articulating governmental rules or standards of conduct. Thus, if Professor Laycock is using the term "viewpoint discrimination" in its ordinary sense, as a reference to government regulation of private speech, he is wrong to apply that term to secular purpose restrictions on government action. Those restrictions do not apply *at all* to speech by private actors and, therefore, are not viewpoint discrimination in the sense that the courts use the term.[131] The secular purpose requirement is a much more moderate infringement on free expression than Laycock asserts, because it is premised on (and thus limited by) the crucial difference between government regulation of private expression and internal constraints on the government's own action.[132]

Likewise, with regard to Professor Laycock's second argument, the secular purpose requirement constitutes discrimination against religion only in the sense that some religions refuse to accept constitutional limits on government action and, therefore, are denied access to the reins of government.[133] Ironically, Laycock himself has articulated this point nicely:

130. *Id.* at 801.

131. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995). In *Rosenberger*, the Court held:

> When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 829. The fact that the Establishment Clause (and, therefore, the secular purpose requirement) applies only to state action makes it especially crucial to determine when private speakers so dominate a state-run forum that their speech in essence becomes the government's speech. This is the subject of part III. *See infra* notes 188–315 and accompanying text.

132. *See Rosenberger*, 515 U.S. at 828.

133. Professor Kathleen Sullivan has made a similar point in noting that the Establishment Clause embodies not just a "negative bar against establishment of religion" but also an "affirmative 'establishment' of a civil order for the resolution of public moral disputes." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

> More specifically, the establishment of a secular civil order:
> by its very existence, "distorts" the outcomes that would have obtained had that war [of all sects against all] continued. Public affairs may no longer be conducted as the strongest faith would dictate. . . . From the perspective of the prepolitical war of all sects against all, the exclusion of any religion from public affairs looks like "discrimination." But from the perspective of the settlement worked by the Establishment Clause, it looks like proper treatment.

Id. at 198–99.

> Under the religion clauses, as I understand them and as the Supreme Court has understood them, all religions are protected. But that commitment itself entails one choice about types of religion. There is one type of religion that cannot be fully protected. That is the religion of those people who believe that their religious exercise requires use of the instruments of government, either to directly impose their belief on others or to use government in their own worship services. This choice among types of religion is also a choice among types of liberty. I believe that it is not simply a raw choice. It is a principled choice, based on the view that the best you can do to maximize religious liberty for all citizens is to prevent anyone from using the government for religious purposes.[134]

This passage seems to explain and justify the application of the secular purpose requirement to the religious expression of government officials, and it is puzzling that Laycock so steadfastly rejects the concept. The answer seems to be that Laycock distinguishes between religious matters that are "outside the jurisdiction of government" and religious matters that are "inside the jurisdiction of government."[135] This is how he explains this distinction:

> [I]t is occasionally suggested that the Establishment Clause helps keep religion out of politics. Simply put, that is nonsense. As history clearly demonstrates, religion is always a part of politics. . . . What the Establishment Clause separates from government is theology, worship, and ritual, the aspects of religion that relate only to things outside the jurisdiction of government. Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both. In a democratic society, the state will ultimately decide these questions at least to the extent of deciding what conduct will be subject to legal sanctions. But these are also questions on which churches are absolutely entitled to speak.[136]

This "jurisdictional" distinction between different subjects of government and religious action is flawed in at least two respects. First, the distinction would make it possible for a religious political majority to provide a level of direct governmental support for religious institutions never before seen in the modern era, as long as that support avoided the narrow categories of "theology, worship, and ritual." If representatives of churches are allowed to "speak" through government action that does not directly involve "theology, worship, and ritual," for example, then it should be permissible for the government to directly fund one hundred

134. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 374–75 (1992).

135. *Id.* at 374.

136. *Id.* at 381.

percent of the secular curriculum of private religious schools,[137] even though this would allow the schools to greatly increase their religious operations by shifting their private funds into religious enterprises. Moreover, since under Laycock's theory the secular purpose limitation on government action would be eliminated, the government could announce that it was funding the secular aspects of religious education with the specific intention of increasing the attractiveness and influence of religious education. By the same logic, the government could expressly endorse a particular church's entire social agenda, so long as the manner in which the government carried out this agenda avoided direct references to religion. All of this would greatly increase the involvement of government in the supposedly private religious choices of citizens by intentionally (and expressly) skewing social choices in favor of the dominant faith. This seems to cut directly against Laycock's own basic notion 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."[138]

The second flaw in Professor Laycock's "jurisdictional" distinction is that it views the relevant aspects of religious dominance too narrowly. If Laycock's "jurisdictional" distinction were used to dictate the application of the Establishment Clause, it would be impossible to prevent a religious political majority from imposing rules and regulations on everyone in a community that, although clearly (and often exclusively) religious in nature, fall short of "theology, worship, and ritual." As we know from the disputes that frequently arise in the free exercise context,[139] many religious groups themselves contend that mandates per-

137. The Court treated the distribution of funds as "speech" in *Rosenberger*, 515 U.S. at 819, and interpreted its prior decision in *Rust v. Sullivan* as holding that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Id.* at 833 (*citing* Rust v. Sullivan, 500 U.S. 173, 194 (1991)). Therefore, Professor Laycock's argument that the Establishment Clause permits the government to "speak" on religious matters that do not specifically involve "theology, worship, and ritual" seems to authorize the government to "speak" on such matters through funding decisions that favor religious goals and enterprises (such as religious education). This sort of direct funding of religious enterprises would be a marked departure from what is permitted under current law. The Supreme Court has invalidated direct governmental assistance to religious schools in the form of money for teachers, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state reimbursements for state-mandated examinations, *Levitt v. Commission for Public Education & Religious Liberty*, 413 U.S. 472 (1973), and funding for buildings that may be converted to religious use, *Tilton v. Richardson*, 403 U.S. 672 (1971). The ability of the government to fund religious education indirectly has been greatly enhanced recently by the Supreme Court's holdings in *Mueller v. Allen*, 463 U.S. 388 (1983), which upheld tax exemptions for educational expenses, including tuition, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), which upheld permitting public financing of a sign-language interpreter at a religious school, and *Agostini v. Felton*, 521 U.S. 203 (1997), which upheld permitting publicly financed remedial education in religious schools, although the Court's continued insistence that aid be funneled through parents and students rather than distributed directly to the religious institutions themselves probably indicates that the direct aid prohibition remains intact, if increasingly ineffectual.

138. Laycock, *Formal, Substantive Neutrality*, *supra* note 122, at 1001.

139. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 693 (1986) (religious parent argues that religion prohibits him from obtaining a Social Security number for his children); Bob Jones Univ. v. United States,

taining to personal lifestyle are often theologically indistinguishable from mandates regarding formal worship or prayer. From the Establishment Clause perspective, therefore, it is just as problematic for a religious political majority to impose on nonadherents one central aspect of its theological culture—i.e., religiously derived ethical values and lifestyle choices—as Laycock acknowledges it would be to impose other aspects of that theology—such as "theology, worship, and ritual."

If the Establishment Clause were governed by the narrow jurisdictional perspective Professor Laycock suggests, the Constitution would permit a religious political majority to rely on its own theological conclusions about personal and public morality to enact highly contentious, daily behavioral mandates into law. Thus, a Muslim political majority could require women to obscure their sexuality by wearing the chador in public, an Amish political majority could eliminate public schooling beyond the eighth grade, an Orthodox Jewish majority could impose a separate-but-equal educational structure for male and female students in the public schools,[140] and a fundamentalist Christian community could prohibit public school teachers from teaching evolution[141] and require psychological counseling for avowed homosexuals.[142] These examples of religiously motivated legislation fall short of "theology, worship, and ritual," but they clearly involve the imposition of religious values through the government—precisely what the Establishment Clause prohibits. Al-

461 U.S. 574, 574 (1983) (religious school argues that religion requires regulation of student interracial dating); United States v. Lee, 455 U.S. 252, 252 (1982) (employer argues that religion prohibits him from paying Social Security taxes for employees); Thomas v. Review Bd., 450 U.S. 707, 707 (1981) (religious adherent argues that religion prohibits him from working on armaments production); Wisconsin v. Yoder, 406 U.S. 205, 205 (1972) (religious adherent argues that religion requires parents to remove children from school after the eighth grade); Sherbert v. Verner, 374 U.S. 398, 401 (1963) (religious adherent argues that religion prohibits her from working on Sunday); Reynolds v. United States, 98 U.S. 145, 150 (1878) (religious adherent argues that polygamy is religious duty).

140. *See* Board of Educ. v. Grumet, 512 U.S. 687 (1994) (overturning state delegation of discretionary authority over public schools to practitioners of Satmar Hasidim Judaism).

141. *See* Epperson v. Arkansas, 393 U.S. 97, 107–08 (1968) (holding unconstitutional an Arkansas statute making it unlawful for a teacher in any state-supported school or university to teach the theory of evolution and noting that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. . . . It is clear that fundamentalist sectarian conviction was and is the law's reason for existence").

142. Homosexuality would obviously be a major flash point if religious political activism were to increase. National political leaders already have few qualms about announcing their religious views on the subject, and their official actions often seem to reflect these views. *See* Alison Mitchell, *Lott Says Homosexuality Is a Sin and Compares It to Alcoholism*, N.Y. TIMES, June 16, 1998, at A24 (describing the views of United States Senate Majority Leader Trent Lott, who "told a conservative talk show host . . . that homosexuality is a sin and then compared it to such personal problems as alcoholism, kleptomania, and 'sex addiction'" and noting that Lott strongly opposed legislation prohibiting discrimination against homosexuals on the ground that the legislation was "part of a larger and more audacious effort to make the public accept behavior that most Americans consider dangerous, unhealthy or just plain wrong"); Alison Mitchell, *Controversy Over Lott's Views of Homosexuals*, N.Y. TIMES, June 17, 1998, at A24 (describing statements of United States House Majority Leader Dick Armey citing biblical passages in support of Lott's statements that homosexuality is a sin and noting possible linkage between these statements and Republican opposition to nomination of a homosexual individual as ambassador to Luxembourg).

though some of these proposals might violate other constitutional interests—such as the nondiscrimination mandate of the Fourteenth Amendment—it seems equally clear that the Establishment Clause interest in being free from governmental religious mandates is violated by a religious political majority's overt effort to impose its own theologically dictated ethical and lifestyle choices on everyone in a community.

It cannot be argued that these policy choices about personal morality, sexuality, and lifestyle are not "religious" within the Establishment Clause context. In the debates that generate these issues (abortion and homosexuality, at one end of the political continuum; welfare and civil rights, at the other), the relevant political actors would probably acknowledge forthrightly that they are acting religiously in supporting these mandates to the same extent as they are acting religiously when they engage in worship or prayer. If a legislator's religious faith leads him to believe that homosexuality is sinful and must be eradicated, it is difficult to argue that these views do not enter into his votes to (for example) criminalize homosexual sex acts. Laycock recognizes that it is a clear infringement of religious liberty for a legislator to legally mandate that his constituents pray to the legislator's God,[143] but it is just as clear an infringement for the legislator to make his constituents obey his God's rules concerning personal and moral behavior. If the religious freedom protected by the Establishment Clause is to have real meaning, the Clause cannot be read to protect only against the government's religious mandates on Sunday morning. The religious mandates that operate the rest of the week often can intrude even more deeply into an individual's religious and moral universe. This is why the secular purpose requirement is so important; it is the method by which courts enforce Establishment Clause restrictions on the more subtle—but often even more intrusive—forms of religious domination.

Professor Laycock would probably respond that this subtle domination is simply the nature of politics in a democracy and that outside the narrow confines of "theology, worship, and ritual," the political rights of religious groups are co-extensive with the rights of every other political faction. But under our constitutional scheme, religious majorities are treated differently than other political factions, in part because (as explained in more detail in part IV[144]) religious factions exhibit traits that are uniquely and inherently antidemocratic in nature. Laycock obviously disagrees, and his third argument against the secular purpose requirement relies on the many positive contributions that religious groups make to the democratic political structure. I will leave until part IV a full discussion of why the hierarchical and absolutist structure of religious thought makes its contributions to public policy—including positive ones—problematic in a democracy. For the moment, however, it should

143. *See* Laycock, *supra* note 112, at 777–80.
144. *See infra* notes 316–44 and accompanying text.

be clear that even legislation incorporating the Golden Rule becomes tainted if opponents cannot question the legislation's validity or desirability without suffering their government's threat of eternal damnation (a threat that is always implicit whenever religious motives are given for any governmental policy).

Religious motives are also problematic because they are inherently exclusionary in nature and, therefore, have the tendency to squelch political debate by rendering political compromise—and democratic government—difficult and sometimes impossible. Laycock rejects this claim and asserts instead that religious appeals "can be powerfully moving and unifying for large numbers of believers, and . . . can resonate with analogous expressions of the same or similar values in other religions and in secular thought."[145] But if a religious policy proposal is universal in the sense that it has a direct analog outside the faith, then the policy does not need to be based expressly on religious ideals, and the secular purpose requirement would not prevent the government from passing exactly the same policy based on the policy's universalist, secular appeal. If the policy is not universal in that sense, then Professor Laycock's assertion is false; if there is no secular analog to the religious argument, then the proposed policy amounts to nothing more or less than pure religious domination. The Establishment Clause must come into play in this latter circumstance to invalidate the religiously motivated legislation.

In the end, the most dubious aspect of Professor Laycock's defense of religious politics is his insistence that religion tends to be a unifying force in political disputes.[146] On the contrary, if the government is permitted to pursue religious goals that cannot be articulated and defended in secular terms, then it is inevitable that disputes will eventually arise in which absolute and uncompromising religious values will clash with competing secular values (or another sect's conflicting but equally absolute religious values). Political disputes over religious absolutes are by nature dangerously exclusionary and divisive. They do not lend themselves to the political compromise and deference among adversaries that is crucial to the successful maintenance of a pluralist democracy.[147] In its modest form, religious political action is likely to result in discrimination and recrimination against religious minorities. In its extreme form, religious politics provide a recipe for the sort of outright religious warfare that persists throughout the world.[148] The Establishment Clause is de-

145. Laycock, *supra* note 112, at 808.

146. *See id.* at 742.

147. This point is the rationale for Kent Greenawalt's similar conclusion that democratic decisions should not be based on explicitly religious justifications. "In a very religious but extremely tolerant society, public airing of particular religious views might work well, but in actuality such discourse promotes a sense of separation between the speaker and those who do not share his religious convictions and is likely to produce both religious and political divisiveness." KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 219 (1988).

148. Several commentators, including Michael McConnell and Michael Perry, have rejected the divisiveness argument, asserting instead that civil discord in the United States has been produced more

signed to prevent both of these alternatives. The secular purpose requirement is one way—and possibly the only effective way—of avoiding this route to democratic self-destruction.

2. The Pragmatic Arguments Against the Secular Purpose Requirement

Both conservative and moderate critics of modern Establishment Clause theory raise pragmatic arguments against limiting the religious expression of public officials (or other manifestations of official reliance on religious motives for government action). There are both broad and narrow versions of the pragmatic arguments against the secular purpose requirement. For purposes of the present discussion, Justice Scalia's dissenting opinion in the Supreme Court's second creationism decision, *Edwards v. Aguillard*,[149] will be used as a representative example of the broad pragmatic argument. Professor Michael Perry's work on the subject of religion and politics will be used as a representative example of the narrow pragmatic argument.[150]

Justice Scalia's broad pragmatic argument against the secular purpose requirement is part of his general skepticism about the power of courts to go beyond statutory texts to ascertain legal meaning.[151] In Jus-

often by secular rather than religious issues. *See* Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405, 413 ("Religious differences in this country have never generated the civil discord experienced in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery."); Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 743 (1996) ("American history does not suggest that religious debates about controversial issues—racial discrimination, for example, or war—are invariably more divisive than secular debates about those or other issues.").

Quantifying precisely the relative amounts of secular and sectarian civil strife is impossible; during this country's existence, there has certainly been plenty of both. But two characteristics render religious disputes potentially more divisive than secular disputes. First, the virulence of secular disputes tends to abate once one side has achieved victory over a particular issue. Once that issue is settled, the former antagonists filter back into society as mutually tolerant fellow citizens; the issue leaves no lasting mark. Religious disputes that turn political, on the other hand, never seem to end until one side has been eradicated or ejected from the society. Few citizens who lived through the Vietnam War era know (or care) any longer which of their contemporaries were hawks or doves on Vietnam. On the other hand, no one in a religiously politicized country ever forgets his or her religious allegiance or that of the neighbor. The tragic remnants of the former Yugoslavia provide a cautionary lesson for what can happen when a society fails to jealously guard the principle that religion and politics operate in totally separate domains.

The second thing that makes religion different from the secular issues cited by McConnell and Perry is that in this country we have created a constitutional structure that channels religious discord away from the apparatus of political power. The stakes of religious discord are, therefore, not as great as they are in a country where the religious losers have no Supreme Court to protect them. Thus, even if McConnell and Perry correctly note that this country has generated more secular than religious civil discord, they have failed to acknowledge the reason—i.e., the very structure of constitutional separation of church and state against which McConnell and (to a much lesser extent) Perry argue in their work.

149. 482 U.S. 578 (1987).

150. *See generally* Perry, *supra* note 148.

151. Justice Scalia explained his view of constitutional and statutory interpretation in the Tanner lectures, which he delivered at Princeton University in 1996. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

tice Scalia's words, "while it is possible to discern the objective 'purpose' of a statute, . . . or even the formal motivation for a statute where that is explicitly set forth . . . discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task."[152] Justice Scalia gives three reasons for this difficulty. First, there are many relevant actors involved in the adoption of any legislative policy whose reasons for supporting a particular policy are often vague and may vary widely;[153] second, sources of information about the views of legislators and other government officials are "eminently manipulable" and untrustworthy as evidence of unconstitutional intent;[154] and third, in some cases, only a few legislators may have an unconstitutional intention in voting to adopt a particular policy, and it is inappropriate to invalidate the legislation when "everyone else's intent was pure."[155]

Justice Scalia's first two reasons come into play in cases such as *Edwards*, where a legislature carefully constructed a record that presented an ostensibly secular rationale for a statute that was (according to an overwhelming majority of the Supreme Court) clearly motivated by religious purposes.[156] In *Edwards*, Justice Scalia argued that the Court should accept the Louisiana legislature's claims of a secular purpose for its creationism statute,[157] while seven members of the Supreme Court rejected Louisiana's claims, noting that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[158]

The question of how much deference should be given to legislative attempts to cleanse the record of evidence of impermissible religious intentions is a difficult one, but it is irrelevant to the matter at issue in this article. The question here is whether the free speech provisions of the First Amendment protect a legislator's expression of religious motives in support of legislation. This issue did not arise in *Edwards* because the legislators in that case tried to disguise their true intent by remaining silent about their religious motives; they did not claim free speech protection of their religious expression because there was no such expression to protect. Because the issue addressed in this article will only arise where public officials overtly express a definitive religious motive for supporting a particular government policy, Justice Scalia's first two practical objections to the secular purpose requirement are irrelevant.

Justice Scalia's third point is relevant to the religious free speech dispute when some, but not all, legislators express religious objectives regarding specific legislation. Justice Scalia's third point says little, how-

152. *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting).
153. *See id.* at 636–37.
154. *Id.* at 638.
155. *Id.*
156. *See id.* at 597.
157. *See id.* at 610–11.
158. *Id.* at 586–87.

ever, about the main issue: whether the First Amendment protects the overt expression of religious motives for government action. In any event, it can be conceded without undermining the argument presented here that the Establishment Clause would not require the invalidation of a statute based solely on the isolated expression of a religious purpose by one or two legislators who had little effect on the passage of a piece of legislation (although the one or two ineffectual legislators may themselves have acted unconstitutionally). However, the expression of religious motives by any significant government actor (or any significant number of government actors) in the policy-making process will raise Establishment Clause concerns and require the invalidation of the legislation. If (as proposed here and as a majority of the Supreme Court continues to hold) the Establishment Clause requires all government policies to be supported by a secular purpose, then the only logical interpretation of that requirement is that the Clause would be violated by any legislation that is supported to a significant degree by a religious rationale. Otherwise, the statement of a secular purpose by one legislator would insulate from Establishment Clause challenge a statute that would not have been enacted but for the legislative majority's religious motivation. In sum, an Establishment Clause violation exists if the legislative facts indicate that the religious motivation was a significant factor in the adoption of legislation. The fact that some legislators may have "pure" motives is irrelevant if the legislation as a whole is tainted.

But this still leaves the narrow pragmatic objections to the restriction of religious expression under the secular purpose requirement. Unlike Justice Scalia, who would abandon altogether the secular purpose requirement (and, therefore, restrictions on the religious expression of government actors), Michael Perry takes a more subtle approach to issues of religious expression by government policymakers. Professor Perry accepts the basic separationist principles of the Establishment Clause and also recognizes that the secular purpose requirement plays a role in protecting those principles.[159] But Professor Perry shares Professor Laycock's reluctance to exclude religious adherents from the political process and couples this reluctance with his own skepticism that the courts can accurately ferret out the underlying religious motives for legislation drafted by a resolute sectarian majority that intentionally masks its religious objectives.[160] Thus, Perry dilutes the secular purpose analysis to the point that it would prevent only the most inattentive or incompetent legislature from adopting religiously motivated policies.

Professor Perry's theory is richly detailed and carefully argued, and the very different focus of this article makes it impossible to do justice to his full theory.[161] The part of Perry's argument that will be considered

159. *See* Perry, *supra* note 148, at 734.
160. *See id.* at 734–35.
161. For example, there will be no consideration here of Perry's extensive concern with the moral,

here is his operational rule regarding the constitutional limits on the use of religious justifications for governmental policy. Professor Perry begins his argument regarding the constitutional limits on religion in politics by distinguishing between the expression of religious arguments about a public policy (which Perry believes is permissible)[162] and reliance on those arguments in adopting that policy (which Perry would prohibit).[163] With regard to the expression of religious arguments, Perry writes that "[e]very citizen, without regard to whether she is a legislator or other public official, is constitutionally free to present in public political debate whatever arguments about morality, including whatever religious arguments, she wants to present."[164] With regard to the government's actual reliance on those arguments, however, Perry's rule is quite different:

> The nonestablishment norm forbids government to base political choices on religious arguments; thus, at least as an ideal matter, the nonestablishment norm requires that if government wants to make a political choice, including one about the morality of human conduct, it [must] do so only on the basis of a secular argument.[165]

Under Professor Perry's theory, therefore, a legislator may make religious arguments (apparently even on the floor of the Senate or House) but may not then rely on those arguments when it is time to vote. Although this distinction seems to impose an absolute prohibition against public officials relying on religious arguments to enact public policies, judicial enforcement of the reliance prohibition would be governed by a weak rule that would have the courts uphold any statute if "a plausible secular rationale supports the choice without help from a parallel religious argument."[166] Apparently, this "plausible secular rationale" would not have to be stated by the legislature (or government agency) at the time it adopts the policy; the rationale could be developed in litigation, or even by the courts themselves, without any proof that the "plausible secular rationale" was even considered (much less relied upon) by the relevant policymakers.

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as opposed to legal, constraints on public officials' use of religious arguments. *See, e.g.*, *id.* at 753–91 (discussing the moral appropriateness of public officials' reliance on religious arguments). Perry expands on this argument in MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997) [hereinafter RELIGION IN POLITICS].

162. *See* Perry, *supra* note 148, at 735.

163. *See id.* at 735–36.

164. *Id.* at 733.

165. *Id.* at 735.

166. *Id.* at 737. Professor Perry would provide individual legislators complete immunity from judicial enforcement of Establishment Clause rules against religiously motivated legislative actions. After recognizing that the Establishment Clause imposes a duty on individual legislators to refrain from voting on legislation unless that legislation is supported by a persuasive secular rationale, Perry emphasizes that "I am not suggesting that such a constitutional duty could be, or even should be, judicially enforced. How could a court determine whether or not an individual legislator really believes that there is a persuasive secular rationale? The duty would have to be self-enforced." RELIGION IN POLITICS, *supra* note 161, at 37.

Professor Perry concedes that this weak rule "involves an 'underenforcement' of the full ideal of nonestablishment"[167] but argues that this is a necessary concession to the practical realities of ascertaining whether the government relied in part on impermissible religious reasons in adopting a particular policy.[168] One of the practical realities Perry cites is the probability that if courts demand evidence that legislatures rely only on secular premises for legislation, legislatures dominated by determined religious activists would simply lie about their motives. Perry argues "[p]ublic officials could, and many doubtless would, take steps to construct a legislative history that would make it even harder for a court to conclude that such a political choice was not based solely on a secular moral argument."[169]

The adoption of Professor Perry's weak rule requiring only a "plausible secular rationale" would amount to an evisceration of the secular purpose requirement. Perry himself implicitly acknowledges this by noting at one point that the "underenforcement" of the secular purpose requirement under his rule would likely amount to a total lack of enforcement in most instances, since "there will be plausible secular rationales for most . . . political choices [about the morality of human conduct] that government might want to make."[170]

Professor Perry's concessions to the practicalities of enforcing the secular purpose requirement go far beyond what the evidence indicates is necessary. Every one of Perry's practical concerns can be addressed within the scope of present doctrine; indeed, many of these concerns are actually created by Perry's own initial concession that government officials may express religious motives freely so long as they do not ultimately rely on those motives in voting on legislation.[171] The threat of legislative duplicity is the easiest to address. In *Edwards v. Aguillard*,[172] the Supreme Court has already confronted and dealt effectively with a legislature that constructed a sanitized record to cloak its impermissible religious motives for enacting a statute advancing the cause of creationism. The Court dealt with the façade by assessing not just the legislative record itself but also the background and logical inferences drawn from the statute. The Court then concluded that the legislature's stated secular motives were a sham.[173]

Admittedly, not all statutes will be as obviously religious as a statute advancing the perspective of the Book of Genesis in public school classrooms. Yet courts regularly make judgments about the constitutionality

167. Perry, *supra* note 148, at 737.
168. *See id.* at 735.
169. *Id.* at 737.
170. *Id.* at 738.
171. *See id.* at 740.
172. 482 U.S. 578 (1987).
173. *See id.* at 586–87.

of legislative intent based on imperfect evidence[174] and are fully capable of seeing through obvious legislative attempts to surreptitiously advance a religious agenda. On the other hand, it is true that the legislative record and logical inferences from the statute itself will not always be sufficient for courts to discern the legislature's true motives for adopting some policies. But the fact that it is often difficult to interpret a silent or incoherent legislative record does not free the courts from their responsibility to enforce the Establishment Clause; it simply means that the courts at times have to use ancillary evidence of what motivated the legislators.

The courts' obvious need to use ancillary evidence to prove impermissible legislative intent reveals the flaw in Professor Perry's attempt to distinguish between a legislator's expression of religious motives and the legislator's subsequent reliance on those motives. A legislator's public expression of the religious basis for supporting a particular policy will often be the best—or even the only—evidence of what motivated that legislator in voting for a piece of legislation. It is illogical in at least two respects to attempt to enforce the secular purpose requirement without limiting a legislator's expression of those motives—expression that could even come in the form of multiple, vociferous public statements asserting a religious basis for proposed legislation in the weeks or months leading up to the vote on that legislation. First, by protecting a legislator's expression, Perry assumes that the expression is somehow divorced from the legislator's ultimate motive in voting for legislation. In fact, the line between a legislator's public expression and his or her legislative motives does not exist; the expression is a direct reflection of the motive. When a legislator speaks out on religious grounds about pending legislation, the legislator is undertaking the public aspect of his official duties. Legislation is not created spontaneously at the time of the final vote; it is developed over time, and a crucial part of a bill's gestation is public discussion of that bill by those who will vote on it. Second, to the extent that the Establishment Clause prohibits government actions that contribute to the public perception of religious influence over government (which is a mat-

174. This is a very common phenomenon in modern equal protection jurisprudence. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court made a racially discriminatory intent the key to adjudicating equal protection claims on behalf of suspect classes. *See id.* at 245. One year later, the Court noted that clear-cut cases of improperly discriminatory legislative intent would be "rare." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). In the majority of cases, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* The Court has engaged in similarly open-ended assessments of improper intent in equal protection cases involving groups other than those formally classified as suspect or quasi-suspect classes. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a state constitutional amendment was motivated by prejudice in violation of the federal Equal Protection Clause, based on the Court's inference from the amendment's structure that the amendment was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests"); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that a federal statute was motivated by unconstitutional prejudice against an unpopular group, based on a brief conference report and one senator's comments).

ter of particular interest in applying Justice O'Connor's endorsement analysis[175]), a legislator's public statements about legislation may actually be more important than that legislator's silent vote. The public is not likely to comprehend the fine line between a legislator's expressed views and the legislator's silent motives. When a legislator announces in public his or her intention to carry out God's dictates that certain behavior be mandated (or prohibited) by law and then subsequently votes to enact that very mandate (but without repeating God's instructions), the public will understand quite clearly why the legislator voted as he or she did. If legislators and other government officials are permitted to militate in favor of demonstrably unconstitutional actions and undertake those very actions without restraint so long as they do so without further stating the obvious, then the secular purpose limitation has been emptied of any meaning or effect.

To underscore what seems to me (but apparently not to others) an obvious point, consider a variation on one of the Supreme Court's own secular purpose decisions involving the Alabama silent prayer statute. The Court held this statute unconstitutional in *Wallace v. Jaffree*,[176] based on the Court's conclusion that an impermissible religious purpose motivated the statute.[177] One of the key pieces of evidence supporting this conclusion was a statement that the law's sponsor in the state senate placed in the legislative record.[178] Part of this statement contains the following passage: "Since coming to the Alabama Senate I have worked hard on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber [sic]."[179] The senator who made this statement later confirmed in testimony before the district court that returning prayer to the classroom was his only purpose in supporting the legislation.[180] Based largely on this evidence, the Supreme Court struck down the statute. But suppose the same statute was litigated in a slightly different context. Suppose instead of placing in the legislative record a statement about his intention to return prayer to school, the statute's sponsor embarked on a six-month crusade through the state, announcing at every opportunity his intention to return prayer to public schools as a means of returning to "the basic moral fiber." Then, when the legislation came up for a vote, the legislator and all his colleagues remained silent about their motives, and no one attached to the legislation a legislative record of any kind. Moreover, at a trial on the constitutionality of the statute, the legislator testified that his intention in supporting the statute was merely to provide a moment of quiet reflection at the beginning of the school day, and his colleagues all testified to the

175. *See supra* note 58.
176. 472 U.S. 38 (1985).
177. *See id.* at 56.
178. *See id.* at 56–57.
179. *Id.* at 57 n.43.
180. *See id.* at 57.

same effect. If, as Professor Perry asserts, the Establishment Clause "does not forbid any person—including any person who happens to be a legislator or other public official—to say whatever she wants to say, religious or not, in public policy debate,"[181] and if (as lower courts have held)[182] the ostensible intent to provide a moment of quiet reflection constitutes what Perry calls a "plausible secular rationale,"[183] then under Perry's theory, the courts would be obligated to uphold the statute even though everyone in the process knows very well that the statute was devised and enacted for an unconstitutional purpose. This rule is worse than ineffective; it provides an open invitation for recalcitrant government officials to mock the courts and the Constitution at every turn.

As a practical matter (as indicated by Professor Perry's own concession that his weak rule will do little to enforce the Establishment Clause),[184] it seems clear that adequate enforcement of the Establishment Clause requires scrutiny of the public religious expression of government officials as an indication of their motives in voting for legislation. This does not mean that someone litigating a restrictive abortion statute, for example, could raise as evidence of unconstitutional intent the fact that a legislator is Catholic and attends Mass regularly, but the example given at the beginning of this section is another matter.[185] If a congressman gives an impassioned testimonial at a religious service on Sunday in which he cites the Bible in support of the proposition that abortion is sinful, and Monday the same congressman introduces legislation severely restricting abortion, and the legislation is ultimately adopted, it is reasonable for the courts to use the congressman's speech as evidence of an impermissible legislative intent (which, of course, may be rebutted if other evidence is produced indicating that the congressman's views had no significant effect on the fate of the legislation).

Perry's (and Laycock's) concerns about the free speech rights of religious citizens are misplaced when they apply those concerns to the official policy-making actions of government officials. Perry and Laycock's assertions that the expression of all perspectives—including religious perspectives—must be permitted in public discussions are correct with regard to the expression of private persons. But, as Laycock himself has pointed out,[186] the government and its officials are treated differently than private citizens. The Establishment Clause prohibits government from incorporating religious perspectives into law and enforcing them on everyone in society; since government officials *are* the government when

181. Perry, *supra* note 148, at 734.

182. This is the secular purpose the Eleventh Circuit cited recently in upholding Georgia's moment-of-silence statute. *See* Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1469–70 (11th Cir. 1997).

183. Perry, *supra* note 148, at 737.

184. *See supra* note 167 and accompanying text.

185. *See supra* text accompanying notes 98–100.

186. *See supra* note 134 and accompanying text.

it comes to the making of policy, it is only logical that courts enforce the Establishment Clause against individual government officials whose expression announces the government's illegal actions.[187]

III. PRIVATE RELIGIOUS SPEECH AS AN UNCONSTITUTIONAL ESTABLISHMENT OF RELIGION

Aside from the debate over whether the Establishment Clause contains an implicit secular purpose requirement, the issue of whether religious speech by government employees violates the First Amendment requires little deep analysis. Even the staunchest proponents of closer relations between church and state would acknowledge that some relig-

187. Legislators and legislation have been the main focus of the discussion in this subpart, partly because that is the most direct application of the *Lemon* secular purpose test and partly because it is the focus of most academic discussions of the matter. This narrow focus does not mean, however, that limitations on the religious speech of government officials apply only to legislators. Any government official who has the authority to cause the government to act (or refrain from acting) for any reason is a policymaker subject to the limitations discussed above. Thus, the limitations discussed here would apply to presidential statements about why he is (or is not) signing a bill or proposing a particular policy, to administrative agency personnel responsible for developing rules and regulations, and also to judges who must enforce the law through litigation. This is not a remarkable extension of the doctrine. The clearest example of an existing application of the same principles to judges is *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991), which reversed televangelist James Bakker's sentence on the ground that the trial judge had made improper remarks about the judge's own religion. The court noted that "[we] cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." *Id.* at 740.

This is not a surprising holding. What is surprising is that Professor Sanford Levinson agrees with this holding, even though he no longer believes that the Establishment Clause supports the application of the secular purpose analysis to legislative matters and now believes that the Court made a mistake in citing the secular purpose analysis to strike down the Arkansas anti-evolution statute in *Epperson v. Arkansas*, 393 U.S. 97 (1968). *See* Levinson, *supra* note 116, at 2078 & n.73. It is not clear why Professor Levinson distinguishes between religious legislation and religious adjudication; Levinson's comments to this effect are tentative, and to my knowledge he has not elaborated on them. But Levinson probably states a very common conclusion that if any government entity should be free of religious animus or prejudice, it should be the judiciary. The devil, however, is in the details. Religious comments made at a sentencing hearing provide an easy case; the difficulties arise when judges make extrajudicial statements analogous to those discussed in the text with regard to legislators.

In an article defending some controversial religious comments that Justice Scalia made at a prayer breakfast, Professor Michael Paulsen and attorney Steffan Johnson acknowledge that judges must "refrain from publicly discussing a pending case or from making statements amounting to campaign promises or pledges as to how they will rule on a particular case or issue." Michael Stokes Paulsen & Steffan N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 871 (1997). But the authors argue that judges and Justices should be allowed to freely express their religious views—up to and apparently including very specific, abrasive, and exclusionary points of religious doctrine. *See id.* at 874–75 (favorably comparing Justice Scalia's "genuine Christian exhortation" to "pasty, cream-of-wheat-consistency politicians' religion-talk"). Such overtly religious comments by a sitting Justice, if linked in some way to an issue or issues coming before the Supreme Court, are potentially just as problematic as a legislator's similar comments. If Justice Scalia had announced (even outside the context of a specific case) that he intended to interpret the Constitution "in precise accord with God's teachings," then these statements would pose the same problem as a legislator's statement that he intended to pursue a religious agenda in his legislative actions. Whether Justice Scalia's statements crossed this line is impossible to say without reviewing a transcript of his comments (which has not been released), but holding judges to the same constitutional obligations as other government officials is hardly "simultaneously naive and itself a threat to freedom of speech and religion." *Id.* at 874.

ious speech by government employees violates basic constitutional protections of religious liberty.[188] No serious scholar or jurist has ever suggested that the First Amendment would permit, for example, Christian government employees to produce and distribute, on government time, a pamphlet describing the theological errors of Judaism or Islam. Although (as the discussion in part II indicates) [189] there is much debate over more subtle forms of government employee speech on religious topics, there is at least basic agreement that the Establishment Clause applies to the most egregious cases.

This agreement about basic principles breaks down when the discussion turns to whether private religious speech on government property violates the Establishment Clause. Basic disagreement about the treatment of private speech has been a central feature of the Supreme Court's Establishment Clause decisions since the first school prayer case when Justice Stewart caustically dissented from the Court's decision to hold the New York regents' prayer unconstitutional on the ground that "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."[190] Although Justice Stewart lost the battle over the regents' prayer, a majority of the Court has endorsed Justice Stewart's underlying premise that government religious speech and private religious speech inhabit two completely separate constitutional compartments. As the Court noted in upholding the Equal Access Act, which provides religious groups access to public school facilities, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect."[191]

The problem with this broad statement is that a majority of the Court does not entirely believe it. This becomes evident upon a careful analysis of the opinions in *Capital Square Review and Advisory Board v. Pinette*,[192] where the Court split closely on whether private religious speech in a public forum could ever constitute a violation of the Estab-

188. For example, even Justice Scalia, who supports one of the most restrictive interpretations of the Establishment Clause among the current Justices, is willing to concede that the Constitution prohibits government statements (i.e., statements by government employees who are authorized to make such statements) endorsing religion where "the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

189. *See supra* notes 57–187 and accompanying text.

190. Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).

191. Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

192. 515 U.S. 753 (1995). The case involved a private group's placement of a Latin cross in a public plaza next to the state capital. The lower courts found that the plaza was a traditional public forum, in which free speech rights are at their zenith. *See id.* at 761. Also, the state conceded that it had denied permission to place the cross in the park specifically because of the display's religious content to avoid any perception of an official endorsement of religion. *See id.* Thus, the only issue before the Supreme Court was whether private religious speech on public property could constitute an Establishment Clause violation.

lishment Clause.[193] Four Justices, led by Justice Scalia, argued for an absolute rule that religious expression does not violate the Establishment Clause "where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[194] Thus, the four-Justice plurality rejected the argument that private religious speech is constitutionally problematic when it "is conducted too close to the symbols of government" or "whenever private speech can be mistaken for public speech," although the plurality left open the possibility that the Establishment Clause might be violated if the government "fostered or encouraged" the mistaken attribution of private religious speech to the government.[195]

If the plurality opinion in *Pinette* were the law, then this section would be of little more than academic interest. But the key to *Pinette* is that five Justices rejected the conclusion of the plurality opinion, which means that five Justices believe that in some circumstances private religious speech *does* pose Establishment Clause problems and should, therefore, be restricted by the courts.[196] The fact that one of the five Justices holding this opinion also wrote the language in the Equal Access case quoted above about the "crucial difference" between private and governmental religious speech[197] and that the five Justices who disagreed with Justice Scalia also disagreed vehemently among themselves about whether the speech in *Pinette* itself was problematic[198] gives some indication of the complications this issue presents. But it is important to underscore that in *Pinette*, five Justices agreed that the Constitution requires extensive judicial oversight over private religious speech in government-owned forums—even when the government is publicly neutral in its relationship with the religious speakers. Even in the most moderate formulation of this principle, Justice O'Connor noted that "an impermissible

193. *See id.* at 757–817.

194. *Id.* at 770 (plurality opinion).

195. *Id.* at 766 (plurality opinion).

196. *See id*. at 774 (O'Connor, J., concurring in part and concurring in the judgment) (concluding, in an opinion joined by Justices Breyer and Souter, that "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism"); *id*. at 791 (Souter, J., concurring in part and concurring in the judgment in part) (discussing extensive precedent in which the Court has applied the Establishment Clause to private religious speech and concluding that "[e]ven if precedent and practice were otherwise . . . and there were an open question about applying the endorsement test to private speech in public forums, I would apply it in preference to the plurality's view, which creates a serious loophole in the protection provided by the endorsement test"); *id*. at 799 (Stevens, J., dissenting) (concluding that "[i]f a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display"); *id.* at 817 (Ginsburg, J., dissenting) (concluding that "[i]f the aim of the Establishment Clause is genuinely to uncouple government from church, . . . a State may not permit, and a court may not order, a display of this character").

197. *See supra* note 191 and accompanying text.

198. *Compare Pinette*, 515 U.S. at 772 (O'Connor, J., concurring in part and concurring in the judgment) (concluding that the speech in *Pinette* did not violate the Establishment Clause), *and id*. at 783 (Souter, J., concurring in part and concurring in the judgment in part) (same), *with id.* at 797 (Stevens, J., dissenting) (concluding that the speech violated the Establishment Clause), *and id.* at 817 (Ginsburg, J., dissenting) (same).

message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism."[199] This may occur "even if the governmental actor neither intends nor actively encourages [the endorsement]."[200] Thus, the Establishment Clause imposes on the government "affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message."[201]

These are strong statements, and they directly contradict the statement in a section of the *Pinette* majority opinion (in which the conservative plurality was joined by Justice O'Connor to form a majority) that "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."[202] Notwithstanding Justice O'Connor's incongruous vote to endorse the section of the *Pinette* plurality opinion containing this statement, in her own separate *Pinette* opinion she joins four other Justices in announcing unequivocally that the Establishment Clause limits the Free Speech Clause's protection of private religious speech when that speech occurs on government property or in other contexts in which the speech becomes associated with the government.[203] Thus, if there is a "crucial difference between government speech endorsing religion . . . and private speech endorsing religion,"[204] there is also an equally crucial difference (at least when the speech takes place on government property or is otherwise associated with the government) between private speech endorsing religion and private speech endorsing secular subjects.

The problem, of course, is how to apply these distinctions in the complicated disputes over religious speech that occur in the real world. These complications are the subject of the remainder of this section. The next subsection will deal with these issues in the public school context, where speech is already more limited than in forums such as public parks, and where at least a tentative test for constitutionality is already implied by the cases. The final subsection applies the test implicit in the school cases to speech outside the public school context.

A. The Problem of Private Religious Domination—The Public School Cases

Public schools provide the most obvious context in which private religious speech in a government-owned forum dominated by members of one faith creates Establishment Clause problems. The facts of three recent cases are illustrative.

199. *Id.* at 774 (O'Connor, J., concurring in part and concurring in the judgment).
200. *Id.* at 777.
201. *Id.*
202. *Id.* at 760.
203. *See id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment).
204. Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

In *Jones v. Clear Creek Independent School District*,[205] plaintiffs challenged a public school district's decision to permit graduating high school seniors to choose a student volunteer to give a nonsectarian invocation at the school's graduation ceremony.[206] A panel of the Fifth Circuit Court of Appeals rejected the constitutional challenge on the ground that the graduation prayers resulting from the district's decision would involve private rather than government speech and, therefore, would not violate the Establishment Clause.[207] As the court summarized the effect of its decision, "[t]he practical result of our decision . . . is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies."[208]

Three years after *Jones*, a different Fifth Circuit panel reached a slightly dissimilar conclusion when it confronted another example of private religious speech in public schools. In *Doe v. Duncanville Independent School District*,[209] a junior high school student was harassed, ridiculed, and ostracized after she expressed her desire not to participate in prayers that were routinely conducted during classes and other activities at the school.[210] The prayers were conducted before and after basketball games, in a class offered for members of the basketball team, at awards ceremonies, and at graduation. The school also permitted the distribution of Gideon bibles to fifth-grade classes and included several explicitly Christian songs in the repertoire of the school's choir.[211] The case arose after the plaintiff's father saw Ms. Doe participating in the basketball team's prayer, which was "recited in the center of the court at the end of the game, the girls on their hands and knees with the coach standing over them, heads bowed."[212] Ms. Doe "was uncomfortable with these prayers and opposed to the practice, [but] participated out of a desire not to create dissension."[213] She stopped participating after her father told her that she did not have to join the basketball team's prayers. She was then required to stand apart from the team while the other students were praying. In effect, she became a religious pariah: "her fellow students asked, 'Aren't you a Christian?' . . . one spectator stood up after a game and yelled, 'Well, why isn't she praying? Isn't she a Christian?,' . . . [and her] history teacher called her 'a little atheist' during one class lecture."[214] The

205. 977 F.2d 963 (5th Cir. 1992).
206. *See id.* at 965.
207. *See id.* at 971.
208. *Id.* at 972.
209. 70 F.3d 402 (5th Cir. 1995).
210. *See id.* at 404.
211. *See id.* at 404–05. This citation is to the Fifth Circuit's opinion addressing the district court's final decision on the merits in the case. An earlier court of appeals opinion affirming the district court's preliminary injunction contains a much fuller description of the facts in the case. *See* Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 161–63 (5th Cir. 1993).
212. *Doe*, 994 F.2d at 161.
213. *Id.*
214. *Id.* at 162–63.

court of appeals upheld the provision of the district court's injunction prohibiting teachers from participating in or supervising prayers during official school activities but denied Ms. Doe's claims against the Bible distribution and choir songs and mentioned nothing about the school's obligations to restrain students and community members from expressing their hostility to Ms. Doe's nonparticipation in religious activities.[215]

Doe is hardly the only case in which a community's dominant religious group has exercised its influence in public schools by behaving aggressively and boorishly toward an individual who politely refuses to participate in the dominant group's religious activities.[216] Similar confrontations are chronicled in a case involving prayer at a Tennessee public university. In *Chaudhuri v. Tennessee*,[217] a Hindu faculty member named Dilip Chaudhuri objected to the Tennessee State University (TSU) practice of offering Christian prayers at "graduation ceremonies, faculty meetings, dedication ceremonies, and guest lectures."[218] In response to Chaudhuri's objection and a subsequent opinion by the university system's general counsel, the university decided that future prayers would be "generic."[219] This decision changed the prayers offered on behalf of the university in only one respect: explicit references to Jesus Christ were omitted.[220] Many other Christian references were retained, however, and the overall thrust of the prayer at a subsequent commencement ceremony was so permeated with Christian references that it was described by a dissenting judge as "a package of bias."[221]

The minor change in prayer practices did not satisfy Professor Chaudhuri, who sued the university for violating the Establishment and Free Exercise Clauses.[222] In response to this lawsuit, the university changed its practice again. It announced that it was replacing official verbal prayers at university ceremonies with moments of silence. In the first spring graduation ceremony conducted under the new "moment of silence" rule, the crowd picked up where the university had left off before Chaudhuri's complaint. When the crowd was asked by the graduation speaker to rise and remain silent, "[t]he moment that followed proved less than silent. Someone, or a group of people, began to recite the Lord's Prayer aloud. Many audience members joined in—spontaneously, by all accounts—and loud applause followed."[223] At the summer graduation following this incident, the university invited as a commencement speaker a local educator who was also a pastor at a local church.[224] Once

215. *See id.* at 167.
216. For other examples not discussed in the text, see *infra* note 226.
217. 130 F.3d 232 (6th Cir. 1997).
218. *Id.* at 234.
219. *Id.*
220. *See id.* at 234, 241 & n.2 (Jones, J., concurring in part and dissenting in part).
221. *Id.* at 241 n.2 (Jones, J., concurring in part and dissenting in part).
222. *See id.* at 235.
223. *Id.* at 235.
224. *See id.*

again, the speaker asked the audience to stand for a moment of silence, and once again the audience recited the Lord's Prayer.[225] And, once again, the university denied responsibility for the incident. Professor Chaudhuri amended his lawsuit to challenge the university's ineffective new "moment of silence" policy, but the court of appeals upheld the district court's summary judgment ruling against him.[226] As the court of appeals summarized the reason for its decision, "Dr. Chaudhuri admits that there is no evidence of complicity by the university in these incidents. . . . The Establishment Clause does not require TSU to silence an audience of private citizens."[227]

In two of the three cases described above (*Jones* and *Chaudhuri*), the courts upheld the infusion of religious expression into public school activities on the ground that the expression was private in nature and not subject to Establishment Clause restrictions. In the third case (*Doe*), the court ruled very narrowly that the teachers at the school could not participate or actively supervise religious activities at the school, but it said nothing about the private religious expression that comprised much of Ms. Doe's harassment. The thrust of these holdings offers a bright-line test for determining when religious expression in a public school is immune from constitutional limits. If state employees are not directly authorizing or participating in the religious expression, these courts imply, there is no Establishment Clause problem—regardless of how pervasive and exclusionary the private religious expression may be. As *Chaudhuri* illustrates, this rule applies even when the government organizes the ceremony at which the expression occurs and even if the government subtly invites the religious expression by providing a moment of silence in the middle of a formal ceremony that is led (on the invitation of the school authorities) by a prominent local religious representative.

There are many problems with the courts' conclusions in these cases, not least of which is that the bright-line, public-private speaker rule that the cases seem to observe is inconsistent with the holdings of both *Abington Township v. Schempp*,[228] in which the Supreme Court held that the Establishment Clause prohibited a school from allowing students to broadcast their own private religious views over a school intercom,[229] and *Lee v. Weisman*,[230] in which the Court emphasized that private, peer-group pressure on a public school student who objected to graduation prayer was a crucial element in creating an unconstitutional atmosphere.[231] In contrast to the holdings of the lower courts discussed above,

225. *See id.*
226. *See id.* at 240.
227. *Id.* at 237.
228. 374 U.S. 203 (1963).
229. *See id.* at 205.
230. 505 U.S. 577 (1992).
231. *See id.* at 593–94 (noting strong peer-group pressure among public school students and holding that "the government may no more use social pressure to enforce orthodoxy than it may use

Schempp and *Lee* illustrate why in many circumstances private religious speech in a public school logically should be attributed to the government. The underlying theme of the Supreme Court decisions in those cases is that the line between government and private religious speech often ceases to exist in a closed environment like a public school, especially in a community where one religion dominates, and the school officials themselves may be hostile to the religious neutrality the Establishment Clause requires of them.[232]

The most obvious respect in which the line between government and private religious speech becomes blurred in public school cases stems from the government acting as a silent coordinator of a religious exercise. That is, the government delivers an audience of potential recruits to a religious majority, which then uses the opportunity to proselytize. In these situations, the government also provides a forum for the religious majority to announce and celebrate its position of influence in the community, thus reinforcing the views of those already committed to the majority faith. The dual functions served by private religious expression at public school ceremonies—allowing the majority faith to proselytize nonadherents and simultaneously reinforce the beliefs of its own members—mirror the two Establishment Clause concerns Justice O'Connor cites as key elements of the endorsement analysis: these activities send "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[233]

The fact that private citizens, rather than government employees, actually conduct the ultimately religious exercise at a public school ceremony does not diminish the government's critical role in providing a unique atmosphere that imbues the private religious expression with an added importance that it would not otherwise possess. Ironically, the same "solemnization" rationale courts use to justify the inclusion of prayer at public school graduation ceremonies actually demonstrates why private religious expression on these occasions violates the Establishment Clause.[234] The solemnization rationale asserts that the religious ex-

more direct means"). These lower-court cases are also inconsistent with the Supreme Court's ruling in *Santa Fe Independent School District v. Doe*, No. 99-62, 2000 U.S. LEXIS 4154 (June 19, 2000), which was handed down while this article was in press. The *Santa Fe* decision reaffirms many aspects of *Lee* (including that decision's focus on the coercive nature of peer-group pressure in the public school context) and specifically rejects the argument that the Establishment Clause does not apply to officially sanctioned student elections to include religious ceremonies in public school functions such as football games. *Id*. at *37–*39. The Court noted that "[i]n this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id*. at *31.

232. Several lower courts have recognized this fact. *See* ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477–78 (3d Cir. 1996) (en banc) (rejecting a free speech rationale for permitting students to include prayer at a public school graduation ceremony); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994) (same), *vacated as moot*, 515 U.S. 1154 (1995).

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

234. *See* Chaudhuri v. Tennessee, 130 F.3d 232, 236 (6th Cir. 1997) (favorably citing the univer-

ercise provides an added spiritual dimension to the ceremony, but by the same token, the argument effectively concedes that the government's ceremony provides added value and significance to the religious exercise by conveying to participants the importance of a particular religious view of human spirituality as an essential factor in the otherwise secular experience of public education.

In upholding "voluntary" graduation prayer, for example, the Fifth Circuit forthrightly acknowledged that a totally secular graduation ceremony would provide "government[] recognition of student achievement," and a privately sponsored baccalaureate would provide "God's recognition" to those who desired it.[235] Even though these two functions could be served even if prayer were excluded from a public school graduation ceremony, the court nevertheless held that graduation prayer was necessary to provide "the community's recognition of student achievement."[236] Presumably this is a reference to the fact that "the community" in question is overwhelmingly religious (i.e., Christian), and since the graduation ceremony is a reflection of "the community," the ceremony should be allowed to reflect the religious values of that community. Unfortunately, even the most tightly knit communities have members who do not share the dominant religious ethos. The dark underside of judicial decisions that permit the melding of community, religion, and government is the silent message those decisions send to religious dissenters, who are told, in effect, to shut up or get out. The Fifth Circuit comes close to conveying this message explicitly in *Jones* by noting that "[b]y attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards."[237] A similarly exclusionary spirit infuses the Sixth Circuit's opinion in *Chaudhuri*, in which the court opens its discussion of the case by noting that the Hindu plaintiff "came to this country from India in 1971, and in due course he became a naturalized United States citizen."[238] This fact is irrelevant to any of the legal issues in the case, but it subtly suggests that the one individual who objected to the community's "private" celebration of its religious identity at a government-sponsored function is himself an outsider whose claims are contrary to the community's sense of self-definition and, therefore, do not rise to constitutional significance. But when "community" is defined in this way, the line between government and private religious expression is erased entirely; ostracism from the dominant religious community becomes indistinguishable from po-

sity's argument that prayer solemnized the ceremony and adding that "prayer may serve to dignify or to memorialize a public occasion"); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 966 (5th Cir. 1992) (citing the "secular purpose of solemnization" as a justification of graduation prayer).

235. *Jones*, 977 F.2d at 972.

236. *Id.*

237. *Id.*

238. *Chaudhuri*, 130 F.3d at 233.

litical ostracism. As Justice O'Connor's phrasing of the endorsement standard emphasizes, the Establishment Clause specifically protects religious outsiders from being excluded in this way by religious insiders.[239] The lower courts' attempts to transform public school ceremonies into a reflection of "the community's" values, and thus pretend that the government has nothing to do with the conversion of the ceremony into a religious exercise, is nothing more than an attempt to avoid through artificial categorization this otherwise insuperable constitutional principle.

The mutual reinforcement of government, community, and religion in cases such as *Doe*, *Jones*, and *Chaudhuri* is indistinguishable from direct government action in the degree to which it justifies and insulates "the community's" systematic religious domination of public functions and the effective exclusion of religious minorities from the public sphere. It is thus inadvisable to limit the scope of the Establishment Clause to behavior or expression that the government overtly authorizes. Government association with private religious speech can communicate religious domination just as effectively as direct government action on behalf of religion. Under the standard set by the Fifth and Sixth Circuits, the relevant government actors can simply stand back, announce a superficial attitude of neutrality toward religious expression, and issue a hollow denial of complicity when the government affair inevitably turns into a religious revival meeting.

It would be naive not to suspect that many of the local government actors in cases such as these secretly applaud this result. Consider the two cases described at the beginning of this subsection in which the courts ruled entirely in favor of the government. In both *Jones* and *Chaudhuri*, the "voluntary" prayer policy was adopted after many years in which the government actors themselves authorized explicitly Christian prayers at various school functions.[240] In both cases, the "voluntary" policy was implemented only after the schools were sued for Establishment Clause violations.[241] In *Doe*, the ongoing religious involvement of government employees was the only thing the court enjoined, but the equally hostile actions of the other students and community members were not addressed.[242] Is there any reason to believe that in any of these cases, the relevant government actors altered their views about the ad-

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

240. According to an earlier appeal in the *Jones* case:

> Pre-1986 Clear Creek graduation invocations included overt references to Christianity. Clear Creek's 1986 graduation invocation mentioned "Lord," "Gospel," "Amen," and God's omnipotence. Two Clear Creek students, joined by their fathers . . . complained that Clear Creek's policy and actions permitting invocations consisting of traditional Christian prayer at high school graduation ceremonies violated the First Amendment's Establishment Clause.
>
> On December 15, 1987, three weeks before this case was to be tried, Clear Creek's Board of Trustees adopted [the voluntary prayer policy].

Jones, 930 F.2d at 417.

The prior prayer policy in *Chaudhuri* is described, *supra*, at notes 218–21 and accompanying text.

241. *See Chaudhuri*, 130 F.3d at 234; *Jones*, 977 F.2d at 964.

242. *See supra* notes 209–14 and accompanying text.

visability of prayer at school functions after adopting a "voluntary" prayer policy? And since the courts in these cases refused to impose Establishment Clause limits on the behavior of the parents, students, and community members, is it likely that the private individuals who continued to dominate the schools would alter their behavior in response to the litigation? From the perspective of plaintiffs Doe, Jones, and Chaudhuri, is it likely that they will feel more or less welcome in the persistently hostile religious atmosphere of their respective public schools? From their perspective, nothing has changed, except that the government actors are now following the hostile mob instead of leading it.[243]

There is no reason the Establishment Clause must be read as formalistically as the Fifth and Sixth Circuits suggest. In the schools described in these cases, as in schools in many other areas of the country, the community at issue is so overwhelmingly devoted to one religion

243. For two other examples of this phenomenon, see generally *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998), *vacated and remanded on other grounds*, 177 F.3d 789 (9th Cir. 1999) (en banc); and *Goluba v. School District of Ripon*, 45 F.3d 1035 (7th Cir. 1995).

Madison involved an Idaho public school district policy inviting a minimum of four students to speak at commencement exercises. *See Madison*, 147 F.3d at 834. The students were chosen according to academic standing and were given the freedom to include any material in their presentation, including "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* (internal quotations omitted). A panel of the Ninth Circuit Court of Appeals upheld this policy on free speech grounds. The plaintiff's Establishment Clause concerns were dismissed on the ground that "[c]ontrol over content [of the presentations] rests in autonomous individuals." *Id.* at 836. Therefore, although the court recognized that the peer group pressure on Ms. Doe would be the same as that found constitutionally problematic in *Lee v. Weisman*, the "absence of [school] control . . . saves the graduation policy at issue from facial constitutional invalidation." *Id.* at 835. Evidence that the school district may have had some inkling that their policy would tend to favor religious speech appears only in the decision's footnotes. One footnote refers to the fact that the school district had included official religious exercises in the graduation ceremonies for seven years prior to the adoption of the policy at issue in *Madison*. *See id.* at 834 n.3. Another footnote dismisses as irrelevant "the high concentration of Mormons in Rexburg, community sentiments, and any possibility that the District will not strictly adhere to the policy." *Id.* at 836 n.6. A third footnote inadvertently alludes to the nature of those "community sentiments" by noting that the plaintiff filed the lawsuit under a pseudonym "because she feared retaliation by the community." *Id.* at 834 n.1.

Goluba involved a public school district that had routinely invited local clergy to perform prayers at graduation ceremonies. *See Goluba*, 45 F.3d at 1036. The district abandoned this practice in 1993 in favor of authorizing two students to present the graduation prayer. Other students sued the school district and obtained from the district court a "permanent injunction prohibiting the School District from participating or actively involving itself in religious prayer at graduation." *Id.* After the school board passed a resolution to implement the injunction, two students who objected to the policy announced a plan to recite the Lord's Prayer five minutes prior to the official start of the graduation ceremony. *See id.* at 1037. They carried out this plan as the students were assembling for the graduation processional. *See id.* Evidence was introduced to the district court indicating that school officials knew about this plan but did nothing to stop it. *See id.* After the religious students carried out their plan, the students who had obtained the injunction returned to the district court seeking to have the school district held in contempt for violating the injunction. The district court refused, and in its opinion upholding the district court's refusal, the Seventh Circuit read both the relevant contempt standards and the school district's constitutional obligation narrowly, holding that the school officials were not in contempt because they did not "purposefully" violate the injunction. "The clear meaning of that decree was that the School District should not promote prayer at graduation. That was the obligation the School District undertook to enforce diligently and energetically. . . . The fact that Alger and other School District officials had inklings of the prayer plan before graduation and did nothing to stop the prayer does not trigger the conclusion that they meant to encourage prayer at graduation." *Id.* at 1039.

(usually Protestant Christianity) that it makes no practical sense to distinguish between private religious expression of community members at government ceremonies and the official religious expression of the government at those ceremonies. In these situations, the community *is* the government, and pretending otherwise denies the basic objective of the Establishment Clause, which is to prevent a religious majority from using its overwhelming numbers to drown out, embarrass, or frighten religious minorities into being proselytized in silence.

B. A Proposed Solution to the Problem of Private Religious Expression in Public Schools: The Opt-Out Rule

A simple and effective remedy for the problems created by private religious expression in public schools is suggested in Justice Kennedy's opinion for the Court in *Lee v. Weisman*.[244] That opinion contains Justice Kennedy's lengthy rebuttal of the government's contention that the graduation prayer at issue presented no constitutional problem because the student plaintiff's attendance at her graduation ceremony was purely voluntary. Justice Kennedy rejected this argument on the ground that "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[245] He noted that the government's argument "turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[246] Stated in general terms, the underlying theme of these comments is that the First Amendment is violated not only by direct government action that amounts to a religious exercise but also by government actions that permit private religious activities to so dominate a government ceremony, forum, or operation that a religious dissenter must forego access to (i.e., opt out of) the government ceremony, forum, or operation to avoid attending—and implicitly participating in or endorsing—the religious exercise.[247] Stated more succinctly, if someone

244. 505 U.S. 577 (1992).

245. *Id.* at 596.

246. *Id.*

247. I recognize that this general statement goes somewhat beyond Justice Kennedy's own application of his theory in *Lee*. In particular, my statement of the theory is inconsistent with Justice Kennedy's attempt to reconcile the holding of *Lee* with the Court's previous holding in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court rejected an Establishment Clause challenge to the Nebraska legislature's practice of opening each legislative session with a prayer. The Court justified the result on historical grounds, asserting that the Framers themselves approved of legislative prayers and, therefore, considered them acceptable under the First Amendment. *See id.* at 790–91.

Justice Kennedy distinguishes the case from *Lee* on different grounds. He argues that the legislative prayer context is more informal than the graduation context, thus making it easier for dissenters to avoid the religious exercise without forfeiting any important state benefit. *See Lee*, 505 U.S. at 596–97. This conclusion seems to be based on Justice Kennedy's observation that schools exercise more control than legislatures over "the precise contents of the program, the speeches, the timing, the move-

must opt out of a government benefit to avoid participating in private religious expression, then the private expression violates the Establishment Clause.

There is little reason to limit this opt-out rule to one specific aspect of public education, such as a graduation ceremony. Although a graduation ceremony is one of the more joyful and celebratory aspects of a public school education, it is, after all, only the capstone of the main enterprise: the educational process itself. Thus, if (as the Supreme Court concluded in *Lee*) the government must prevent the inclusion of religious expression in a public school graduation ceremony on the ground that the religious expression would otherwise force dissenters to forego a highly desirable government benefit, then the government must be even more vigilant in preventing the infusion of religion into the daily operation of public education, where the benefits potentially denied to religious dissenters are infinitely more valuable.

This opt-out rule does not bar all religious expression from public school property or other government forums. The opt-out rule applies only to religious speech that dominates the forum in a way that forces nonadherents to give up their access to that government property or forum to avoid unwanted participation in a religious exercise.[248] The model here follows the limitations the Supreme Court set forth in its equal access cases, *Widmar*[249] and *Mergens*.[250] In *Mergens*, for example, the Court

ments, the dress, and the decorum of [participants]." *Id.* at 597. Given the fact that legislators themselves (who are agents of the government) have virtually complete control over these very elements of the legislative process, including the inclusion of religious activities, *see, e.g.*, *Marsh*, 463 U.S. at 789 n.11 (compiling a list of formal legislative rules authorizing prayer), this is a dubious conclusion. But even if Justice Kennedy's conclusions about the informality of the legislative context were empirically accurate, they would provide little reason to distinguish *Marsh* from the approach Justice Kennedy took to the prayer in *Lee*. In both cases, individuals indisputably will be forced to modify the nature of their contact with government to avoid attending a religious exercise. Moreover, even more than graduation prayer, legislative prayer weaves religion into the fabric of government in a way that imbues the process with sectarian elements that are bound to inhibit participation in the political process. Although abstract, this is no less an important benefit than forfeiting "those intangible benefits which have motivated the student through youth and all her high school years." *Lee*, 505 U.S. at 595. Therefore, despite Justice Kennedy's efforts to prove the contrary, the holding of *Marsh* appears to be irreconcilable with *Lee*, and my application of the theory in the text is premised on this conclusion.

248. "Participation" is defined, as in *Lee*, to include situations in which a dissenter seeking to partake of a government benefit or use a government forum has to choose between "maintain[ing] respectful silence" and opting out of that benefit or forum. *See Lee*, 505 U.S. at 593. Most instances in which the opt-out rule will come into play in the public school context will involve obvious situations in which the dissenter will have no other option to avoid the religious expression. These obvious situations include religious expression in a classroom setting during class time, at the beginning of a school athletic contest, *see* Santa Fe Indep. Sch. Dist. v. Doe, No. 99-62, 2000 U.S. LEXIS 4154 (June 19, 2000); Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), and during a school graduation or awards ceremony. Conversely, many situations involving private religious expression at school will clearly not implicate the opt-out rule, such as conversations among religious adherents in a lunch room, at recess, or in the parking lot before or after school. The opt-out rule comes into play only when these private conversations begin to so dominate a particular portion of the school environment that they effectively exclude (or pressure into silence) nonadherents.

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

250. *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990).

applied the public forum theories it had earlier articulated in *Widmar* to uphold the federal Equal Access Act,[251] which requires any public secondary school with a "limited open forum" to permit student groups to meet without regard to the groups' "religious, political, or philosophical" orientations.[252] The Court emphasized, however, that permitting religious groups to meet on school premises did not violate the Establishment Clause only because great care was taken to ensure that the meetings were held in "noninstructional time,"[253] did not interfere with the educational program of the school,[254] were not endorsed by the school,[255] involved no participation by school officials,[256] were held in an atmosphere in which "a religious club is merely one of many different student-initiated voluntary clubs,"[257] and were undertaken with care to avoid coercing unwilling students to attend.[258] In short, a public school may not allow private religious expression that forces nonadherents to opt out of some part of the school's educational operation to avoid the religious activities.[259] Local officials may permit religious expression on public school premises, on the other hand, if other types of private expression are also permitted. In that way, nonadherents can avoid participating in the religious expression of others, and the religious expression is offered in a manner that permits students who are predisposed to participate in that expression to do so by specifically opting into the religious exercise.

The opt-out rule extrapolated from *Lee*, *Widmar*, and *Mergens* helps to explain a small number of controversial lower court decisions limiting student religious speech in classrooms, school hallways, and auditoriums. Some of these cases have upheld limits on student distribu-

251. 20 U.S.C. §§ 4071–4074 (1994).

252. *Mergens*, 496 U.S. at 235 (quoting § 4071(b)).

253. *Id*. at 251 (quoting § 4071(b)).

254. *See id.* at 239 (noting that the Equal Access Act requirement that a religious group be a "'noncurriculum related student group' . . . [is] interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school").

255. *See id.* at 250.

256. *See id.* at 251.

257. *Id.* at 252; *see also id.* at 243–44 (noting the existence of 30 other voluntary student clubs at the school).

258. *See id.* at 251.

259. Domination of a public school's "limited open forum" by one religious sect would alone probably be sufficient to violate the Establishment Clause. *See id.* at 252 (noting a variety of nonreligious student groups at school). "At least in the absence of empirical evidence that religious groups will dominate [the university's] open forum, . . . the advancement of religion would not be the forum's 'primary effect.'" *Id.* (citing Widmar v. Vincent, 454 U.S. 263, 275 (1981)); *Widmar*, 454 U.S. at 274 (noting that over 100 student groups existed at the school and emphasizing that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect").

tion of invitations to religious meetings,[260] religious pamphlets,[261] and religious newspapers.[262] In another case, a federal magistrate upheld a school district's effort to avoid unconstitutionally advancing religion at a graduation ceremony by instructing the valedictorian not to use religious references in her graduation speech.[263] Another set of cases has upheld public school limitations on student religious speech in the classroom.[264] Although these cases all involve religious speech, many of the courts do not discuss or extensively rely on the Establishment Clause as the basis of their decisions. Most of the courts refer instead to aspects of free speech jurisprudence, such as the limited public forum or time, place, and manner doctrines, to justify upholding schools' restrictions on religious speech.[265]

This reasoning is unsatisfactory in two respects. First, it grants schools unnecessary authority to limit nonreligious speech that does not come within the ambit of the Establishment Clause; and second, it pro-

260. *See* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996) (rejecting a student's challenge to a public school requiring religious handbills to be submitted to the principal and approved in writing); Perumal v. Saddleback Valley Sch. Dist., 243 Cal. Rptr. 545 (Ct. App. 4th Dist. 1988) (upholding a public high school decision to prohibit students from distributing leaflets inviting other students to a Bible study group).

261. *See* Hedges v. Wauconda Community Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) (rejecting a public school policy prohibiting distribution of any religious pamphlets containing religious advocacy but upholding part of the policy limiting distribution of pamphlets to a table near the school entrance).

262. *See* Hemry v. School Bd., 760 F. Supp. 856 (D. Colo. 1991) (upholding the application to a religious newspaper a public school rule prohibiting distribution in any school of material disruptive of normal school activity or discipline or inconsistent with the district's educational mission). *But see* Johnston-Loehner v. O'Brien, 859 F. Supp. 575 (M.D. Fla. 1994) (striking down a similar policy on the ground that the school had not demonstrated that religious speech would materially and substantially interfere with school operations or with the rights of other students); Clark v. Dallas Ind. Sch. Dist., 806 F. Supp. 116 (N.D. Tex. 1992) (overturning a public school policy prohibiting student distribution of religious tracts immediately before or after school).

263. *See* Guidry v. Broussard, 897 F.2d 181 (5th Cir. 1990). Although the magistrate upheld the school's decision on Establishment Clause grounds, *see id.* at 182, the Fifth Circuit affirmed the summary judgment in favor of the school on procedural grounds alone. *See id.*

264. *See* Settle v. Dickson County Sch. Bd., 53 F.3d 152 (6th Cir. 1995) (denying a free speech claim against a teacher who rejected a student's proposal to write a ninth-grade research paper on "The Life of Jesus Christ"); DeNooyer v. Livonia Pub. Schs., 799 F. Supp. 744 (E.D. Mich. 1992) (upholding a school district's order prohibiting a student from showing a videotape of herself singing a proselytizing religious song to a second-grade class during show and tell), *aff'd in unpublished disposition*, 12 F.3d 211 (6th Cir. 1993); Duran v. Nitsche, 780 F. Supp. 1048 (E.D. Pa. 1991) (denying an injunction against school officials who prohibited a student from distributing a survey on God and giving an oral presentation on God to a fifth-grade class), *order vacated and appeal dismissed*, 972 F.2d 1331 (3d Cir. 1992).

265. *See Muller*, 98 F.3d at 1537–38 (upholding restrictions on the ground that an elementary school is a nonpublic forum); *Settle*, 53 F.3d at 155 (noting that "in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum"); *Hedges*, 9 F.3d at 1302 (upholding restrictions on the ground that a junior high school is a nonpublic forum and the restrictions are not "arbitrary or whimsical"); *DeNooyer*, 799 F. Supp. at 749 (upholding a restriction on the ground that a second-grade classroom is a nonpublic forum); *Duran*, 780 F. Supp. at 1053 (upholding a restriction on the ground that a classroom is a nonpublic forum); *Hemry*, 760 F. Supp. at 863 (upholding a restriction on the ground that it was a legitimate time, place, and manner restriction in a nonpublic forum); *Perumal*, 243 Cal. Rptr. at 551 (upholding restrictions based on finding that a school is a closed forum).

vides no simple response to criticism that the religious speech is being treated differently than equally controversial nonreligious speech.[266] The opt-out rule provides a satisfactory explanation for these decisions. In other words, the religious speech in the cases was permissibly restricted to prevent private religious expression from being incorporated into the public school atmosphere or curriculum in a manner that gives religious dissenters no way to avoid being proselytized without opting out of some portion of their educational entitlements. Each instance of speech could be characterized fairly as an attempt by a religious student to use the school's educational mandate as a tool with which to subject an unwilling audience to religious proselytizing. This borders on direct religious coercion and should, therefore, violate even narrow coercion-based theories of the Establishment Clause.[267]

These decisions—especially the classroom speech cases—have caused much consternation among those who would reduce Establishment Clause restrictions on religious expression in public schools. For example, one article criticizing Establishment Clause limits on religious speech denounces *Settle v. Dickson County School Board*[268] as "an absolutely amazing case of fear and misunderstanding of religious expression."[269] Other commentators have even used this handful of decisions as a rationale for amending the Constitution to remove or severely reduce the scope of Establishment Clause limitations on prayer in school.[270]

It is difficult to see the basis for the furor over these cases. There is little evidence to support one commentator's assertion that these decisions represent only "the tip of an iceberg" of rampant discrimination against religious expression,[271] much less to support other commentators' even more grandiose charges that there are "scores" of cases involving antireligious hostility such as "students being hauled to the principal's of-

266. *See* Paulsen & Johnson, *supra* note 187, at 879 (criticizing the ruling in *Settle* and arguing that "it is hard to imagine a court taking such an unequivocally hands-off approach if the subject had been something other than traditional religion [such as gay rights or racism]").

267. For a critical description of the various coercion-based Establishment Clause interpretations, see Gey, *supra* note 72, at 490–526.

268. 53 F.3d 152 (6th Cir. 1995).

269. Paulsen & Johnson, *supra* note 187, at 877.

270. For arguments citing some of the cases discussed in this subpart as justification for a Religious Equality Amendment, see *Hearings on Religious Equality Amendment Before Senate Judiciary Comm.*, 104th Cong. 20–30, 50 (1995) (statement from Michael W. McConnell's testimony) [hereinafter *McConnell Testimony*] (citing many of the cases discussed in notes 214–18, *supra*, and arguing that in light of these decisions, "the Committee should give serious consideration to a constitutional amendment embodying the fundamental principle of religious equality"), *available in* 1995 WL 615788; *see also* Steven T. McFarland, *The Necessity and Impact of the Proposed Religious Equality Amendment*, 1996 BYU L. REV. 627, 643–44. The most recent version of this amendment effort fell 61 votes short of the two-thirds vote necessary to pass the United States House of Representatives and was never brought to the Senate floor for a vote. *See* Katharine Q. Seelye, *House Rejects Drive to Allow Formal Prayer in the Schools*, N.Y. TIMES, June 5, 1998, at A15. Although the proposed amendment was supported by the Christian Coalition and other religious conservatives, it was opposed by a broad range of other religious denominations, including "Catholics, Jews, Presbyterians, Seventh-day Adventists and Muslims." *Id.*

271. *McConnell Testimony*, *supra* note 270, at 19.

fice for praying in the cafeteria or publicly stating a belief in God" or "religious groups being excluded from privileges solely on account of their religious identity."[272] To the contrary, there is nothing in these cases that even approximates the graphic attacks on religious liberty found in cases addressing the unconstitutional infusion of religion into public education.[273] As the materials cited in the previous subsection abundantly at-

272. Paulsen & Johnson, *supra* note 187, at 881.

273. *See, e.g.*, Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169, 1172 (S.D. W. Va. 1985) (describing in-school conversations during which Christian students criticized a Jewish student for not praying during a legally mandated "moment of silence" in a public school classroom; one student suggested that "if [the Jewish student] prayed all the time, maybe [he] could go to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews;" another student asked why the first student was "even trying to talk to [the Jewish student] because the Jews weren't worth saving because they had killed Christ and that was about the end of it"); *Gingrich Voucher Remark Is Called 'Nuts;' Mississippi Mother Rejects Criticism of Her Fight Against School Prayer*, WASH. POST, June 9, 1995, at A11 (noting U.S. House of Representatives Speaker Newt Gingrich's comment regarding the *Herdahl* case that it is "nonsense to say that one person can dictate to 3,000" and his suggestion to Ms. Herdahl to "[g]o find a school you like. But don't dictate to everyone else in your community based on your particular prejudices"); *Mother Files Suit to Halt Prayer in a Public School in Mississippi*, N.Y. TIMES, Dec. 23, 1994, at A22 (discussing the experiences of plaintiff's children in *Herdahl v. Pontotoc County School District*, 887 F. Supp. 902 (N.D. Miss. 1995), including an incident in which the mother's "7-year-old son . . . was called 'football head' after a teacher made him wear headphones to drown out the prayers broadcast on the school's intercom"); *supra* notes 210–14 and accompanying text (discussing *Doe v. Duncanville Independent School District*, 70 F.3d 402, 404 (5th Cir. 1995), involving a junior high school student who refrained from joining in prayers by fellow students and faculty members and was subjected to ostracism and harassment by students, spectators at a school basketball game, and a history teacher). Incidents such as these cannot be explained away as insignificant examples of religious insensitivity; religious exercises in public school—including moments of silence that operate as de facto prayer sessions for a majority of the class—focus a daily spotlight on the private religious beliefs of those who do not share the majority's faith and make those beliefs the object of constant public debate and (all too often) scorn.

The notion that the reported cases only present the "tip of the iceberg," *see* note 271 and accompanying text, applies in this context as well. At roughly the same time a federal district court was issuing its decision invalidating the Alabama school prayer statute, *see Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997), another Alabama family encountered its own problems with the governmentally condoned spiritual atmosphere of Alabama's public schools. In this case Paul, David, and Sarah Herring were the only Jewish students in the Pike County, Alabama, school system. During their six years in the Pike County schools, Christian students taunted the Herring boys, called them "Jew boys" and "Jewish jokers," drew swastikas on their lockers, book bags, and jackets, and ripped Yarmulkes from their heads. *See* Sue Anne Pressley, *Tough Lessons in an Alabama Town; Jewish Children Persecuted at School, Parents Charge in Lawsuit*, WASH. POST, Sept. 2, 1997, at A3. School officials contributed their own abuse. In addition to distributing Bibles in classes, producing a "Birth of Jesus" play, and having a "Happy Birthday, Jesus" party in Paul's class, the teachers and administrators also targeted the children individually:

> When Paul Herring, 14, was sent to the school office to be disciplined for disrupting class, he was ordered by the vice principal to write an essay on "Why Jesus Loves Me." When David Herring, 13, failed to bow his head during a school assembly prayer, a teacher allegedly reached over and lowered it for him. After Sarah Herring, 11, heard a minister deliver a fire-and-brimstone sermon at her elementary school, she said she had nightmares for weeks about burning in hell.

Id. Paul Herring's teacher also once ordered him to remove a Star of David lapel pin "because she said it was a prohibited gang symbol." *Id.* In response to the litany of problems the children faced, the Pike County school superintendent defended the Christian students and teachers and placed at least part of the blame on the Herring children themselves. He told the *Washington Post*: "Sometimes children, and I'm not going to say these, bring these things on themselves. The teachers try to prevent it, but if you have kids who brag and talk, other kids are going to do things to them." *Id.* The parents' case against Pike County was settled when the county signed a consent decree repeating most of the major features of the district court's order in *Chandler*. *See* Gita M. Smith, *Alabama County Vows Tolerance: Jewish*

test,[274] the "religious groups being excluded from privileges solely on account of their religious identity" tend to be members of Jewish, Muslim, Seventh-Day Adventist, Jehovah's Witness, and nonobservant groups who are forced to endure the persistent sectarian overtures of the religious majority whenever they enter their public schools.[275] The decisions discussed in this subsection[276] address this problem through a simple application of the principle that religion in this country is constitutionally deemed a private and not a governmental affair. Thus, access to government benefits such as a public education should not be conditioned on daily exposure to the religious pressure of classmates whose faith dominates the schools. It has been clear for over thirty years that public school officials have an obligation to refrain from applying religious pressure on students directly,[277] but the same principle also imposes on officials the obligation to prevent the system of public education from imposing such pressure indirectly by becoming a privately organized religious gauntlet for dissenters.

C. The Opt-Out Rule and Private Religious Domination Outside the Public School Context

It is relatively easy to justify applying the opt-out rule to private religious speech in public schools, given the Supreme Court's ruling in *Lee* and the generally restrictive rules the Court has imposed on public schools for private speech by students on any subject.[278] At first impression, it seems that it should be more difficult to apply the same theory to private expression outside the public school context, given the broader protections generally offered to adults' private speech. But closer examination of the Court's doctrine regarding adult religious expression on government property[279] reveals that something akin to the opt-out rule for assessing Establishment Clause compliance in public schools can be inferred from the Court's decisions in contexts other than public schools.

Family's Suit Charging Discrimination by School Teachers and Staff Members Is Settled, ATLANTA CONST., Apr. 22, 1998, at A8.

274. *See supra* notes 205–43 and accompanying text.

275. *See supra* notes 205–43 and accompanying text.

276. *See supra* notes 260–64 and accompanying text.

277. *See* Engel v. Vitale, 370 U.S. 421 (1963) (prohibiting officially sanctioned prayer in a public school).

278. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (giving school authorities broad authority to edit a student's speech in a school-sponsored newspaper); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (broadly construing a school's authority to punish "disruptive" student speech, even as applied to mildly salacious speech by a student council candidate).

279. Although it should be obvious from the details of the discussions in the text, it is worth emphasizing that all the discussions in this article recommending limitations on private religious speech refer only to private religious speech that occurs on government property, uses government facilities, receives government financial support, or otherwise associates the religious speech with the government. This is the crucial nexus that brings private religious speech within the scope of the Establishment Clause. Private religious speech that is truly private retains all the protections offered other types of speech under the Free Speech Clause and is not limited by Establishment Clause concerns.

There is, in fact, fairly broad support in the cases for applying the opt-out rule to adult religious speech. Justice O'Connor, for example, provides such support in her *Pinette* concurrence (which deals with adult religious speech in a public plaza): "At some point . . . a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval."[280] Private religious domination of a government forum, like direct governmental approval of religious ideas, potentially 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."[281]

Justice O'Connor's *Pinette* opinion notes several factors other than outright domination of a public forum that may also contribute to a finding that private religious speech ostracizes nonadherents and, therefore, violates the Establishment Clause. These factors include "the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue."[282] This list is important because it moves the discussion of private religious speech away from the obviously coercive context of the public school and into the context of adult perceptions about the role of private religion in government. These perceptions are the focus of the endorsement analysis that commands (in one variation or another) the allegiance of a majority of the present members of the Court.[283] Under the endorsement analysis, perceptions of linkages between government and religion are key to determining whether the Establishment Clause has been violated. The various opinions in *Pinette* demonstrate that a majority of the current Supreme Court is willing to recognize that private religious speech on government property is problematic to the extent that it ostracizes and marginalizes religious dissenters. The fact that private religious speech may be so dominant, so prominently placed, or so persistent that it becomes a fixture of a public forum not only coerces a dissenter in the *Lee* sense of effectively forcing the dissenter out of the forum (although it does that, too) but also indicates when the dissenter is likely to perceive the message that he or she is not welcome as a full-fledged member of the political community. Ascertaining when a dissenter is likely to feel obliged to opt out of a forum to avoid participating in a religious exercise is a much more certain method of assessing impermissible government endorsement than Justice O'Connor's preferred method of ascribing perceptions to a hypothetical and highly malleable "reasonable observer."[284]

280. Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

281. *Id.* at 773 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

282. *Id.* at 778.

283. *See supra* note 58.

284. *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in the judgment) (describing the reasonable observer concept).

Under the opt-out rule, subjective judgments will still be necessary to determine when private religious speech in an adult forum has reached the level at which dissenters will feel so unwelcome that they are effectively obliged to opt out of the forum to avoid subjecting themselves to a hostile religious exercise. Although this is a more precise determination than the entirely subjective observations of a hypothetical "reasonable observer," disagreements will still arise, as indicated by the dispute over the constitutionality of the Latin cross among the five *Pinette* Justices who agreed in theory that some private religious speech on public property should be limited.[285] And although Justice O'Connor mentioned several factors that may assist in ascertaining whether the "opt-out" line has been crossed, she did not tell us what aspects of the "geography, the nature of the particular public space, or the character of the religious speech"[286] are significant.

As a preliminary step toward extending Justice O'Connor's analysis and making it more definitive, consider the following proposed enhancements to Justice O'Connor's list of factors that are relevant to the assessment of private religious speech. With regard to "the fortuity of geography" and "the nature of the particular public space,"[287] several additional elements may indicate that a particular example of private religious speech on government property violates the Establishment Clause: (1) the scale of the religious exercise is such that it essentially monopolizes a significant portion of a particular forum; (2) the religious speech is repetitive and frequent, thus constantly reinforcing the perceived link between the government forum and the religious perspective; (3) the religious speech takes a form that is especially intrusive on unwilling observers; and (4) the religious speech alters the forum in a way that draws attention to the relationship between religion and government. If any of these elements are found in a case involving private religious speech on government property, then this should constitute strong evidence that religious dissenters are being forced to opt out of that forum in violation of the Establishment Clause.

All of these elements have been discussed extensively in the reported cases dealing with private religious speech on public property outside the public school context. In *County of Allegheny v. ACLU*,[288] for example, the Supreme Court held unconstitutional the placement of a privately owned Christian holiday display on the "Grand Staircase" of a county courthouse.[289] Justice Blackmun's majority opinion emphasized

285. *See id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment) (arguing that the placement of a cross did not violate the Establishment Clause); *id.* at 783 (Souter, J., concurring in part and concurring in the judgment) (same). *But see id.* at 797 (Stevens, J., dissenting) (arguing that the placement violated the Establishment Clause); *id.* at 817 (Ginsburg, J., dissenting) (same).

286. *Id.* at 778.

287. *Id.*

288. 492 U.S. 573 (1989).

289. *Id.* at 579.

that the religious materials stood alone as the "single element"[290] of a display in "the 'main' and 'most beautiful part' of the building that is the seat of county government."[291] The Court also noted that the display had been placed in the courthouse every Christmas for several years[292] and remained in place between one and two months.[293] The Court also noted that the display was located in "the most public part" of a government building that housed the offices of the county commissioners, controller, treasurer, sheriff, and clerk of court.[294] Thus, three of the four elements identified above—the dominant scale of the display, the repetition and frequency of the display, and the intrusiveness of the display—entered into the Court's consideration of the constitutionality of this private religious expression.[295] The fourth element—involving religious speech that alters the forum in a way that draws attention to the church/state linkage—was not discussed extensively in *Allegheny* but was the primary focus of the two dissenting opinions in *Pinette*.[296]

Unfortunately, the focus on these precise elements in various *Allegheny* and *Pinette* opinions did little to make the Establishment Clause analyses in those cases more precise or predictable. In *Pinette*, three of the five Justices who agreed that private speech must be occasionally regulated to prevent Establishment Clause violations nevertheless rejected the dissenters' focus on the physical alteration of the forum.[297] These three Justices chose instead to base their decision upholding the *Pinette* religious exercise on a metaphysical discussion about whether endorsement should be measured by "the actual perception of individual observers"[298] or a hypothetical "reasonable observer" imbued with sub-

290. *Id.* at 598.

291. *Id.* at 599.

292. *See id.* at 579.

293. *See id*. at 580 (noting that "[d]uring the 1986–1987 holiday season, the crèche was on display on the Grand Staircase from November 26 to January 9").

294. *Id.* at 579.

295. Likewise, Justice Blackmun referred to two of these elements in distinguishing the other religious display at issue in the case—an 18-foot menorah placed beside a 45-foot Christmas tree on a sidewalk outside another city-county government building. Justice Blackmun emphasized that in contrast to the display by the Grand Staircase, the relative scale of the religious and secular components of the outside display diminished the religious elements. *See id.* at 617 ("In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season."). I do not intend to defend Justice Blackmun's distinction but rather simply note his use of the elements identified in the text as focal points for discussions of these issues.

296. *See* Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 802 (1995) (Stevens, J., dissenting) ("[W]hen a statue or some other freestanding, silent, unattended, immovable structure—regardless of its particular message—appears on the lawn of the Capitol building, the reasonable observer must identify the State either as the messenger, or, at the very least, as one who has endorsed the message."); *id.* at 817 (Ginsburg, J., dissenting) (noting the characteristics of unattended displays that make it difficult to convey governmental nonendorsement).

297. *See id.* at 781–82 (O'Connor, J., concurring in part and concurring in the judgment) (joined by Souter, J. and Breyer, J.).

298. *Id.* at 779.

stantial knowledge about the display.[299] The Court found the latter to be instructive; judges, therefore, will use the hypothetical observer to determine "objectively" whether the display conveys the prohibited message of state endorsement.[300] Discussions of this sort foster what has been disparagingly characterized as the Court's "We Know It When We See It" Establishment Clause jurisprudence.[301]

A far more sensible approach would be to use the factual elements such as those listed above (which are themselves merely enhancements of factors Justice O'Connor identified) as indicators that private religious speech is likely to freeze religious dissenters out of a particular forum. Focusing the Establishment Clause analysis in this more precise way would probably lead to a different result in *Pinette* (since the dissents in that case focus more carefully than Justice O'Connor did on the significant alterations in the forum) and would also restrict other instances of religious speech that effectively capture an otherwise public space and put that space to exclusively religious uses. Several examples of this sort of impermissible private speech can be found in lower court decisions.

In *Doe v. Village of Crestwood*,[302] for example, the Seventh Circuit Court of Appeals ruled that a municipal festival could not include a Roman Catholic mass.[303] Plans for the mass had involved the installation of an altar and the display of a cross and lighted candles on festival grounds, although the mass costs would be borne entirely by the church.[304] The court held the inclusion of the mass in the festival unconstitutional, relying on the narrow characterization of the festival as a nonpublic forum[305] and also on the fact that the village had seemed to actively sponsor and encourage attendance at the mass through advertisements in the village newspaper.[306]

The problem with this narrow ruling is that the plaintiff's injury would have been exactly the same even if the festival were open to anyone who desired to participate and even if the village had not advertised its association with the mass. The key to the plaintiff's injury is that the plaintiff would have had to leave a government-sponsored festival at some point in the festivities to avoid participating unwillingly in a religious exercise. The Establishment Clause forbids the government from forcing citizens to make this kind of choice. The village's encouragement of attendance at the mass made this injury more pronounced, but the

299. *Id*.

300. *Id.* at 779–80 (arguing that the endorsement standard should be applied with the "reasonable person" hypothetical observer to determine the "objective" meaning of the government's action).

301. *See generally* William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

302. 917 F.2d 1476 (7th Cir. 1990).

303. *See id.* at 1479.

304. *See id.* at 1478.

305. *See id.* ("Owning a public forum is one thing, sponsoring a mass quite another.").

306. *See id.* at 1479.

mass itself was the problem, and this problem would not have been alleviated if other nonreligious groups also held events at the festival.

The Establishment Clause analysis proposed in this article would lead to the same conclusion the Seventh Circuit reached about the Crestwood festival mass but on clearer grounds that focus on the real problem of religious ostracism of dissenters from government forums. In *Crestwood*, the mass would implicate three of the elements noted above: it would involve a religious exercise that essentially monopolizes a government forum, it would intrude significantly on the ability of unwilling observers to participate in the festival during the mass, and it would alter the forum physically by introducing a specifically religious structure (the altar).

In addition, *Crestwood* highlights another key factor Justice O'Connor mentioned as relevant to a determination of whether private speech in a government forum violates the Establishment Clause: "the character of the religious speech at issue."[307] Although Justice O'Connor does not explain this reference, she seems to have in mind the difference between ordinary speech about religious subjects and overt religious worship.[308] The logic in this distinction stems from the very different perceptions that are likely to be generated by a formal religious ceremony versus a general discussion of religious topics. Formal religious ceremonies on government property are more likely than informal religious discussions to raise Establishment Clause concerns about government endorsement of religion; a formal ceremony almost by definition excludes nonadherents and a formal religious ceremony on state property conveys a much deeper symbolic linkage between the state and religion. Thus, the fact that private religious speech on state property takes the form of a formal ceremony adds another element to the four "geographic" elements discussed above in determining whether a particular example of private religious speech violates the Establishment Clause.

307. *Id.* at 1478.

308. This distinction has been raised in two other Supreme Court opinions in similar contexts. In the first, Justice White emphasized the distinction between "verbal acts of worship and other verbal acts" as the basis for dissenting to the Supreme Court's decision in *Widmar* requiring state universities to provide on-campus space for religious meetings. Widmar v. Vincent, 454 U.S. 263, 285 (1981). In the second, Justice Blackmun likewise suggested that religious ceremonies raise special constitutional problems beyond those raised by informal speech about religion when he noted in *Allegheny* that the Constitution clearly prohibits celebrating a specific Christian sacrament in a county courthouse:

> [The county's arguments] would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. While the county may have doubts about the constitutional status of celebrating the Eucharist inside the courthouse under the government's auspices, *see* Tr. of Oral Arg. 8–9, this Court does not. The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.

See County of Allegheny v. ACLU, 492 U.S. 573, 601 (1989); *see also* Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997) (upholding a school district's refusal to rent a facility to a religious group based on a distinction between "religious worship services" and "other forms of speech from a religious viewpoint").

Applying these various factors to private religious speech outside the school context would restrict religious speech the most in open public spaces that would otherwise be used by the general public—without regard to whether those spaces formally qualify as public forums under the Court's free speech jurisprudence. As in *Crestwood*, focusing the Establishment Clause analysis more rigorously on the actual circumstances of a nonadherent's encounter with religious exercises in public spaces would free the courts to face the relevant issues directly, instead of relying on ancillary issues to avoid confronting the difficult issues surrounding the relationship between church and state. When the Pope visited the United States in 1979 and performed Mass in public parks in several different cities, litigation over the constitutionality of these events tended to focus on the amount of money cities had spent in conjunction with the ceremonies.[309] The real Establishment Clause issue, however, was that prominent public parks were being turned into large outdoor churches for days at a time. These were not situations in which religious individuals were speaking or passing out leaflets alone or in such small groups that nonadherents could enjoy the park and still avoid the religious exercise;[310] rather, these were cases in which public parks were devoted entirely to the formal practice of a specific religion, at considerable state expense, to the exclusion of anyone wanting to use the parks in question for a nonreligious purpose. With regard to religious demonstrations in public parks, size matters, as does the formality of the religious exercise; these factors contribute to the message being communicated to nonadherents about their standing in the political community. When Philadelphia invited the Pope to hold Mass at a prominent city park, helped church officials plan the affair, designed and financed a platform from which the Pope would "celebrate Mass and distribute Holy Eucharist," and stood by as over a million participants took part in the ceremony,[311] the city sent a clear message about the church's favorable standing in the city's political affairs. These activities, therefore, violated the Establishment Clause.

It is important to emphasize once again that prohibiting the Pope from performing Mass in a public park does not preclude him from performing Mass on private property nor does it even preclude the Pope from conducting the ceremony in a public facility frequently rented to

309. *See* Gilfillan v. City of Philadelphia, 637 F.2d 924 (3rd Cir. 1980) (holding unconstitutional a city's expenditure of $200,000 to construct an altar for the ceremony); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (upholding a U.S. Park Service permit to hold mass on the Mall in Washington, D.C., despite public expenditures of between $100,000 and $200,000 in public funds on services connected to the ceremony).

310. *See, e.g.*, Kunz v. New York, 340 U.S. 290 (1951) (holding unconstitutional a city arrest of a Baptist minister for speaking in New York City's Columbus Circle without a permit); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding unconstitutional the city's conviction of a Jehovah's Witness for inciting breach of the peace, based on the defendant's actions in passing out religious literature on public sidewalks).

311. *Gilfillan*, 637 F.2d at 927.

private users and often closed to members of the general public. Publicly owned sports arenas and auditoriums are examples of the latter category. Since renting such a facility to a private religious group would not deny nonadherents a public benefit they would normally enjoy (i.e., full access to the facility at that time), the opt-out analysis would not automatically deem this a violation of the Establishment Clause. Thus, the analysis set forth here does not conflict with the Supreme Court's expansion of its equal access decisions to protect religious groups' ability to rent public buildings to hold meetings, including religious services.[312] The analysis proposed here does suggest, however, that the rental of limited-access public facilities should be subject to restrictions whenever a religious group's use of those facilities becomes so frequent that a government endorsement of that activity becomes implicit.[313] Thus, although a religious group would be permitted to rent a public facility for irregular meetings or even a special worship service, that group should not be permitted to rent a public facility for regular weekly church services. Such regular use of a public facility for religious purposes would send the impermissible message of government endorsement and would pose the same constitutional problem as permanent religious structures or large-scale religious services in public parks.

Although the analysis suggested here is more definitive than Justice O'Connor's more vaguely worded suggestions in *Pinette* and would, therefore, provide fewer avenues for evading the constitutional limits on impermissibly close relationships between church and state, there is little doubt that gray areas remain. This is not necessarily disturbing, so long as the analysis suggested above is applied with a healthy recognition of the separationist principles the analysis is intended to serve. These principles are not new, nor are they unusual. As noted at the beginning of this section,[314] five current members of the Supreme Court recognize that private religious speech on public property must sometimes be limited to protect the religious liberty values of the Establishment Clause. Unfortunately, these principles have been clouded recently—sometimes intentionally[315]—with false claims about free speech. Despite the abundant evidence introduced above indicating that religious and nonreligious free speech rights are not—and have never been—coextensive when that speech occurs in close proximity to the government, courts and commentators persist in uncritically accepting false free speech claims by those

312. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a school district must permit a church group to use school facilities after hours for a religious-oriented film series on family values and child rearing, since the district had permitted nonreligious groups to use the facilities for discussions on similar subjects).

313. This issue was not before the Court in *Lamb's Chapel*. *See Lamb's Chapel*, 508 U.S. at 387 n.2 (noting that the plaintiff did not challenge the court of appeals ruling upholding the district's refusal to rent facilities to a church group for regular Sunday morning services).

314. *See supra* note 196 and accompanying text.

315. *See supra* notes 7–8 and accompanying text.

who would expand religious influence over government. The next part goes beyond the details of applying the Establishment Clause, which has been the focus of the previous sections of this article, and attempts briefly to explain why those details are important. In other words, it discusses why religious speech is treated differently under the First Amendment.

IV. A BRIEF REMINDER OF WHY THE FIRST AMENDMENT TREATS RELIGIOUS AND NONRELIGIOUS SPEECH DIFFERENTLY

The discussion in part I[316] identifies two aspects of First Amendment jurisprudence that help explain the initially counterintuitive conclusion that private religious speech should be restricted in some circumstances in which other types of speech should remain unfettered: (1) the phrasing of the First Amendment (i.e., the Establishment Clause, which embodies a specific restriction on private religious activity that occurs in conjunction with the government) and (2) the continuing fear of political factionalism—defined as a quest for dominance—along religious lines.[317] These two aspects of First Amendment jurisprudence are merely specific examples of a broader principle underpinning the First Amendment's treatment of religion. Stated bluntly, the broader principle motivating Establishment Clause restrictions on private religious activity associated with the government is that religion and religious ideas are fundamentally incompatible with the structure of democratic government.

This principle depends on a particular definition of religion, which I have developed elsewhere[318] and will only briefly summarize here. In short, religion in the modern era is defined by three characteristics: "(1) religious principles are derived from a source beyond human control; (2) religious principles are immutable and absolutely authoritative; and (3) religious principles are not based on logic or reason, and, therefore, may not be proved or disproved."[319] The conclusion that religion is incompatible with democratic government also depends on a particular definition of democratic government, which can be summarized simply by stating the negative of the three characteristics of religion. Thus, (1) democratic principles require governmental policies to be under the complete control of the government's (human) citizens; (2) the policies of democratic governments are, by nature, temporary and subject to constant revision; and (3) democratic policies are always subject to empirical and rational critique.

316. *See supra* notes 36–41 and accompanying text.

317. *See supra* notes 32–41 and accompanying text.

318. *See generally* Steven G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990).

319. *Id.* at 167.

More specifically, the first characteristic of religion is a necessary consequence of deriving meaning and authority from an extrahuman figure defined as "God." Although there are many theological variations on the theme of "God" among the world's different religions, the core concept postulates a supreme being beyond the full understanding of humans and certainly beyond their temporal control. The supremacy inherent in every variation of the concept of "God" dictates that to the extent God requires individuals to behave in certain ways, His mandates must supersede the secular demands of the state. Thus, the second characteristic of religion (i.e., that its dictates are immutable and authoritative) defines the core features of a faith that separate religious values from secular concerns. Individuals may dispute, modify, or reject ordinary secular values for reasons of utility, convenience, or even whim. In contrast, religious adherents may not challenge core religious values. The requirement of absolute obedience to these core values is a key manifestation of the superior relationship of God over mortal humans. Core religious dictates and sacred moral obligations are immutable because they come only from God. The obligations are absolutely authoritative; to the extent that they come from a higher authority, they cannot be questioned—much less disobeyed—by anyone seeking to act in accordance with the faith.

These descriptions of religion should not be controversial. Indeed, commentators who argue that the Establishment Clause should be interpreted in a manner that would permit more government involvement with and favorable treatment of religion emphasize precisely these aspects of religion. Professor Michael McConnell, one of the more thoughtful critics of the Court's separationist decisions, summarizes his position by focusing on these characteristics:

> [R]eligious claims—if true—are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by "God." For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist. Religious claims thus differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.[320]

Professor McConnell uses these characteristics of religion to argue against a strong separationist interpretation of the Establishment Clause; I use the same characteristics to argue in favor of such an approach. Our different conclusions turn in large part on the political implications of a third characteristic of religion that Professor McConnell and other proponents of greater state involvement with religion tend not to address in their discussions of the Establishment Clause: i.e., that religion is based

320. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 11–12.

on unproved belief—in other words, faith—rather than logic and critical rationality.[321] Although many defenders of religious involvement in politics dislike the reason/belief taxonomy,[322] it is difficult to dispute that religion is a nonrational phenomenon in the modern world.[323] Immanuel Kant's *Critique of Pure Reason*[324] effectively refuted the traditional logical proofs of God's existence, and this refutation transformed religion into a belief system, rather than a system of knowledge or the product of rational analysis. Religious dictates remain subject to critique and analysis but only within the closed context of the faith itself and only by those who have already made the leap of faith necessary to render the discussion about the intricacies of a particular faith meaningful. Outsiders—that is, nonbelievers, or those whose leap of faith has taken them in the direction of another sect—cannot participate in the internal critique of a particular faith. Thus each sect is insular and exclusionary, and infidels are not necessarily given the benefit of the doubt or the indulgence of toleration.

The insularity and exclusivity of modern, faith-driven religion is the most obvious factor that renders religion incompatible with the democratic governance of a pluralistic constitutional state, but, in fact, all three defining characteristics of religion are contrary to the defining characteristics of democracy. Religion relies on extrahuman authority, but the sine qua non of democracy is that those subject to the laws also make those laws. Political decisions cannot be delegated to an unaccountable celestial patriarch or His human agents without abandoning this central feature of democracy, which is government by popular consent. Likewise, core religious principles are absolute and authoritative, but democratic policies are temporary, produced by political compromise, and are always subject to attack and rejection. Precisely because democracy is characterized by the consent of a population whose membership con-

321. This factor is usually discussed as a justification for broad protections of religiously motivated conduct under the Free Exercise Clause. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1265 (1994) (arguing in favor of broad protection of religiously motivated conduct and noting that "religious faith or belief need not be founded in reason, guided by reason, or governed in any way by the reasonable. Religious commandments can be understood as inspired by beneficent forces that are beyond human comprehension or verification, or by the result of the spite, play, accident, or caprice of entities or forces that do not necessarily hold human welfare paramount").

322. *See infra* note 326.

323. Terms such as "faith" and "reason" are necessarily somewhat inexact, but the essential distinction between the two epistemological approaches is summarized nicely by Professor Suzanna Sherry:

> The crucial difference between faith and reason lies in both the source of truth and in what counts as valid evidence of it. These two aspects of truth, of course, are interrelated. For the faithful, the ultimate authority and source of truth is extrahuman, and evidence can—and in some religious traditions, must—be entirely personal to the individual; for the reasonable, both the source and the evidence for the truth lie in common human observation, experience, and reasoning. To have faith is to affirm a transcendent reality, different from that observed by nonbelievers.

Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 478 nn.26–27 (1996).

324. *See generally* IMMANUEL KANT, CRITIQUE OF PURE REASON (2d ed. 1787).

stantly changes, policies in a democracy must always be tentative and fluid. New majorities eradicate the policies and preferences of old majorities, and no present majority may set policies that cannot be questioned or altered. Finally, religious principles are the product of faith that must remain steadfast even in the face of empirical disproof,[325] while democracy depends on the polity's ability always to reconsider its political judgments when evidence undermines the basis of prior decisions. Critical reason is the lifeblood of democratic decisionmaking but the enemy of faith.[326]

The inconsistent characteristics of religion and democracy dictate that the two realms must exist in entirely separate spheres. This is the regime framed by the Establishment Clause—hence the demand for strict separation of church and state. I hasten to add that none of this is intended to support the claim that the First Amendment "establishes" atheism or that the truly private expression of religious ideas should in any way be restricted or persecuted by the state. Restrictions on political life and the internal operations of government should not prescribe how private individuals structure their own lives. But by the same token, quintessentially antidemocratic personal views and lifestyles cannot be

325. *See* Sherry, *supra* note 323, at 482 ("To have faith is to be able to ignore contradictions, contrary evidence, and logical implications. Indeed, one test of faith is its capacity to resist the blandishments of rationality: the stronger the rational arguments against a belief, the more faith is needed to adhere to it.").

326. Critics of current doctrine who argue in favor of a less separationist interpretation of the Establishment Clause resist the dichotomy of "reason" and "belief," even as they assert the distinctiveness of the religious and secular realms. Stephen Carter argues, for example, that fundamentalists "know" that evolution is false because they use alternative interpretive tools:

> To the devout fundamentalist who accepts the principles of literalism and inerrancy, evolution theory is not simply contrary to religious teachings; it is false. . . . [Fundamentalists] are informed by God's revelation; no artifice or mortal man can contradict that; and any "evidence" that the revelation is incorrect is either erroneous or deceptive.

Carter, *supra* note 112, at 992–93. Elsewhere, Carter has argued that fundamentalist theories such as creationism "rest[] on a nontrivial hermeneutic and a rational application of it to the evidence—although, obviously, creationists dispute what counts as evidence." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 167 (1993) [hereinafter CULTURE OF DISBELIEF].

This final clause of this last quote is significant. The term "critical reason," as used in the text accompanying this note, refers to a body of knowledge and theory that is subject to empirical analysis and falsification. Holding a set of beliefs because one has been "informed by God's revelation" obviously does not fit this definition. Likewise, "disputing what counts as evidence" by ignoring fossil records and genetic evidence in favor of relying on "eleven chapters of straightforward Bible history which cannot be reinterpreted in any satisfactory way," *id.* at 167 (quoting DAVID C.C. WATSON, THE GREAT BRAIN ROBBERY 46 (1976)), removes religious adherents from the realm of rational discourse with those who do not share their idiosyncratic perspectives. Therefore, adherence to creationism (or analogous aspects of religious faith) in the face of abundant and uniform empirical evidence to the contrary is accurately characterized as "belief," not "knowledge." The key point is that what Carter calls the "alternative mode of cognition" that defines religion, *id.* at 168 (quoting LOREN R. GRAHAM, BETWEEN SCIENCE AND VALUES 312–14 (1981)), is open only to those who have already made a leap of faith by adopting beliefs that are inaccessible or even nonsensical to nonbelievers. The religious person's "knowledge" that the biblical account of creation is correct is as useless in a discussion with those of us not in that spiritual realm as "knowing" that a magic carpet will fly. Thus, no one "alternative mode of cognition" can form the basis of democratic government in a society where many different "alternative modes of cognition" must coexist.

incorporated into the fabric of public life and forced through the operation of law on those who do not share those views. Religious ideas can serve as the focal point of individual or private collective thought and action, but—if we are to remain committed to democratic values—cannot serve as the guiding principles of public collective action undertaken by the government.

Efforts to compartmentalize the spheres of government and religion have been attacked from many quarters. Michael McConnell argues that the effort to strictly separate church and state removes a prime source of "public virtue" that provides the values necessary to give a democratic state direction.[327] Steven Smith argues that the search for a coherent constitutional principle of religious freedom (such as the principles set forth in this article) is a "foreordained failure" because "[t]he framers did not enact into law any substantive version of religious freedom, nor does 'reason' produce general or 'principled' answers to questions about religious freedom."[328] Similarly, Stanley Fish asserts that the quest for a constitutional theory of separation simply imposes one orthodoxy (liberal democracy) on another (illiberal theocracy)—neither of which is theoretically superior to the other.[329] Stephen Carter argues that requiring religion to remain separate from the state is somehow part of the government's effort to "ensure that intermediate institutions, such as religions, do not get in the way of the government's will. Perhaps, in short, it is a way of ensuring that only one vision of the meaning of reality—that of the powerful group of individuals called the state—is allowed a political role."[330]

All of these responses call for a similar solution: the great reduction or elimination of judicial power to enforce the separation of church and state and the return to overt politics as the primary means of deciding whether and how much religious groups may inject their sectarian views into government and the law. Only Professor Fish states his position this bluntly;[331] the others try to elude the obvious implications of their pro-

327. *McConnell Testimony*, *supra* note 270, at 16–17.

328. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 123 (1995). Smith does recognize the possibility of developing a "historical" approach, which could "distill [the country's] different, developing beliefs and traditions into a usable law of religious freedom." *Id.* This "historical" approach would seem to provide nothing more than ad hoc governmental approval of existing practices, and when coupled with Smith's suggestion that the courts should abandon judicial review of religious freedom matters, *see id.* at 125, this "usable law of religious freedom" would be unenforceable anyway.

329. Professor Fish argues:

> My point is that if the absence of common ground (because every church is orthodox to itself) initiates a search for a form of government that will accommodate diversity, and you begin (and end) the search by identifying a common ground, what you will have done is elevated some or other orthodoxy to the status of "common sense" and stigmatized as dangerous to the very "foundations of society" those orthodoxies whose common sense is contrary to the preferred one.

Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2264 (1997).

330. CULTURE OF DISBELIEF, *supra* note 326, at 123.

331. Professor Fish surveys the field of constitutional theorists who have discussed church/state

posals, either by referring to hopes that religious groups will develop naturally the feelings of toleration that the First Amendment now imposes upon them[332] or by denying that religious dominance of government is any worse than a system in which government is required to avoid religious entanglements and coercion by remaining resolutely secular.[333]

The hope that religious toleration will flourish unassisted by legal restrictions is unrealistic in a world populated by aggressive proponents of specifically religious political action, as is the suggestion that religious liberty will be fostered by permitting a winner-take-all competition for sectarian domination of government. The popular press contains regular, concrete reminders of the problems that doom efforts to protect religious liberty while erasing the line separating the public functions of government from the private functions of religion.

While this article was being researched, for example, an article appeared in *The Wall Street Journal* announcing a "cease-fire" in the battle over religion in the public schools.[334] The article optimistically recounts

issues and finds little to like. Only once does Fish come close to finding someone else willing to abandon notions of secular fairness in favor of resolving religious issues by unfettered political combat. This (almost) kindred spirit is David Smolin, "a law professor and a fundamentalist Christian," whom Fish praises for "a moment of unusual candor" for "declaring aloud that as a 'traditional theist' what [Smolin] wants is a chance to win out over the 'modernist liberals,' with their 'gospel' of autonomous individualism and radical egalitarianism." Fish, *supra* note 329, at 2330 (quoting Smolin, *supra* note 111, at 1094). Fish especially admires Smolin's insistence that "it is victory he seeks, and he is even willing to acknowledge that if he gains it, the losers will not be treated fairly but will 'live in a society that is hostile to the continuance of their ways of life.'" *Id.* at 2331 (quoting Smolin, *supra* note 111, at 1097). Fish concludes that this is "a great moment and unique in the literature." *Id.* at 2331. But even Smolin eventually disappoints Fish by expressing a desire for "a conception of fairness to which persons of differing allegiances and presuppositions can agree." Smolin, *supra* note 111, at 1094. Fish laments that "it sounds as if someone is finally going to embrace exclusion [of religious/political losers] rather than push it away or disguise it as tolerance; but Smolin, like everyone else who comes to the brink, draws back from it and ends by calling upon the relevant authorities, and especially the judiciary, to take action 'in the interests of all.'" Fish, *supra* note 329, at 2332 (quoting Smolin, *supra* note 111, at 1104). It is left for Fish himself to argue for "revers[ing] . . . the judgment" that "[p]olitics, interest, partisan conviction, and mere belief" are to be kept at bay in battles over religion and government. *Id.* at 2332–33.

332. *See, e.g.*, SMITH, *supra* note 328, at 117. Smith writes:

> [I]n a pluralistic community exhibiting a considerable degree of religious and secular diversity, civil peace and inclusiveness can be achieved only imperfectly and only through compromise, cultivated tolerance, mutual forbearances, and strategic alliances. In this context, the judicial imposition of *any* set of consistent explicit principles is likely to undermine the possibilities for compromise and forbearance, and hence to aggravate the dangers of civil strife and alienation. Civil peace, in short, must be the product of prudence, not of principle imposed from above.

Id. McConnell would at least retain judicial restrictions on overtly coercive state actions infringing upon the religious freedom of dissenters. *See* McConnell, *supra* note 103, at 939–40.

333. For example, in response to the separationist fear that religious groups will, if permitted to exercise political influence directly, seek to impose their views on nonadherents, Stephen Carter argues that:

> it is not easy, in a nation committed to religious liberty, to understand why the risk that the religions might try to impose on secular society their religious visions of the good life is more to be avoided than the risk that the state and its powerful constituents might try to impose on the religions a secular vision of the good life.

CULTURE OF DISBELIEF, *supra* note 326, at 145.

334. Edward Felsenthal, *End of a Culture War? How Religion Found Its Way Back to School*,

the efforts of theologian Charles Haynes to find a "common ground" in defining the appropriate type and amount of religious activity in public schools.[335] In the view of the *Journal* author, there has been widespread acceptance of Haynes's message that "[r]eligion can have a major place in the public schools without offending nonbelievers or violating the law."[336] This optimistic view of extrajudicial religious tolerance mirrors that of the academic theorists cited above. But the very same day that *The Wall Street Journal* article appeared, the front page of *The New York Times* carried an article with a very different message about the "culture wars" over religion in the public sphere.[337] The *Times* article discussed the political frustration of Christian conservatives within the Republican Party and noted that the Republican leadership in Congress had responded to this frustration by agreeing to press several initiatives favored by Christian conservatives, including an amendment to the Constitution, "which Christian conservatives hope would reintroduce prayer into public schools."[338]

The day after the *Journal* and *Times* articles appeared, *The New Republic* arrived, containing an article detailing how the conservative Christian goal of returning prayer to public schools had already been achieved in some parts of Atlanta, Georgia.[339] *The New Republic* reported the details of a "motivational assembly" held for students at a public high school during a school day. The students (who assumed the assembly was mandatory) were joined by hundreds of members of a local Baptist church and sang religious songs, heard religious testimonials, and listened to a local minister leading the students in "confession[s] of faith in Jesus."[340] They also heard a speech by Thomas Brown, the county public safety director and highest-ranking law-enforcement official in the county. Brown told the assembled students how "he once told his nine-year-old daughter that the Supreme Court says people can't use the name of Jesus Christ in school, 'yet here we are, in defiance of the U.S. Supreme Court, calling the name of Jesus Christ.'"[341]

As the previous sections of this article demonstrate, efforts by sectarian groups to infuse the public sphere with their religion principles are not new and are not isolated. The problems these efforts pose are not

WALL ST. J., Mar. 23, 1998, at A1.

335. *Id.*

336. *Id.*

337. Laurie Goodstein, *Religious Right, Frustrated, Trying New Tactic on G.O.P.*, N.Y. TIMES, Mar. 23, 1998, at A1.

338. *Id.*

339. *See* Doug Cumming, *Assembly of God*, NEW REPUBLIC, Mar. 30, 1998, at 11.

340. *Id.*

341. *Id.* at 13–14. In response to local furor over the incident, Brown apologized for his comments, blaming them on the fact that "he was so moved by the students' emotional, and often deeply spiritual response, that he felt compelled to acknowledge the religious faith at its heart." R. Robin McDonald, *Dekalb Official Sorry for School Prayer Talk; Public Safety Chief Admits 'Crossing the Line' at Rally*, ATLANTA CONST., Oct. 10, 1997, at C3.

ameliorated because they often take the form of ostensibly private religious speech. Many of the participants in the Atlanta school assembly were private persons.[342] The school could have carefully masked its own involvement in other ways to emphasize the private nature of the ceremony—by making it clear that attendance by students was voluntary, by having the public safety director announce his intention to speak only as a private citizen, and by having the school issue a statement that other, nonreligious groups were also entitled to hold inspirational meetings at the school. These formal efforts to privatize the speech would probably satisfy many commentators and Justices who have argued in favor of protecting similar religious expression. But efforts to paint the Atlanta assembly as "private" would not hide the essential intent and effect of the assembly—i.e., to use public resources (the school), public officials, and cultural pressure to extend the influence of a dominant religious group to a group of impressionable youngsters. Bishop Eddie Long, who conducted the Atlanta school assembly, essentially agreed with this characterization. According to *The New Republic*, "Long would remind non-Christians that they are merely respected guests in a nation founded by Bible-believers. . . . 'You're welcome in my house, but you will not change the way this house, or this nation, is run.'"[343] Apparently these views found a sympathetic audience in Congress; Long was invited to deliver the opening prayer before the U.S. House of Representatives on March 23, 1998.[344]

The Atlanta school assembly is an all-too-common illustration of the absolutist and exclusionary tendencies that inevitably attend the joinder of religion and politics. Avoiding these tendencies requires that religion and government should remain separate, not only formalistically but also realistically. Religion should be kept apart from the apparatus of the government, even though that goal will entail limiting private religious speech in circumstances where secular speech is permitted.

Many of the arguments against strict judicial enforcement of the Establishment Clause rest on the assumption that religion will be robbed of its important cultural voice if the government is prohibited from embracing openly religious causes and principles. In Stephen Carter's formulation of this argument, the separation of church and state "carries us down the road toward a new establishment, the establishment of religion as a hobby, trivial and unimportant for serious people, not to be mentioned in serious discourse."[345] But it is also possible that the overt inte-

342. Hundreds of members of a nearby church participated in the assembly. They arrived on church buses with a police escort. *See* Doug Cumming, *Assembly in DeKalb Brings Warnings*, ATLANTA CONST., Oct. 8, 1997, at B1.

343. Cumming, *supra* note 339, at 12.

344. *See Dekalb Pastor to Pray in Congress*, ATLANTA CONST., Jan. 20, 1998, at D4.

345. CULTURE OF DISBELIEF, *supra* note 326, at 115; *see also* Fish, *supra* note 329, at 2269 ("There is a very fine line, and sometimes no line at all, between removing religion from the public battlefield and retiring it to the sidelines where it is displayed only on ceremonial occasions marked by

gration of religion into the public, political sphere would undermine precisely those otherworldly aspects of religion that make faith a singular refuge in a hostile world. This is the perspective of Madison, Jefferson, and Roger Williams, who supported the separation of church and state as much to protect the integrity of religious belief as to protect secular government.[346] They understood that power sometimes diminishes the moral stature of those who hold it. It is difficult to imagine any great moral or intellectual benefit emerging from converting religion into merely another political interest group. Although the ACLU and other separationist organizations are usually cast as the evil opponents of religious faith in these battles, in reality Bishop Eddie Wood and others like him may be religion's own worst enemies.

V. CONCLUSION

The restrictions on religious expression proposed in this article are not the product of a secular elite's hostility to religion, although I suspect they will be characterized as such by those who disagree with the approach described here. Indeed, these proposals are "restrictions" only in the limited sense that they channel religious speech away from contexts where it is associated with the government and into the purely private sector, where religious speech will receive the same extensive (which is to say, virtually absolute) protection as every other type of speech. Resistance to proposals such as these inevitably take the form of distressed lamentations that the proposals discriminate against religious beliefs[347] or

the pomp and circumstance we often accord to something we have trivialized.").

346. The most forthright articulation of this argument appears in Madison's *Memorial and Remonstrance Against Religious Assessments*, written in support of Jefferson's Bill for Establishing Religious Freedom in the Virginia legislature. According to Madison:

> [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial[?] What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.

James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 67–68 (1947); s*ee also* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 473–74 (1991) (summarizing Roger Williams's views, including the notion that "because civil government could possess no more power than the people had conferred upon it, and because God had not entrusted mankind in general with the power to rule the Church, the bride of Christ, the people could not transfer such power to the government").

347. *See* Laycock, *supra* note 121, at 9 (noting the separationist argument that private religious speech should be limited on public property and arguing that "[s]eparationists who reason from that starting point wind up actively discriminating against religious speech by excluding it from the public fora"); *see also* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" For Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 658–60 (1996) (arguing that "severe judicial overreading" of the Establishment Clause has led to "outright discrimination against religious speakers and groups in terms of access to public fora and public privileges of various kinds" and characterizing Justices who issued these rulings as belonging to "a doctrinal generation in which a strict discriminationist (often misleadingly labeled 'strict separationist') view of the relationship of church and state has held considerable sway").

even that they "represent[] a sweeping rejection of the deepest beliefs of millions of Americans, who are being told, in effect, that their views do not matter."[348] But if these proposals limit the influence of religion over public affairs, and thereby restrict the ability of religious organizations to use the government as a tool for extending their influence over those who do not share their theology, it is only because that is the theoretical prerequisite to the creation of a viable constitutional democracy. If the First Amendment prohibition on government action "respecting an establishment of religion" requires a continued allegiance to the principles of church/state separation—as logic, history, and longstanding judicial precedents tell us it must—then it is difficult to oppose the erection of institutional barriers preventing the use of government to further private religious ends. Those who would increase the amount of religious speech in public schools and other government facilities may try to win the battle by arguing that free speech is a good thing, but since religious speech in the private sector is not affected at all by these proposals, that is a false characterization of the issue. The crux of the dispute in these cases is not free speech but the Establishment Clause. As religious tyrannies throughout history have repeatedly demonstrated, the only effective way to protect the former is to rigorously enforce the latter.

348. CULTURE OF DISBELIEF, *supra* note 326, at 113 (referring to the *Lemon* secular purpose requirement); *see also supra* notes 100–88 and accompanying text (same).