NEW YORK LAW SCHOOL

DigitalCommons@NYLS

Articles & Chapters

Faculty Scholarship

1993

A Critique of Religion as Politics in the Public Sphere

Ruti Teitel
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

Part of the Constitutional Law Commons, and the Religion Law Commons

Recommended Citation
78 Cornell L. Rev. 747 (1992-1993)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

A CRITIQUE OF RELIGION AS POLITICS IN THE PUBLIC SPHERE

Ruti Teitel †

TABLE OF CONTENTS

Introduction 748
I. THE CALL FROM POLITICS 750
A. Epistemology and Lawmaking 750
B. Of Beliefs and Conversation 752
C. Of Fragmentation and Consensus 754
II. THE CALL FROM RELIGION 756
A. The Original Separation Model 756
B. Three Antinomies of Separation 759
C. The New Engagement 760
D. The Retreat from the Original Model 762
E. Of Fragmentation and Consensus 763
III. RELIGION, POLITICS, AND CONSTITUTIONAL LAW 766
A. The Original Neutrality Principle 766
B. The New Neutrality: Religion as Politics 768
1. *In Legislative Decisionmaking* 768
2. *In Individual Decisionmaking and Free Exercise Clause Doctrine* 773
3. Employment Division v. Smith *and Religion as Politics* 774
C. Religion as Politics and the Analogy to Political Speech 777
IV. THE DISCOURSE MODEL 780
A. The Call to Conversation 780
B. The Commitment to Conversation 781
C. The Commitment to Equality of Access 782
D. Of Duty and of Civility 783

† Associate Professor of Law, New York Law School. J.D. 1980, Cornell Law School. For their helpful comments on a prior draft, my gratitude goes to Steven Arenson, Peter Berkowitz, Saul Berman, Paul Kahn, Michel Rosenfeld, Tony Sebok, Richard Sherwin, Gary Simson, Michael Sinclair, Jonathan Stein, and Harry Wellington.

I am grateful to the American Association of Law Schools Law and Religion Panel, which afforded me the opportunity to present portions of this Article at the session entitled "Making New the Religion Clauses of the Bill of Rights," Jan. 6, 1992, San Antonio, Texas. I am also thankful to New York Law School's Harlan Fellowship Program, which facilitated valuable discussions in 1990 with Michael Perry, Kent Greenawalt, and Stephen Carter concerning religion and politics. Camille Broussard and Leo D'Alessandro provided helpful research assistance.

E. Engagement Towards Moral Consensus and a Critique 784
1. *Ecumenical Politics* 784
2. *Fallibilism, Conversion, and Consensus* 786
V. THE DISCOURSE MODEL AND SECTARIAN POLITICS 787
A. The Theological Problem 787
B. Engagement in the Abortion Rights Debate 789
C. Ecumenical or Sectarian Politics 790
1. *A Paradox About Engagement* 791
VI. AN ALTERNATIVE MODEL: ENGAGEMENT AS REPRESENTATION IN THE PUBLIC SPHERE 792
A. What Does the Public Sphere Signify? 793
B. The Public Sphere as Representational 793
C. Public Displays 794
D. Public Schools 798
1. *The Private or the Public Sphere* 801
E. The Supreme Court 802
VII. REPRESENTATION IN THE PUBLIC SPHERE AND RELIGIOUS EQUALITY 805
A. Why Equal Access? 805
1. *What is Equal Access?* 806
2. *Equality of Access: Religion as Politics* 807
B. Equality of Access and Preferential Representations 809
C. Syncretic Representations 812
1. *Selective Representations* 815
VIII. EPILOGUE: THE PART OF RELIGION AND POLITICS IN OUR CONSTITUTIONAL DEMOCRACY 817

INTRODUCTION

In political and legal academic communities, as well as many religious communities, there is a movement towards a greater intermingling of politics and religion. This Article analyzes the movement's call for greater engagement of religion in politics and raises the profound consequences of this trend.[1] The departure from the prevailing separation model of church and state toward an acceptance of substantial religious representation in public life will ultimately threaten religious equality and pluralism.

This Article suggests that, despite the varying strands of the new trend towards greater religious participation in public life, there is a convergence upon a unitary framework. This Article de-

[1] *See infra* parts I, II.

scribes and critiques the nature and the framework of this development toward increased religious representation.

Scholars have discussed the trends in political philosophy, theology, and law as independent phenomena.[2] There has not been concurrent consideration of these three seemingly discrete bodies of scholarship, as well as the related First Amendment Religion Clause jurisprudence. This Article analyzes the three leading arguments from political theory, theology, and law for the treatment of religion as politics in the public domain.[3] It considers the underlying momentum for the religion and politics debate and explores the implications of these arguments.

This Article then examines the prevailing model for religious public participation. A greater role for religion in public life is erroneously premised on a vision of the public domain as a forum for conversation. This is a reductive conception both of religious expression and of public life, and it elides the actual impact of religious engagement in public life. The model is further analyzed by examining public participation, which demonstrates the limited applicability of the discourse model.

This Article also offers an alternative view of the contemporary religion and politics debate. Engagement in public life may be better understood as a forum for representation or recognition in national culture. Viewed this way, controversies ostensibly over the invocation of religious norms in public discourse are revealed to be struggles over the representation of religion in our public institutions and culture. Properly understood as a dispute over representation, the question of greater engagement in the public realm requires asking by what principle should religious values be portrayed in the public domain?

Part I of this Article identifies the political momentum towards a rethinking of the role of religious engagement. Part II describes the parallel momentum from a number of faith communities. Part III analyzes the constitutional doctrine relating to the religion and

---

2 *See, e.g.*, KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988) [hereinafter GREENAWALT, RELIGIOUS CONVICTIONS] (from the political perspective); A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE (1985) (from the theological perspective); Symposium, *Religion in Public Life: Access, Accommodation, and Accountability*, 60 GEO. WASH. L. REV. 599 (1992) (from the legal perspective).

3 The three bases are from the political, the religious, and the legal communities. From contemporary political theory, the justification for change derives from the recent acknowledgement of the breakdown in the possibility of rational or value-neutral political deliberations, and an attendant rethinking of the role religion might play in public processes. From religion, the argument derives from the contemporary breakdown in the theological understanding of separate private and public arenas of action. From law, the jurisprudence demonstrates a development toward limiting and simplifying the doctrine of religious liberty that reflects special treatment of religious claims.

politics debate. This Part shows how developments in First Amendment Religion Clause jurisprudence support the recent turu to engagement. Part IV proposes that the engagement model is patterned on theories of political participation and conceived as dialogical. The central elements of this model are delineated and critiqued. The engagement model raises serious equality issues by preferring religions committed to public participation. In Parts V, VI, and VII, the discourse model is critiqued by analyzing instances of actual public participation. Rather than functioning as a place for discourse, the public sphere signifies a place for cultural representation. Properly understood as a struggle for representation, the debate over religious engagement holds profound implications for the protection of our religious equality and pluralism.

I
The Call from Politics

A. Epistemology and Lawmaking

The recent debate on the role of religion in public life has led to a demand for reconsidering the separation model as a vehicle for individual and societal decisionmaking. The separation model is grounded in a principle of separation of religious convictions from political decisionmaking.[4] Under this model, an individual's religious convictions are expected to remain private and divorced from his or her political decisionmaking, which are publicly grounded in reason.[5] This conception of separation at the individual level paral-

---

[4] It is primarily a liberal political principle. Nevertheless in this Article, I contend that the separation principle presents a convergence of political and theological commitments from liberal political philosophy and from Protestant theology.

For commentators advocating variations on the separation principle, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3-30 (1980); Ronald M. Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113-43 (1978); JOHN RAWLS, A THEORY OF JUSTICE 31, 446-52 (1971); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 67-102 (1986); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL & PUB. AFF. 259 (1989); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215 (1987).

[5] Bruce Ackerman, a leading proponent of the prevailing understanding, has termed the separation model the principle of "conversational restraint." *See* ACKERMAN, *supra* note 4, at 8 (referring to "constraint[s] on power talk"). Ackerman explains that

> [his] principle of conversational restraint does not apply to the questions citizens may ask, but to the answers they may legitimately give to each others' questions: whenever one citizen is confronted by another's question, he cannot suppress the questioner, nor can he respond by appealing to (his understanding of) the moral truth; he must instead be prepared, in principle, to engage in a restrained dialogic effort to locate normative premises both sides find reasonable.

Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 17-18 (1989). For a thoughtful reconsideration of the arguments for conversational restraints in the area of religion, see Stephen Holmes, *Gag Rules or the Politics of Omission*, *in* CONSTITUTIONALISM AND DEMOCRACY

lels a conception of separate spheres for religion and politics in society.

The separation principle now appears artificial and impossible. Individuals do, in fact, rely on religious (and non-religious) reasons in their public decisionmaking.[6] Rethinking the process by which individuals make decisions has implied an attendant rethinking of the deliberative processes of the political community.

There is also the relatively recent recognition in law of principles of indeterminacy previously recognized in science,[7] history,[8] and philosophy.[9] The leading example is the failure of law to deliver answers in the abortion debate.[10]

In a postmodern legal order, the perceived lack of authoritative standards nurtures the turn to religion. Religious convictions had been considered unacceptable bases for decisionmaking because they were not grounded in reason; proponents of a greater role for religion in public life now question this exclusion.[11] If everything is

---

19 (Jon Elster & Rune Slagstad eds., 1988) (Rather than adhering to epistemological distinctions between nonreligious and religious expression, Holmes offers political justifications that he terms "strategic self-censorship").

6 The decisionmaker behind the veil of ignorance envisioned by John Rawls is now considered a model that is not well-suited to account for the individual's role in the political decisionmaking process. *See* GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 50-54; *see also* Kent Greenawalt, *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990) [hereinafter Greenawalt, *Further Thoughts*] (Greenawalt critiques the liberal position, suggesting it is flawed because, as an empirical matter, secular reasons are not sufficient for individual public decisionmaking. This argument leaves open the related question of whether individual decisionmaking ought be the model for public lawmaking.); Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 398 (1985) [hereinafter Greenawalt, *Lawmaking*]; Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990).

7 *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

8 For an early account of the separation principle in American historical scholarship, see James T. Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing*, 94 AM. HIST. REV. 1011, 1012 (1989) (book review).

9 *See* JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION (Geoff Bennington and Brian Massumo trans., 1984) (Theory and History of Literature, vol. 10); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEOLOGY 49-75 (1984); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 315 (1979) (describing the "demise of epistemology"); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

10 *See* POSTMODERN LAW (Anthony Carty ed., 1990); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987). A decade of scholarship concerning indeterminacy in judicial interpretation followed Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 398 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209 (1980); Frederick Schauer, *An Essay on Constitutional Language*, 29 U.C.L.A. L. REV. 797, 809 (1982).

11 *See, e.g.*, GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2 (discussing a number of conflicts not decided by reason); *see also* WILLIAM A. GALSTON, LIBERAL PURPOSES: DEEDS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE (1991); MICHAEL J. PERRY,

to be taken as a matter of faith, the epistemology of God becomes a proper source of individual and societal decisionmaking.[12]

B. Of Beliefs and Conversation

The debate about religious engagement subsumes a number of sub-debates. For example, what should be the role of religion in individual political decisionmaking? Other debates focus on the role of religious argumentation and the propriety and extent of articulating religious values in political decisionmaking.

Kent Greenawalt proposes a modest departure from adherence to the separation principle. Greenawalt appears to argue, as an empirical matter, that individuals do rely on religious convictions in their political decisionmaking. Consequently, religion is already "in" politics.[13] Conceding individual reliance on religious convictions in decisionmaking, the religion and politics debate devolves on examining the justifications for articulating these religious convic-

---

LOVE AND POWER (1991) [hereinafter PERRY, LOVE AND POWER]. *See generally* ARTICLES OF FAITH, ARTICLES OF PEACE (James D. Hunter & Os Guinness eds., 1990).

[12] One commentator has carried this line of logic into a prescriptive principle governing the relation of religion and politics. Kent Greenawalt advocates the reliance on religious value bases as a last resort, suggesting that a threshold precondition for reliance on religious justifications in politics is the failure or inconclusivity of secular arguments. *See* Greenawalt, *Lawmaking, supra* note 6, at 355, 398. *See generally* Kent Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. REV. 245 (stating that there are borderline questions not resolvable on rational grounds, including abortion, the environment, and animal rights).

[13] GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 51, 109, 145-52, 216. It is somewhat difficult to ascertain if Greenawalt's point is merely descriptive or is also prescriptive. He appears to argue that reliance on religious convictions in public decisionmaking is unavoidable:

> Legislation must be justified in terms of secular objectives, but when people reasonably think that rational analysis and an acceptable rational secular morality cannot resolve critical questions of fact, fundamental questions of value, or the weighing of competing harms, they do appropriately rely on religious convictions that help them answer these questions.

Greenawalt, *Lawmaking, supra* note 6, at 357.

For commentators addressing the related question about the role of religious conviction in the decisionmaking of legislators and judges, see Levinson, *supra* note 6, at 1047; Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075 (1986).

Greenawalt distinguishes between individual reliance upon personal religious convictions and such reliance for "political choice and dialogue." GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 1, 50. This distinction has led Michael Perry to observe that Greenawalt's argument does not respond to the central question of the religion and politics debate, which Perry maintains is not about whether religious convictions constitute a proper basis for policymaking but instead about the nature of argumentation or justification in politics. Perry calls this "political-justificatory discourse." *See* Michael J. Perry, *Neutral Politics?*, 51 REV. POL. 479, 490 (1989) [hereinafter Perry, *Neutral Politics*].

tions: how and to what extent should religious claims be expressed in public deliberations?[14]

Proponents of greater religious participation challenge the accepted justification for the separation principle, contending that the separation principle of "conversational restraint" is simply not neutral.[15] Michael Perry, a leading advocate of greater religious engagement, has called instead for "ecumenical politics."[16] Perry argues that lawmaking is properly justified on religious grounds because law's legitimacy is derived from shared moral norms.[17]

The extent to which values in common are necessary prerequisites or in some way definitional of law has prompted a rethinking of the central terms of the "religion" and "politics" debate. The neorepublican revival's conception of law as embracing the community's good and expressing public virtue implies a stand in the religion and politics debate: the political is equated with the religiomoral consensus and the political world offers hope to the religious consensus.[18]

---

14 *See* AALS Conference, Law and Religion panel (Jan. 4, 1991) [recording on file with author] [hereinafter AALS Conference]; GREENAWALT, RELIGIOUS CONVICTIONS, *supra* note 2, at 12; PERRY, LOVE AND POWER, *supra* note 11, at 3, 22, 83-127; Audi, *supra* note 4, at 259, 284 (Audi proposes a "principle of secular motivation" that public discourse should be conducted in terms of adequate secular reasons. He argues that even if the motivations are religious the stated reasons ought to be secular); *see infra* notes 130-44 and accompanying text.

15 "[T]o contend for a particular practice of political justification—including neutral political justification—is to contend for a particular conception of politics." Perry, *Neutral Politics*, *supra* note 13, at 481. "Neutral political dialogue is an impossibility." PERRY, LOVE AND POWER, *supra* note 11, at 8; *see* Stephen L. Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law* (Lecture Two: The Establishment Clause Mess), 69 OR. L. REV. 471, 495 (1990). *See generally* GALSTON, *supra* note 11, at 273-74 (contending that liberalism does not afford neutrality).

16 *See* PERRY, LOVE AND POWER, *supra* note 11, at 83.

17 Michael Perry suggests there has been "a breakdown in understanding how personal and communal beliefs should be reached in public life." *Id.* at 8.

18 The debate ultimately presents the question of whether the terms "religion" and "politics" can be understood to describe distinct systems. *See id.* at 77-78 ("Religions . . . and the theologies . . . that attend them have an essentially political character. . . . [A]ny religion theology is essentially political. . . . [C]ertainly the . . . "Jerusalem based" . . . Judaism, Christianity and Islam—are in the main, political in a strong sense. They are 'prophetic.' "); *see also* RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE 131 (1984).

> *Both religion and politics, however, are less easily defined and contained.* Religion (*religare*—to bind) deals with the ultimate meanings and obligations in the whole of life. Politics, especially modern politics, tends to assume that "government" and "society" are interchangeable terms. Thus religion and politics compete for dominance over the same territory. Both are political in the sense of being engaged in a struggle for power. Both are religious in the sense of making a total claim upon life.

Id. (emphasis added). "Politics is indeed an extension of ethics and therefore engages religious principles." THE WILLIAMSBURG CHARTER FOUNDATION, THE WILLIAMSBURG CHARTER (1988) *reprinted in* 8 J. L. & RELIGION at 5, 20 (1990) [hereinafter THE WILLIAMSBURG CHARTER]. Neuhaus' equation of religion and politics involves a rethinking

Another challenge to the accepted model separating religion and politics infuses traditional academic discourse with religious norms derived from personal experience. This Article terms that development "critical religion theory" because, like critical legal theory, it challenges legal theorizing divorced from the context of identity and community.[19] Critical religion theory accounts for a substantial part of the impetus in recent political thought for greater religious involvement in public life.

C. Of Fragmentation and Consensus

The impetus for a greater role for religion in politics is justified by the search for authority in lawmaking offered by a religio-moral consensus and by the pursuit of community. Although these pursuits are not necessarily connected, they unite under the conception of an increased role for religion in politics. In the contemporary revival of republican theory, religious arguments are thought to be properly incorporated in public policymaking in order to advance political processes toward a shared notion of what is good.[20]

In one sense, conceiving an active role for religion in politics implies a restoration, a return to an established church that sanctions and provides authority for law and its exercise of coercive power. But the conception of an active role for religion in politics is also incompatible with both the contemporary revival and classical republican theory. Classical republican theory rejected a role for religion in the political deliberation process because it was thought to implicate sectarian values.[21] The contemporary republican revival occurs at a time of heightened political fragmentation. In this

---

of the way religion has been traditionally understood, in distinction from politics, as making a total claim on the person. For a thoughtful analysis of the assumptions in our conceptions of "religion" and "politics" in the debate, see Edward Foley, *Tillich and Camus, Talking Politics*, 92 COLUM. L. REV. 954 (1992) (book review).

19 "Critical religion theory" scholars include PERRY, LOVE AND POWER, *supra* note 11, at 4-7; Stephen L. Carter, *God Talk and Law "In Public,"* AALS Conference *supra* note 14; Emily F. Hartigan, *Surprised by Law*, — B.Y.U. L. REV. — (forthcoming 1993); Frederick M. Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992); *see* GEORGE FLETCHER, LOYALTY (1993). The movement is not classifiable as left or right politics.

20 *See* GALSTON, *supra* note 11, at 265 ("For most Americans, religion provides both the *reasons* for believing liberal principles to be correct and the *incentives* for honoring them in practice."); PERRY, LOVE AND POWER, *supra* note 11, at 65 (arguing for a connection between religio-moral consensus and support for "human rights"); Charles Taylor, *Religion in a Free Society*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 11, at 93.

21 For insight into the classical republican view, see ISAIAH BERLIN, AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS (1979) (discussing political theorist Niccoló Machiavelli). Berlin suggests that Machiavelli did not have a theory for religious participation in politics. *Id.* To the contrary, Machiavelli "distrusted Christianity . . . because it taught men to give themselves to ends other than the city's and to love their own souls

context, the problem of unshared religious norms poses just one of many areas of difference.[22]

---

more than the fatherland." J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT, FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 202 (1975).

The extent of the separationist position in classical republicanism on the role of religion in political life is seen in clear relief when one considers the important role religion did play in the social lives of citizens.

For founders' statements reflecting the republican commitment to the exclusion of religious argumentation from public deliberations, see THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1777), *reprinted in* THE PORTABLE THOMAS JEFFERSON 251-53 (Herrill D. Peterson ed., 1975); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295-306 (Robert A. Rutland et al. eds., 1973) [hereinafter MADISON, MEMORIAL AND REMONSTRANCE]; THE FEDERALIST No. 10 (James Madison); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 266-72 (1967) (discussing the preconstitutional denominational impetus for disestablishment); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 427-28 (1969) (discussing the dilemma of religious freedom and pluralism understood by some scholars as incompatible with republicanism). On the division among colonial Americans on the proper role of religion in politics, see ALAN HEIMERT, RELIGION AND THE AMERICAN MIND (1866).

For commentators affirming the neo-republican exclusion of religion, see Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555 (1988); *see also* THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM 78-85 (1988) (discussing the role religion played in the formation of the Constitution and the Bill of Rights).

Despite other differences in political theory, the republican justifications for the exclusion of religion from the political processes are analogous to liberalism's justifications for a similar exclusion of religion. *Compare* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 359 (1984) ("A generalization of the Establishment and the Free Exercise clauses of the Constitution forbids citizens from justifying their legal rights by asserting the possession of an insight into the moral universe intrinsically superior. It is a preference that law be decided on shared premises, and religion is not considered to offer shareable premises.") *with* Greenawalt, *Further Thoughts*, *supra* note 6, at 1022-23 ("The actual debate of political issues in terms of competing religious convictions is disturbing in a pluralist society. Civility and respect for minorities counsel that public advocacy be conducted in the non-religious language of shared premises and modes of reasoning.").

22 It is also a time when there is a recoguition of greater religious fragmentation. As discussed in Part II, perhaps much of the impetus for engagement in politics paradoxically derives from the pursuit of consensus through the political process.

For proponents of consensus, the language of religious difference is overblown, the demographics of American religion are distorted, and religious differences are minimized. They advoçate "mainline" religion, "mainstream" values, and "right and moral" beliefs worthy of consensus. *See infra* part VI; *see also* ROBERT BELLAH, HABITS OF THE HEART 252-56, 281-83 (1985) (writing of "the culture of coherence"). "Judeo-Christianity" is seen potentially as the great unifier. *See* PERRY, LOVE AND POWER, *supra* note 11, at 39-40, 78. For a critique of this understanding of the "Judeo-Christian tradition" and discussion of varying perceptions of religious consensus and fragmentation, see *infra* part VI.

II
THE CALL FROM RELIGION

A. The Original Separation Model

The call for engagement is also prevalent in the religious sector. Several religious communities have recently rejected the original "segregation" of religion and politics, a principle deriving from the revolutionary and founding periods.[23]

The principle of "segregation," or "separation" as it is now termed, draws from a variety of Protestant religious traditions, including the Puritan,[24] pietist Baptist,[25] Calvinist,[26] and Roger Wil-

---

[23] "Segregation" was the term used at the time. *See* David Little, *Roger Williams and the Separation of Church and State*, *in* RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER 3, 8 (Gordon S. Wood ed., 1985).

[24] *See* REICHLEY, *supra* note 2, at 54 ("The great idea of Puritanism, as of the entire reformation, was the total sovereignty and awesome otherness of God, separated from all things human . . ."); John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to America Constitutionalism*, 39 EMORY L.J. 41, 55 (1990) ("The Puritans conceived the church and the state as two separate covenantal associations, two coordinate seats of godly authority and power in society . . . . To conflate these two institutions would be to the 'misery (if not ruine) of both.' "). *See generally* THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 218 (1986) (quoting THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF MASSACHUSETTS A2 (1648) (M. Farrand ed., 1928)) (discussing Protestantism in early America). But this conception of religion and politics as separate domains derives from the very origins of Christian thought. Thus for example, "Render therefore unto Caesar the things that are Caesar's, and unto God the things which are God's." *Matthew* 22:21.

[25] *See, e.g.*, ISAAC BACKUS, A HISTORY OF NEW ENGLAND 204-10 (2d ed. 1871), *reprinted in* ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES 307 (1950) [hereinafter STOKES]:

> It may now be asked, "*What is the liberty desired?*" The answer is: *As the kingdom of Christ is not of this world, and religion is a concern between God and the soul, with which no human authority can intermeddle*, consistently with the principles of Christianity, and according to the dictates of Protestantism, we claim and expect the liberty of worshipping God according to our consciences, not being obliged to support a ministry we cannot attend, whilst we demean ourselves as faithful subjects. These we have an undoubted right to, as men, as Christians, and by charter as inhabitants of Massachusetts Bay.

Id. (discussing the views of the Antipaedobaptist churches on religious liberty at the Constitutional Convention) (emphasis added); MICHAEL KAMMEN, PEOPLE OF PARADOX 176 (1980):

> For considerable time the two aspects of American pietism remained in tension because of their opposing views of the proper Christian society. Conservative pietists insisted that a Christian state required some official recognition and support for churches. By contrast, Separatists and especially Baptists contended that for the state to support an established denomination infringed upon the freedom of individual conscience and of the other churches.

Id.

[26] *See* JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGIONS (1536), *reprinted in* STOKES, *supra* note 25, at 106-12:

liams.[27] The separation model was also promoted by the founding fathers, who were influenced by the Enlightenment, and in particular by John Locke.[28]

James Madison's writing best reflects the combination of theological and philosophical sources.[29] Madison wrote of a world sepa-

> [T]he church does not assume to itself what belongs to the magistrate, nor can the magistrate execute that which is executed by the church . . . .
>
> Nor let any one think it strange that I now refer to human polity the charge of the due maintenance of religion which I may appear to have placed beyond the jurisdiction of men. For I do not allow men to make laws respecting religion and the worship of God . . . .

Id.

27 *See* ROGER WILLIAMS, THE BLOUDY TENET OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644), *reprinted in* STOKES, *supra* note 25, at 194-202:

> All civil states with their officers of justice, in their respective constitutions and administrations, are . . . essentially civil, and therefore not judges, governors, or defenders of the Spiritual, or Christian, State and Worship. . . . It is the will and command of God that, since the coming of His Son, the Lord Jesus, a permission of the Most Paganish, Jewish, Turkish or anti-Christian consciences and worship be granted to all men, in all nations and countries; and they are only to be fought against with that sword which is only, in Soul matters able to conquer, to wit; the sword of the Spirit—the Word of God . . . God requireth not an uniformity of religion to be enacted and enforced in any civil state; . . . An enforced uniformity of religion throughout a nation or civil state confounds the civil and religious. . . .

Id.

For a description of the debate concerning separation of church and state between Roger Williams and John Cotton, see CURRY, *supra* note 24 at 15-18.

28 *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 242 (1698); John Locke, *A Letter Concerning Toleration, in* 35 GREAT BOOKS OF THE WESTERN WORLD at 1 (Robert M. Hutchins ed., 1952) [hereinafter Locke, *Toleration*]. Reichley describes Locke's influence on Madison and Jefferson. *See* REICHLEY, *supra* note 2, at 90-91 (characterizing Locke's political philosophy as "specifically Christian"). John Locke wrote that:

> Now that the whole jurisdiction of the magistrate reaches only to these civil concernments and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.
>
> First, because the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion. . . .
>
> In the second place, the care of souls cannot belong to the civil magistrate, because his power consists only in outward force, but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.

Locke, *Toleration, supra* at 3. John Locke's advocacy for separation also reflects his theological commitment to deism. *See* JOHN LOCKE, ON THE REASONABLENESS OF CHRISTIANITY (1695) [hereinafter LOCKE, REASONABLENESS OF CHRISTIANITY].

29 *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947) (Rutledge, J., dissenting) and *quoted in* Wallace v. Jaffree, 472 U.S. 38, 53-54 n.38 (1985) ("The Religion then of every man must be left to the conviction and conscience of every man. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the

rable into two spheres: the religious and the secular. Of the two, the religious sphere was considered preeminent.[30] Some of the founders believed in a "wall of separation between the garden of the church and the wilderness of the world."[31] Some envisioned a wall of separation dividing their inward world of belief, which was completely voluntary and free of governmental coercion, and the outward world of action, which was subject to government regulation.[32] This model called for the privatization of religious questions and a commitment to voluntarism—questions of faith were to be decided

---

institution of civil society. . . ."). In the Federalist Papers, Madison writes of the need for separation of religion and politics: "A religious sect, may degenerate into a political faction in a part of the Confederacy." THE FEDERALIST No. 10, at 64 (James Madison) (Jacob Cooke ed., 1961). He also argued that:

> [i]n a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

THE FEDERALIST No. 51 at 351-52 (James Madison); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1877 at 594 (4th ed. 1873) ("The real object of the amendment was . . . to exclude all rivalry among Christian sects . . ."); MORTON WHITE, PHILOSOPHY, "THE FEDERALIST" AND THE CONSTITUTION 32-33 (1987). *See generally* REICHLEY, *supra* note 2, at 90-91.

For a description of the convergence of the two traditions, biblical and Enlightenment, and the underlying American constitutionalism, see Martin E. Marty, *On a Medial Moraine: Religious Dimensions of American Constitutionalism*, 39 EMORY L.J. 9, 10 (1990). For an overview of Locke's theological commitments, see LOCKE, REASONABLENESS OF CHRISTIANITY, *supra* note 28.

30 Madison wrote of man's duty to the "Creator" and the "Governor of the Universe" as "precedent both in order of time and in degree of obligation to the claims of Civil Societies." *See* WHITE, *supra* note 29, at 31-34. Madison's arguments echo those of Roger Williams, contending that separation of church and state would protect religion from government. *See* RICHARD BERNSTEIN, ARE WE TO BE A NATION: THE MAKING OF THE CONSTITUTION 69 (1987).

31 *See* MARK D. HOWE, THE GARDEN AND THE WILDERNESS, RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5-6 (1965) (quoting ROGER WILLIAMS, MR. COTTON'S LETTER EXAMINED AND ANSWERED (1644).

32 Locke believed, that religion should be a voluntary matter:

> [T]rue and saving religion consists in the inward persuasion of the mind without which nothing can be acceptable to God. . . .
>
> Let us now consider what a church is. A church, then, I take to be a voluntary society of men, joining themselves together of their own accord . . .
>
> I say it is a free and voluntary society. . . . No man by nature is bound unto any particular church or sect, but everyone joins himself voluntarily to that society in which he believes he has found that profession and worship which is trnly acceptable to God.

Locke, *Toleration*, *supra* note 28, at 3-4; *see* Michael M. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) (noting that the founders' basic concern was that no person be compelled to adhere to any religious practice or belief and arguing the basic purpose of the establishment clause was to promote the voluntariness of religion). *See generally* BELLAH, *supra* note 22, at 223-25 (discussing Toquevilles' observation about the privatization of religion in American life).

by the individual, free of government direction.[33] The conception was predicated on a withdrawal of governmental power from questions of religion.[34]

B. Three Antinomies of Separation

Although the separation framework seemingly advances neutrality between the state and organized religion, the framework itself is predicated on a nonneutral conception of religion. The conception incorporates antinomies of the public and private, the sacred and the secular, belief and action. These antinomies are immaterial for non-Christian religions but have profound implications for the relation of religion to politics.[35]

Despite varying conceptions of religion, there has been wide support among minority religions for the separation model.[36]

---

33 The First Amendment framework draws from Enlightenment and Protestant philosophy. *See* MICHAEL WALZER, SPHERES OF JUSTICE 243-45 (1983) (referring to the establishment clause as a "legal expression" of Locke's belief that "no man can, if he would, conform his faith to the dictates of another") (quoting Locke, *Toleration, supra* note 28); *see also* KAMMEN, *supra* note 25, at 171-173 (1975) (discussing Congregational commitment to voluntarism and Puritan commitment to individualism during the colonial period).

The parameters of Locke's commitments to voluntarism are now discussed within the larger debate over the role of religion in public life. Thus, for example, political theorist William Galston contends that Locke's views on the nature of neutrality and governmental coercion have been misunderstood. *See* GALSTON, *supra* note 11, at 261 (suggesting that Locke distinguishes between persuasion and coercion in discussing the appropriate role of religious involvement in public life). Galston's observations about Locke are well supported by Locke's writings on religion. In *On the Reasonableness of Christianity*, Locke describes the tenets of Christian faith as universal. Locke's support for civil liberty to persuade nonadherents derives from the need to communicate universal truths. In *A Letter Concerning Toleration*, Locke flatly rejects extension of civil liberties to atheists. Locke, *Toleration, supra* note 28, at 51 ("[T]hose are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of a humane society, can have no hold upon an atheist.").

34 *See* Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered, in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 99 (Mark Tushnet ed., 1990).

35 Thus, for example, in orthodox Jewish thought, no relevant distinction is drawn between the spheres of God-man and man-man relations; God is considered to be involved in all interpersonal relations. *See, e.g.*, DAVID NOVAK, LAW AND THEOLOGY IN JUDAISM 8, 31-32 (1974) (arguing for example that God is involved in the marriage relationship). *See generally* MOSES MAIMONIDES, GUIDE FOR THE PERPLEXED, Book Three (discussing the integration of the civil and the religious). On these distinctions between Judaism and Christianity, see YESHAYAHU LEIBOWITZ, JUDAISM, HUMAN VALUES, AND THE JEWISH STATE (1992). Regarding the relation of belief and action, see EPHRAIM URBACH, THE SAGES 233-35, 250-51 (Israel Abrahams trans., 2d ed. 1979). The divinity of Jewish norms is thought to be achieved through actions in the world. Haim Cohn refers to this as the humanization of the divine law. HAIM H. COHN, JEWISH LAW IN ANCIENT AND MODERN ISRAEL 39 (1971).

36 For a comprehensive account of the long struggle for religious equality in America as inextricably related to separation of church and state, see MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984). Under the separation framework, minority religions such as Judaism would also come to emphasize individual, private, and voluntary beliefs.

Therefore, this model provides the baseline from which to gauge the new trend toward engagement. The separation model's two spheres principle—of sharp distinctions between the private and the public, the sacred and the secular, and belief and action—has enabled minority religion to flourish in this country.[37]

C. The New Engagement

In recent years, a broad spectrum of religious communities, from politically conservative evangelical churches to the politically liberal branches of the Catholic church, have called for engagement in the public realm.[38] Voices within this movement emphasize the impossibility of religious commitment being distinct from public life.[39] One illustration is the emergence in the last decade of the new Christian Right. Primarily evangelical Protestant, its platform

---

See R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS 77 (1986). *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE—INCLUSION, EXCLUSION AND AMERICAN LAW 43-46 (1990) (discussing the dilemma of religious difference, and "the commitment to neutrality as a solution to difference"). *Id.* at 42.

[37] *See* MOORE, *supra* note 36, at 77 (discussing American Judaism's development in Protestant-like denominations).

[38] *See, e.g.*, THE PRESBYTERIAN CHURCH (U.S.A.), GOD ALONE IS LORD OF THE CONSCIENCE, A POLICY STATEMENT ADOPTED BY THE 200TH GENERAL ASSEMBLY (1989) (statement falls in the middle of the spectrum) [hereinafter POLICY STATEMENT]. For a thoughtful analysis and characterization of postmodern religion as politicized, see Nancy Murphy and James W. McClendon, Jr., *Distinguishing Modern and Postmodern Theologies*, MODERN THEOLOGY 191, 208-10 (1989). For a foreshadowing of the change to come, see HARVEY COX, THE SECULAR CITY (1965) (noting the need for a "theory of social change"). *See also* HARVEY COX, RELIGION IN THE SECULAR CITY: TOWARD A POSTMODERN THEOLOGY (1984); DUNCAN B. FORRESTER, THEOLOGY AND POLITICS 57-82, 150-60 (1988) (discussing the contemporary development of Christian political theology that contemplates participation in public life). For a critical discussion of the activity of both the Christian Right and the Christian Left in American public life, see Stanley Hauerwas, *A Christian Critique of Christian America*, *in* RELIGION, MORALITY AND THE LAW: NOMOS XXX 110 (J. Roland Pennock & John W. Chapman eds., 1988).

[39] Martin E. Marty, a leading American church historian, notes that although a recent switch from private to public commitment occurred rather abruptly in conservative American Protestantism, others "long have recognized a commitment to relate private faith to public order through what we are calling a public church." MARTIN E. MARTY, THE PUBLIC CHURCH: MAINLINE-EVANGELICAL-CATHOLIC 98 (1981) [hereinafter MARTY, THE PUBLIC CHURCH]. For Marty, the "public church" is a "communion of communions" that includes Protestant, Evangelical, and Catholic traditions. *Id.* at 3-22.

> According to the Reformed tradition and the standards of the Presbyterian church (U.S.A.) then, it is a limitation and denial of faith not to seek its expression in both a personal and a public manner, in such ways as will not only influence but transform the social order. *Faith demands engagement in the secular order and involvement in the political realm.*

Religious Participation in Public Life, *in* POLICY STATEMENT, *supra* note 38, at 48 (emphasis added).

called for political involvement on a variety of social issues: abortion, feminism and school prayer.[40]

The recent activities of the Catholic church display a similarly heightened commitment to political action. The Church has advocated "integralism," the complete integration of Catholic doctrine in the political realm.[41] In the abortion debate, Catholics serving in public office have been encouraged to translate their religious convictions into public policy.[42] Although the abortion debate implicates substantive church doctrine about when life begins, it also raises broader questions about the role of religious convictions in public policymaking.

In Jewish thought, the role of religion in public life had long been debated, even though Jewish communities had supported the separation model because it facilitated autonomous religious communal norms.[43] Despite staunch support for the separation principle, recently there has been a shift toward political participation in a

---

40 This new political involvement has been characterized as a nostalgia for a "Christian America" and an opposition to "secular humanism," which is considered responsible for moral decline. *See* Richard V. Pierard, *Religion and the New Right in the 1980s*, *in* RELIGION AND THE STATE 393 (James E. Wood, Jr. ed., 1985); *see also* ERLING JORSTAD, EVANGELICALS IN THE WHITE HOUSE: THE CULTURAL MATURATION OF BORN AGAIN CHRISTIANITY 1960-1981 83-128 (1981); MARTY, *supra* note 39, at 97; THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION (Robert C. Liebman & Robert Wuthnow eds., 1983) (compilation of essays describing the main dimensions of the New Christian Right and attempting to explain its emergence); GARY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS (1991).

41 Examples are the Catholic Bishop's 1983 and 1986 Pastoral Letters calling on citizens to act through the political process: (1) on the American Economy and Poverty and (2) Nuclear Defense and Disarmament. *See* THE NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND ONE RESPONSE, A PASTORAL LETTER ON WAR AND PEACE (1983); *see also* PENNY LERNOUX, THE PEOPLE OF GOD: THE STRUGGLE FOR WORLD CATHOLICISM 167 (1989) (discussing Church doctrine advocating "integralism": the complete integration of Catholic tenets in the political realm).

42 *See, e.g.*, THE NATIONAL CONFERENCE OF CATHOLIC BISHOPS, RESOLUTION OF NATIONAL CONFERENCE OF CATHOLIC BISHOPS (1989); Ari L. Goldman, *O'Connor Warns Politicians Risk Excommunication Over Abortion*, N.Y. TIMES, June 15, 1990, at A1, B2 ("Catholics in public office must also have this commitment to serve the state; but service to God must always come first."); Ari L. Goldman, *Catholic Bishops Hire Firms to Market Fight on Abortion*, N.Y. TIMES, April 6, 1990, at A1 (Bishops announcing a nationwide anti-abortion campaign in which they are expected to spend between three and five million dollars). *See generally* Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990) (surveying the Roman Catholics in the judiciary and discussing the relationship between morality and law).

43 For support of the principle of separation of church and state, see *Judaism and American Public Life: A Symposium*, 11 FIRST THINGS, March 1991, at 24 (Jonathan Sarna identifies the connection between the community's search for an "equal footing" and its support of strict church-state separation). *See generally* BORDEN, *supra* note 36 (relating the Jewish struggle for religious equality to the support for separation of church and state). For discussion of the theological, as well as epistemological, debate underlying the question of the role of Jewish thought as prescriptive norms in general policymaking, see *infra* part V.A.

number of areas including abortion, the right to die, and education.[44]

The momentum for religious engagement is further illustrated by the creation of a foundation whose sole mission is to create a framework for debate on church-state issues. The Williamsburg Charter Foundation's mandate was to develop an ecumenical document that expresses a reappraisal of those constitutional principles that define religious liberty.[45] To that end, the Williamsburg Charter challenges the exclusion of religion from public life and calls for public policymaking grounded on religious convictions.[46] The Charter has been endorsed by a wide range of religious organizations, academics, and others, thus making it the leading proposal from the religious sector to effectuate the momentum for more public engagement.[47]

D. The Retreat from the Original Model

The present opposition of a substantial part of the religious community to the separation model is not simply a challenge to constitutional doctrine. What appears to have been forgotten within the religious community is that politicians or constitutional lawyers never imposed the separation model on the churches.[48] To the con-

---

44 *See, e.g.*, Brief of Agudath Israel of America as Amicus Curiae, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-1503); Brief Amicus Curiae for American Jewish Congress, et al., *Webster*, (No. 88-1503); Brief of Agudath Israel as Amicus Curiae, Cruzan v. Director of Mo. Dept. of Health, 497 U.S. 261 (1990) (No. 88-1503); *see* discussion *infra* at part V.B.

45 *See* The Williamsburg Charter, *supra* note 18. For discussion of the Charter, see *The Williamsburg Charter—A Symposium*, This World 40-101 (Winter 1989).

46 The Williamsburg Charter, *supra* note 18, at 16-18.

47 The siguers of the charter include more than 30 religious leaders of Protestant, Catholic, and Jewish organizations representing many other religions. *Id.* at 23-31. *See generally* Articles of Faith, Articles of Peace, *supra* note 11, at 123 (reprinting the Williamsburg Charter); Perry, Love and Power, *supra* note 11, at 45 (discussing the nature of "ecumenical political dialogue"); Richard Neuhaus, *The Williamsburg Challenge*, Nat'l Rev., Sept. 2, 1988, at 41 (criticizing members of the political right for not siguing the document).

48 For example, William Galston characterizes the constitutional separation doctrine as a purely "juridical" understanding. *See* Galston, *supra* note 11, at 257-89 (contending that a "clash" exists in contemporary America between "juridical liberalism" and "traditionalism").

The role of religion, particularly main line Protestantism, in the withdrawal from public life has been acknowledged by a very few theologians:

> [T]he most culturally influential religious forces in American life have tended to support a view of liberalism in which religion can impinge upon, but never really belong in, public space. By supporting liberal doctrine in theory, these religious forces would seem to be working for their own exclusion from the public square. At the same time, however, they want to be "politically relevant" . . . *In its public interventions today, mainline Protestant religion is typically advancing a view of politics and society in which religion has no right to intervene.*

trary, the separation model was primarily derived from preconstitutional religious traditions.

In sharp contrast to the French experience, for example, in which political change imposed an abrupt break between religion and politics, the historical relationship in America is more complex.[49] Perhaps paradoxically, many religious traditions facilitated the creation of the separation model.[50] The religious communities' current attack of the separation model is, in great part, an attack on their earlier vision of privatized religious life and attitude of "forbearance"—or withdrawal from the political sphere.[51]

E. Of Fragmentation and Consensus

The religious community justifies the retreat from the separation model as a redress to a perceived loss of power and legitimacy. The movement is based on the premise that withdrawal from public life has weakened religious mores. The claim has implications for the religious community and for public life. Proponents of change in the relationship deplore the status of religion in what they label our "secular society."[52] As a result, both the religious community

---

NEUHAUS, *supra* note 18, at 137-38 (emphasis added).

Yet even when commentators have conceded the theological support for the separation framework, the understanding is ahistorical. Today's theological support is erroneously thought to follow contemporary liberal democratic principles, rather than predating those principles and deriving from prior theological commitments dating back to pre-revolutionary America. *Id. See, e.g.*, BAILYN, *supra* note 21, at 246-72 (discussing the political and religious events that shaped the call for the disestablishment of religion in the American colonies).

49 *See generally* ROGER CHARTIER, THE CULTURAL ORIGINS OF THE FRENCH REVOLUTION (1991) (discussing the French experience).

50 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 27 (Henry Reeve trans., 1961) (1840) ("The American clergy stand aloof from secular affairs. This is the most obvious but not the only example of their self-restraint."). *Compare* CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 221 (David Macey trans., 1988) (discussing "the historical disentanglement of the religious and the political") *with* discussion *supra* part II. *See also* PATRICIA BONOMI, UNDER THE COPE OF HEAVEN 222 (1986). Bonomi juxtaposes the European association of modernity and anticlericalism with the American association of revolution as entirely compatible with religion. "Because the colonies possessed no single established church that was perceived as being in league with the government, the American revolutionaries did not have to overthrow a church along with the state." *Id.*

51 There are notable exceptions to the general approach that I characterize as forbearance. *See* Frederick M. Gedicks & Roger Hendricks, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1590 (1987) (discussing the abolitionist and civil rights movements as leading examples of religious involvement in public life).

52 *See, e.g.*, NEUHAUS, *supra* note 18, at 9-19 (decrying secularism and calling for "unprecedented ways of relating politics and religion"). *Compare* COX, *supra* note 38, at 2-3 (suggesting that secularization is equivalent to religious disappearance) *with* MARTIN E. MARTY, RELIGION AND REPUBLIC: THE AMERICAN CIRCUMSTANCE 18 (1987) (suggesting that secularization has been misunderstood and that religious manifestations have simply changed in form). *See also* UNSECULAR AMERICA (Richard J. Neuhaus ed., 1986) (es-

and the country's moral standing are viewed as being related and somehow beleaguered. The claim is curious when one considers that although religious observance always has been high throughout American history, there is now a recent surge in religious affiliation.[53] The country has never been more religiously pluralist, and it surpasses other industrialized democracies in levels of observance and diversity.

But the turn to politics also occurs at a time of greater fragmentation within the religious sector. In a post modernist age, there is acknowledgment of the decentralization of the American religious community. Just as a divided politics animates the turn to religion, a fragmented religious community presents the context for the turn to the political process.[54] For both the political and religious sectors,

---

says and discussions from the Rockford Institute Center on Religion and Society Conference in January 1985 discussing secularity and religion in American public life).

[53] Ari L. Goldman, *Portrait of Religion in U.S. Holds Dozens of Surprises*, N.Y. TIMES, April 10, 1991, at A1, A18 (survey finding that 90% of Americans identify themselves as religious).

Bible literacy and belief in the divinity of Jesus Christ are also up from past periods. *See* ANDREW GREELEY, RELIGIOUS CHANGE IN AMERICA 14-20 (1989) (reporting that three-fourths of Americans pray once a week, and that, since 1944, nine out of ten believe in the existence of God); *Record 74 Percent of Americans Report Commitments to Christ*, RELIGIOUS NEWS SERVICE, Sept. 21, 1990, at 4 (this survey noted an increase from 60% in 1978); Kenneth L. Woodward, *Talking to God*, NEWSWEEK, Jan. 6, 1992, at 39-49 (regarding the upsurge in personal prayer). Two-thirds of donations by individuals to nonprofits go to religious organizations. *See* JENCKS, WHO GIVES TO WHAT? THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 321 (1985). According to recent Gallup Polls, 40% of Americans attend religious services once a week, which is a fairly constant figure. Church membership is approximately 70% of the total population. *See generally* BELLAH, *supra* note 22, at 219; *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1612-1613 (1987); *Religion in America: 50 Years: 1935-1985*, THE GALLUP REP. 50 (May 1985).

[54] Although Americans have long been identified according to denomination, *see* WILL HERBERG, PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN SOCIOLOGY (1955), there is a recent surge in denominationalism. *See* J. GORDON MELTON & JAMES V. GEISENDORFER, A DIRECTORY OF RELIGIOUS BODIES IN THE UNITED STATES 1-6 (1977); *see also* Wade C. Roof, *The Episcopalian Goes the Way of the Dodo*, WALL ST. J., July 20, 1990, at A12 (reporting that denominational lines have blurred).

Among American religious historians, there has been considerable debate about the character of American religious life and the extent of fragmentation in the religious community. *Compare* R. LAWRENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS ix (1986) (arguing that sectarianism is the essence of American religiosity) *with* SIDNEY E. MEAD, THE NATION WITH THE SOUL OF A CHURCH (1975) *and* Robert Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967) (arguing for the existence of a civil religion).

Moore notes that early church histories emphasized unity. *See* MOORE, *supra*, at 13-16. For an example of the early emphasis on consensus in American religious history, see WILL HERBERG, PROTESTANT, CATHOLIC, JEW 254-72 (1955) (promoting the "Judeo-Christian" tradition). For a critical analysis of the consensus view, see MARTIN E. MARTY, ANTICIPATING PLURALISM: THE FOUNDERS' VISION (1986).

For Moore, the freedom to fragment is the essence of American religious life; nevertheless, it is only with the passage of time that historians have acknowledged religious

internal division appears to drive the turn outward.[55] Although it may appear paradoxical in light of the divisiveness in political life, the religious community has turned to politics for the possibility of moral consensus.

An awareness of American religion as fragmented and the related turn to the engagement model in pursuit of moral consensus underscore the central question of religion and politics debate: what is to be the character of American religious life?[56] Pursuit of moral consensus through religio-political engagement[57] has the potential to effect a profound transformation in American religious life.

---

division. *See* MOORE, *supra*, at 18. Recent historical writing reflects this recognition. *See, e.g.*, CATHERINE L. ALBANESE, AMERICA, RELIGIONS AND RELIGION (1981); THEODORE CAPLOW, ET AL., ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN'S RELIGION (1983); ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 185-222 (1971); MARTIN E. MARTY, RELIGION AND THE REPUBLIC 233 (1987) [hereinafter MARTY, RELIGION AND THE REPUBLIC]; MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA (1984).

55 *See* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (contending that a new religious alignment is emerging in which the orthodox within traditions share a political agenda with those from other traditions and are forming political coalitions to define the country); MARTIN E. MARTY, FROM PERSONAL TO PRIVATE FROM POLITICAL TO PUBLIC 5 (Marty suggests that, with the loss of support of private and secondary associations, there is a turn to public involvement. Commentators have suggested that political consensus through conservatism offers the potential of religious unity among diverse churches.); *see also* NEUHAUS, *supra* note 18; REICHLEY, *supra* note 2, at 327-31 (describing this development as "a conservative coalition").

See MARTY, THE PUBLIC CHURCH, *supra* note 39. *See also* MARTY, RELIGION AND THE REPUBLIC, *supra* note 54, at 347 (discussing the Civil War period as a time of putative religious consensus). Marty characterizes the argnment for religious consensus at the time of the Civil War as paradoxical. Nevertheless, this Article suggests that the development of a notion of civil religion during the Civil War illustrates the connection between political dissension and the turn to religion. Another commentator suggests that religion has worked against the building of a political consensus. *See* George M. Marsden, *Afterword: Religion, Politics and the Search for an American Consensus*, *in* RELIGION AND AMERICAN POLITICS FROM THE COLONIAL PERIOD TO THE 1980s 380, 388 (M.A. Noll ed., 1990) [hereinafter RELIGION AND AMERICAN POLITICS].

56 Consensus historians tend to emphasize the periods immediately during and after the Civil War, and the 1970's, *see* RELIGION AND AMERICAN POLITICS, *supra* note 55, whereas the history of denominationalism harks back to the pre-revolutionary period. *See also* BAILYN, *supra* note 21, at 249-71. The debate between consensus and pluralist conceptions is complicated. To what extent is moral consensus actually naked majoritarianism? *See* MARTY, RELIGION AND THE REPUBLIC, *supra* note 54, at 244 ("The 'note' of public civil religion is Protestant.").

57 *See infra* part IV regarding the Charter model; *see also* BELLAH, *supra* note 22, at 200. Bellah offers as one of a number of conceptions of politics, the conception of a "consensual community." Under this view, "politics is making operative the moral consensus of the community, reached through free face-to-face discussion." *Id.* at 200. Bellah suggests that biblical religion and republican politics have been traditional responses to individualistic trends in our society. *Id.* at 38.

III
RELIGION, POLITICS, AND CONSTITUTIONAL LAW

Developments in First Amendment[58] doctrine suggest a shift in constitutional analysis toward the acceptance of religious justifications for political and judicial decisionmaking. The constitutional doctrine's equation of religious and political reasons tracks the shift from the political and religious communities toward greater religious engagement. The emergent doctrine models religious engagement on political participation. But ultimately, the Court's conception of religion as politics is a reductive understanding of religious engagement.

A. The Original Neutrality Principle

The founders' perspective of the relationship of religion and politics was primarily predicated on a separationist approach to government and religion:[59] questions of faith were matters for individual choice.[60] This original understanding of the proper relation of religion to politics undergirds the jurisprudence of the First Amendment religion clauses.[61] Constitutional neutrality guaranteed that individual religious choice would be free of governmental influence.[62] Through the principle of neutrality, the Constitution also provided similar protection for autonomy in church-state rela-

58 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

59 *See supra* notes 23-34 and accompanying text.

60 This understanding is derived from convergent theological tenets and those of Enlightenment philosophy. *See supra* notes 24-33 and accompanying text. On the traditional primacy of individual choice regarding religion, see DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 140-62 (1986).

61 The Court has reiterated this understanding in its decisionmaking under the religion clauses. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 672 (1984) ("This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.' ") (citations omitted); Larson v. Valente, 456 U.S. 228, 252-53 (1982); Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971); Engel v. Vitale, 370 U.S. 421, 429-30 (1962); Everson v. Board of Educ., 330 U.S. 1, 8-14 (1948). Although the Court's approach to neutrality is in flux, the Court has consistently maintained that religion clause jurisprudence delineates the constitutional parameters of religion in politics.

62 Under the Protestant model, neutral government action should neither burden nor benefit individual religious decisions, so that decisions could be made voluntarily. *See* Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985); *Everson*, 330 U.S. at 15-16. For an argument for strict neutrality, see Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). For a critique of the neutrality principle, see Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 703-06 (1986). For a comprehensive discussion of alternative interpretations of neutrality, see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

tions.[63] The neutrality and separation principles were considered entirely compatible; in fact, separation was considered to advance neutrality.[64]

Recent fluctuations in the religious clause doctrine stem from competing understandings of neutrality.[65] These doctrinal developments signal a judicial struggle over what is required for religious neutrality: special treatment of religious convictions in politics, such as that contemplated under the separation approach, or identical treatment of political and religious rationales.[66]

After four decades, the view that neutrality depends on such a separation is yielding to a wholly different understanding—one that equates religious and political claims. Whereas the traditional conception of neutrality insisted on a withdrawal of religion from politics, the emerging view of neutrality, in a radical reversal, is concerned with the fair integration of religion in the political process. The corresponding constitutional mandate is characterized simply as a right of access to public life.[67]

---

63 In addition to protecting the individual's religious choice, neutrality governs relations between the state and organized religion. *See Everson*, 330 U.S. at 16 (articulating the metaphor of a "wall of separation").

For commentators emphasizing the structural aspect of religious freedoms, see Mary A. Glendon & Paul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991). *See generally* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (suggesting that the Bill of Rights should be viewed as deploring organizational structure to protect people from self-interested governments and to protect minorities from the majority).

64 Despite the prevailing understanding, the Court and constitutional scholars increasingly characterize the neutrality and separation principles as dichotomous. *Compare Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting) *and* Allegheny County v. ACLU, 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring) *with Everson*, 330 U.S. at 13. *See also* Gedicks, *supra* note 51 (making a case for more religion in public life); Michael Sandel, *Freedom of Conscience or Freedom of Choice?*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 11, at 79-80; Tushnet, *supra* note 62 (juxtaposing neutrality and separation). *But see* Robert Audi, *Religious Commitment and Secular Reason: A Reply to Prof. Weithman*, 20 PHIL. & PUB. AFF. 66 (1991) (arguing for a principle of political "neutrality," which implies a separation of church and state).

The attraction of dichotomies in recent judicial review reflects a "zero-sum" approach to constitutional rights. *See* Ruti Teitel, *Reactionary Constitutional Identity*, 14 CARDOZO L. REV. 747 (1993).

65 *See* Lee v. Weisman, 112 S. Ct. 2649 (1992) (appearing to replace Lemon test with a coercion test); *Lynch*, 465 U.S. at 668 (1984) (purporting to apply the Lemon test to a possible Establishment Clause violation).

66 "Equal treatment" refers to religion-blind treatment and does not imply substantive equality. To the contrary, this Article contends that substantive equality is better realized through a religion-sensitive approach. Equal access principles do not actually advance religious equality. *See infra* notes 250-81 and accompanying text. For a related discussion of distinctions between formal and substantive neutrality in the church-state area, see Laycock, *supra* note 62.

67 *See generally* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (discussing the rethinking of neutrality following Lochner v. New York, 198 U.S. 45 (1905)).

B. The New Neutrality: Religion as Politics

Controversy over constitutional treatment of religious claims surfaces in the ongoing debate over abortion.[68] Although the substantive question of abortion rights has dominated the rights jurisdiction debate, one can also understand the abortion debate in the context of a broader debate over the role of religion in constitutional and legislative decisionmaking. *Roe v. Wade*[69] raised but did not resolve the role of religion in constitutional interpretation.[70] The dilemma over abortion raises the question of the proper standards of judicial review over state interests that promote religious values over other individual rights.[71]

1. *In Legislative Decisionmaking*

Religio-moral questions treated previously as constitutionally protected private decisions are now cast as public decisions subject to the political process.[72] Recent judicial developments in the standard of review under the First Amendment Establishment Clause evince judicial support for a greater role for religion in political affairs.

Establishment Clause doctrine defines the extent to which religious claims may motivate governmental action.[73] Under the analysis developed by the *Warren* and *Burger* Courts, governmental actions that had the primary purpose or effect of advancing reli-

---

68 For a discussion of the problems of moral skepticism and the rationale for noninterpretive reviews, see Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 299 (1981). Perhaps not surprisingly, Perry has moved from the interpretation debate, in which he supported bringing moral and religious considerations to bear on judicial decisionmaking, to the religion and politics debate, in which he is an avid proponent of greater religious engagement. *See, e.g.*, PERRY, LOVE AND POWER, *supra* note 11; MICHAEL J. PERRY, MORALITY, POLITICS AND LAW (1988).

69 410 U.S. 113 (1973).

70 *Id.* For a lucid exploration of the interpretation debate in light of *Roe*, see HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION (1991).

71 *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 560-72 (1989) (Stevens, J., concurring in part and dissenting in part); *see, e.g.*, Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990); Bowers v. Hardwick, 478 U.S. 186, 192 (1985); *see also* Ronald Dworkin, *The Right to Death*, 38 N.Y. REV. OF BOOKS, Jan. 31, 1991, at 14 (suggesting that the sole governmental interest in prolonging Nancy Cruzan's life was religious).

72 *See Webster*, 492 U.S. at 535 (Scalia, J., concurring in part and concurring in the judgment) (characterizing abortion as a "political issue" for the legislature to decide). *See id.* at 568-69 (Stevens, J., concurring in part and dissenting in part) (viewing the statute's preamble as endorsing a theological position on the beginning of life).

73 *See infra* notes 81-82 and accompanying text.

gion[74] were impermissible under the Establishment Clause.[75] Now the Court's Establishment Clause doctrine has relaxed, allowing a substantial religious animus for governmental actions.[76] Under the traditional standard, religious reasons could permissibly animate public decisionmaking so long as there was a distinct predominant secular purpose.[77] Without expressly overturning precedents, the Court has recently indicated its willingness to dispose of the secular purpose requirement. Rather than requiring a primary secular justification, the Court now substitutes a standard that tolerates religious purposes for governmental actions.[78]

To the extent that there remains a secular purpose standard, it is no longer meaningful. It is easily satisfied by the assertion of any secular legislative purpose, no matter how transparent, as long as the underlying religious purpose "coincides" with the asserted secular purpose.[79] The secular justification may be merely incidental.[80]

---

74 In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court announced a three-part standard: "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.'" *Id.* at 612-13 (citations omitted).

75 Notably, as distinguished from other standards under the Bill of Rights, the nonestablishment analysis rejects an express inquiry into possible governmental interests justifying its infringement.

76 The Court has been moving away from the standard declared in *Lemon* for some time. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting the Court's "unwillinguess to be confined to any single test or criterion"); Mueller v. Allen, 463 U.S. 388, 394 (1983) (noting that *Lemon* merely guides "[t]he general nature of our inquiry"); *see also* Edwards v. Aguillard, 482 U.S. 578, 636-40, (1987) (Scalia, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 108-14 (1985) (Rehnquist, J., dissenting).

77 The secular purpose standard was first articulated in Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). For arguments supporting the standard, see Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259, 284-85 (1989). *See generally* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987) (discussing the resolution of personal conflicts between the claims of morality and the law, as well as the lawmakers' dilemma regarding those who break the law for moral reasons).

78 *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 603 (1988) (upholding the facial constitutionality of the Adolescent Family Life Act, 42 U.S.C. § 3002 (1982 & Supp. 1991) and noting that "even if . . . the [Act] was motivated in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate secular concerns"). A majority of the Court now appears to require only that the state identify a secular purpose.

79 *Id.* at 605 (suggesting that the government's "approach is not inherently religious, although it may *coincide* with the approach taken by certain religions") (emphasis added).

80 *See id.* What counts is the *asserted* legislative purpose. The Court will not look beneath the face of the statute to the motivation of the legislators. "[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 249 (1990) (O'Connor, J., plurality opinion). In analyzing the constitutionality of legislation protecting worship meetings in the public schools, the Court added that

By upholding laws adopted primarily for religious ends, the Court's purpose inquiry de facto equates religious and secular bases for decisionmaking.

Other changes in the Court's Establishment Clause inquiry also suggest judicial support for a substantial role for religion in politics. Under the previous standard, the Court asked whether the law or policy's primary effect was to advance or inhibit religion,[81] thereby barring governmental impact in primarily advancing religious ends. This has yielded to an interpretation in which the Court considers the parameters of policymaking that may permissibly advance religion.

Alternative approaches to determine the extent of permissible state action range from support of a modest role for religion in politics, limited by an "endorsement" standard,[82] to a more expansive role for religion in politics, limited only by a "coercion" standard. The "coercion" standard contemplates governmental action for a variety of religious reasons and having a variety of religious impacts—provided the action does not coerce individual adherence to

---

"because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.' " *Id.* (citations omitted).

The Court's emerging purpose review under the First Amendment Establishment Clause resembles review in the area of commercial legislation. The judicial inquiry does not probe beneath the asserted legislative purpose; therefore, the political majority controls the definition of religious purposes. Although Justice Scalia is the leading proponent on the Court of this move away from consideration of legislative motivation and history, this approach attracted a majority in *Mergens*. *Id.* at 242 ("[O]ur view [is] that the legislative history of the Act, even if relevant, is highly unreliable.").

For a discussion of the purposes of the Equal Access Act, see Ruti Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HASTINGS CONST. L.Q. 529 (1985).

[81] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[82] Justice O'Connor has argued for an endorsement standard. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984). To Justice O'Connor, "endorsement" is a form of governmental support that goes beyond mere incidental overlap with religious goals. *See* Wallace v. Jaffree, 470 U.S. 38 (1985) (O'Connor, J., concurring in judgment). Exemplifying this type of approach, the Court recently upheld aid to churches for pregnancy counseling, allowing the "coincidental" promotion of religion. *See Bowen*, 487 U.S. at 605.

The attempt to apply the endorsement standard in a principled fashion illustrates the concerns that this Article raises in analyzing the access debate as a controversy primarily over religious representation in our culture. To the extent the Court appears to be rejecting the "endorsement" inquiry in favor of a "coercion" inquiry, this is a step backward in the judicial willingness to evaluate the significance of religious representations in the public sphere.

religion.[83] According to the Court, coercion occurs when the state preferentially promotes a particular religious viewpoint.[84]

---

83 The coercion standard is one justice short of a majority. *See* Allegheny County v. ACLU, 492 U.S. 573, 660-61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The Court's division over the establishment clause standard became apparent in the 1991 term. In a recent opinion on the Establishment Clause standard, Lee v. Weisman, 112 S. Ct. 2649 (1992), involving a graduation prayer in public school, four justices endorsed the pre-existing *Lemon* standard. *Id.* at 2661-67 (Blackmun, J., concurring, joined by Justices Stevens and O'Connor) and at 2667-78 (Souter, J., concurring, joined by Justices Stevens and O'Connor). Another four justices clearly rejected the standard. *Id.* at 2678-86 (Scalia, J., dissenting, joined by Chief Justice Rehnquist and Justices White and Thomas). Justice Scalia commented that "our religion-clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions." *Id.* at 2685. Justice Kennedy, who argued in *Allegheny* for a shift from the *Lemon* standard to the coercion standard, said that the minimal requirement under establishment analysis is that "government may not coerce anyone to support or participate in religion or its exercise . . . ." *Id.* at 2655. Unlike in the nativity display in *Allegheny*, Kennedy found coercion in the context of a public school graduation ceremony. *Id.* at 2655-61. Dicta in *Weisman* suggests, however, that Justice Kennedy and the dissenting justices would apply the coercion standard more liberally outside the public school context. *See id.* at 2655, 2681.

Notably, until *Allegheny*, Supreme Court doctrine appeared settled on the coercion standard. The impact of governmental action on the individual was considered irrelevant to the Establishment Clause claim. The inquiry instead focused on the constitutional constraints set on government action. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); McCollum v. Board of Educ., 333 U.S. 203 (1948).

For an argument supporting the coercion standard based upon the founders' conception of establishment, see THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); *see* McConnell, *supra* note 32, at 933.

84 The coercion analysis appears to have two strands: (1) financial support—coercion through taxation; (2) and proselytization—coercion through conversion. *See Allegheny*, 492 U.S. at 659-60; *see also Bowen*, 487 U.S. at 615-18 (rejecting coercion claim in which government was financing Adolescent Family Life Act that allowed religious teaching against sexual relation and abortion).

The coercion standard radically limits the establishment mandate. Coercion requires not only that government actually promote religion in general but also that it prefer a particular religion. The Court therefore appears close to limiting the mandate of the Establishment Clause to the protection of choice among religions, but not the choice of nonreligion over religion—that is, atheism or secularism. Yet, the doctrine on this point had previously appeared settled. *See* Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985); MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 21, *quoted in* Everson v. Board of Educ., 330 U.S. 1, app. at 64 (1947) ("The religion then of every man must be left to the conviction and conscience of every man."); Ruti Teitel, *Original Intent, History and Levy's Establishment Clause*, 15 LAW & SOC. INQUIRY 591 (1990).

The Court is currently divided on this point, as is evident from the *Weisman* decision. In Justice Kennedy's opinion, which was joined by Justices Blackmun, Souter, O'Connor and Stevens, coercion not only embraces choices among religions but also those between religion and nonreligion. *Weisman*, 112 S. Ct. at 2655 ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .").

Two Establishment Clause cases, which are pending in the 1993 Supreme Court term, are likely to reveal the judicial direction on this question: Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992) (holding unconstitutional as an establishment violation aid in the form of a sigu language interpreter for a deaf student at-

In a recent decision, the limited inquiry into the effect of governmental action reflects a similarly limited understanding of the constitutional mandate, allowing room for substantial government support of religion short of guaranteeing protection for the advancement of particular religious claims. The Establishment Clause is limited to ensuring that the government does not overtly prefer particular beliefs.[85]

The third element of the Establishment Clause inquiry addresses governmental entanglement in religion.[86] Informed by the notion that religious participation in politics poses a distinct problem,[87] the entanglement analysis set limits on religious institutional involvement in politics. The analysis addressed two concerns: the implications of political intrusion on the autonomy of religious institutions,[88] as well as the possibility that religious participation would lead to political divisiveness or religious factionalization.[89]

---

tending a religious high school); Lambs Chapel v. Center Moriches, 959 F.2d 381 (2d Cir. 1992) (holding constitutional under the First Amendment a school district's refusal to allow use of school facilities for a religious film series).

85 *See Allegheny*, 492 U.S. at 660 ("The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses."). The greater protection for religious beliefs as compared to religious actions is discussed *infra* notes 118-20 and accompanying text.

86 The Court first articulated this concern as an independent prong of the establishment standard. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) ("The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."). The Court noted that "the Constitution's authors sought to protect religious worship from the pervasive power of government." *Id.* at 623.

87 At some level, perceiving religious divisiveness as a problem reflects the republican understanding concerning the exclusion of religion from political deliberations. *See supra* notes 4-6 and accompanying text.

88
> "Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process."

Lemon, 403 U.S. at 622 (citations omitted); *see also* Larson v. Valente, 456 U.S. 228, 252-53 (1982). For the historical concern with religious divisiveness in politics, see *supra* notes 4-6 and accompanying text.

89 *Lemon*, 403 U.S. at 622. *See* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 933 n.116 (1987) (While political divisiveness is not an independent basis for invalidating a law, it is a "warning signal" that the Establishment Clause is being violated). To the extent that political divisiveness was subsumed in the religion clause doctrine, it expresses a convergence of both liberalism and republican theory that religious involvement in public life implies more discord than differences over other norms. For a contemporary argnment against religious involvement in public life on the basis that, while not epistemologically distinct, use of such arguments has peculiar political impact, such as greater divisiveness, see Holmes, *supra* note 5.

Despite these concerns, the Court has retreated from its entanglement analysis. Recent opinions reflect a shift in the judicial tolerance of religious participation in politics.[90] The transformed establishment standard accepts religious and political rationales for public policy, as well as substantial religious involvement in politics.[91]

2. *In Individual Decisionmaking and Free Exercise Clause Doctrine*

The Court's Free Exercise Clause jurisprudence addresses the relevance of religious bases for individual decisionmaking as justifications for exemptions from political obligations. Similar to its consideration of religious reasons in governmental decisionmaking,[92] the Court has alternated between special and equal treatment approaches to determine when an individual's religious convictions exempt the individual from political obligations. Recently, the Court retreated from the special treatment approach and reverted to an earlier approach that treated religious convictions as secular political convictions.

In its earliest Religion Clause decisions, the Court did not distinguish between general questions of conscience and those specifically grounded in religious conviction. The Court treated cases that limited individual's rights to proselytize as cases raising freedom of expression concerns.[93] This approach prevailed for nearly two decades before yielding to a special scrutiny standard for questions involving religious conscience. In the 1960s, the *Warren* and *Burger* Courts shifted its standard to provide special treatment for religious liberty claims as distinct from those involving freedom of expression.

The Court's application of a special treatment principle to religious claims justified exemptions from generally applicable laws ex-

---

[90] *Compare Lemon*, 403 U.S. at 622-23 (invalidating state aid to private religious schools under the new three-pronged test) *with* Bowen v. Kendrick, 487 U.S. 589, 606-09 (1988) (upholding a statute requiring participation of religious organizations in the funded problem) *and Allegheny*, 492 U.S. at 659-63 (upholding the use of various religious symbols in a publicly-sponsored display).

[91] *See* Lynch v. Donnelly, 465 U.S. 668, 684 (1984) (finding that entanglement is relevant only in challenges to "a *direct* subsidy to church-sponsored schools") (emphasis added). *But see Bowen*, 487 U.S. at 616 (deeming the entanglement inquiry irrelevant unless the organizations are "pervasively sectarian"). *See also* Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (finding fears of political divisiveness from entanglement "unpersuasive").

[92] *See supra* notes 73-91 and accompanying text.

[93] The judicial remedy reflected an interpretation of what constitutes religious equality. Rather than exempt religious observers, the Court struck down the statute in its entirety. *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268 (1951); Martin v. City of Struthers, 319 U.S. 141 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

clusively on religious grounds.[94] Accordingly, the Court's Free Exercise approach paralleled the prevailing Establishment Clause standard, which barred governmental action with the purpose or effect of advancing or inhibiting religion.[95] This convergence of the religion clause standards corresponded with the conception of religion and politics as distinct spheres.

3. Employment Division v. Smith *and Religion as Politics*

Under the separation model, religious challenges were leveled not at political decisionmaking as a general matter, but at laws as applied to particular religious minorities.[96] This approach offered an alternative avenue to religious participation in politics[97] because the judicial process accommodated differences among religions without the need to turn to political processes.[98] Judicial grants of free exercise exemptions helped to maintain the separation model, with its bright lines between the sacred and the secular, and the private and public spheres. Minority adherents, in particular, benefitted from judicial exemptions under the Free Exercise Clause.[99]

This approach, which governed conflicting political and religious claims for nearly four decades, now has been entirely jettisoned by the Rehnquist Court. Over the last decade, the Court has struggled over whether special treatment of religious claims raises

---

94 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing exemption from compulsory school attendance); Sherbert v. Verner, 374 U.S. 398 (1963) (allowing exemption from employment compensation laws).

95 *See supra* note 74 and accompanying text.

96 The requested remedy was not invalidation of the challenged law but rather exemptions for the particular minority.

97 In some instances, the exercise of religious expression might simply be incompatible with political obligations.

98 If accommodation by exemption constitutes political involvement, it is a minimal form of involvement, a mere tinkering at the margins. *See* Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299 (suggesting that the Court will not accommodate when many would take advantage of the accommodation). For additional support, compare *Yoder*, 406 U.S. at 205 (granting exemption from school attendance law) with United States v. Lee, 455 U.S. 252 (1982) (denying exemption from social security tax).

In very few cases would the granting of a judicial exemption have fairness implications for nonadherents. For a thoughtful analysis of this problem, see Kent Greenawalt, *Conscientious Objection and the Liberal State*, *in* RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER, *supra* note 23, at 247.

99 Minority religious adherents, in particular, have turned to the courts for special exemptions under the free exercise clause. *See supra* notes 96-98 and accompanying text.

For an example of a Sabbath observer's successful challenge, see Sherbert v. Verner, 374 U.S. 398 (1963). For unsuccessful challenges, see Braunfeld v. Brown, 366 U.S. 599 (1961) and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). These petitions have been understood as challenges to law as applied to particular plaintiffs with special religious needs, and not as general challenges to the laws' constitutionality.

fairness implications.[100] Under the new neutrality standard, distinctions between claims grounded in religious and secular convictions may implicate impermissible preferences.[101] Consequently, the new neutrality standard contemplates formally equal treatment of religious and secular claims;[102] the religion clauses mandate no "special respect" for religion.[103]

In *Employment Division v. Smith*,[104] the Court returned to its 1940s jurisprudence rejecting the special treatment of religious claims and shifting to a constitutional standard that equates religious and secular claims. This approach is evident in two aspects of the *Smith* opinion: that religious claims eligible for constitutional

---

100 *See, e.g.*, *Lee*, 455 U.S. at 259-60 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

101 *See* Employment Div. v. Smith, 494 U.S. 872, 880-82 (1990). The new approach avoids any evaluation of which accommodations present fairness considerations. For a thoughtful analysis of this question, see Greenawalt, *supra* note 98. *See also* Estate of Thorntou v. Caldor, 472 U.S. 703, 710 (1985) (considering fairness implications of allowing employees an exemption for the Sabbath).

102 *See Smith*, 494 U.S. at 882. The Court's justification for formally equal treatment seems to reiterate the governmental or legislative justification of the need for uniformity. *See, e.g.*, *Lee*, 455 U.S. at 257-59 (considering uniformity justification as a "compelling interest").

103 *See Smith*, 494 U.S. at 882. Justice Stevens has long advocated this conception of neutrality. *See* Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Stevens, J., concurring) (stating that the uniformity requirement "was not motivated by hostility against, or any *special respect* for any religious faith.") (emphasis added). *But see id.* at 523-24 (Brennan, J., dissenting) (noting that this is coincident with the formal equality standard treating religion as politics, and that deferring to the product of the political process in fact shows respect only for those religious principles that coincide with majoritarian political beliefs, namely mainstream Christianity).

104 494 U.S. 872 (1990). *Smith* is now considered a watershed in free exercise jurisprudence. It is clear from subsequent decisions relying on *Smith* that the Court has fully abandoned the entrenched strict scrutiny standard. The strict scrutiny standard had been applied in free exercise review, except in cases involving religious viewpoint discrimination, which are governed by general First Amendment principles. *See* First Covenant Church of Seattle v. City of Seattle, 787 P.2d 1352 (Wash. 1990) (remanded to Supreme Court of Washington to reconsider the designation of a Church building as a landmark in light of the *Smith* decision), *vacated*, 111 S. Ct. 1097 (1991).

In *Smith*, the Court suggests that the free exercise exemption raises equality problems because it relieves religious observers from performing duties assumed by other citizens. *Smith*, 494 U.S. at 880 ("There would be no way . . . to distingnish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. . . . [S]uch individuals would have a similarly valid claim to be exempt.").

See generally Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). For a scholarly account of the original understanding of free exercise, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

For a thoughtful analysis of the doctrine regarding neutrality in the free exercise area, see Laycock, *supra* note 62.

protection can be circumscribed and that most claims ought to be relegated to the political process.[105]

The neutrality standard articulated in *Smith* requires only equal access to the political process; the political process then protects religious freedoms.[106] So long as equal access is guaranteed, products of the political process will be considered neutral.[107] This approach assumes that equal political opportunity ensures religious neutrality. Following *Smith,* the Court has said that it will treat religious claims just as secular claims.

This version of governmental neutrality toward religion avoids any consideration of the realities of the legislative processes and the actual impact of the law. Public decisionmaking may manifest entirely secular legislative intent, yet consistently understate the concerns of minority religions. Minority religious beliefs and practices often may conflict with prevailing legal norms that are overwhelmingly grounded in majoritarian religious values.[108]

But *Smith's* neutrality standard would support legislative results no matter the impact.[109] *Smith* avoids addressing the consequences of relegating questions of religious freedom to the political process. Instead, the majority opinion perversely recognizes only the problem of the minority adherent "demanding coincidence" of the law with his own beliefs.[110] The Court fails to acknowledge the result-

---

105 *See Smith,* 494 U.S. at 889-90. Laws of general applicability are considered "neutral," although Scalia's opinion for the majority concedes "that leaving accommodation to the political process" places minority religious practices at "a relative disadvantage." *Id.* at 890; *see also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

The few judicial accommodations that the Court sustains demonstrate the equation of religious and secular claims: those arising in the context of good cause hearings evaluating non-religious bases for employment, such as unemployment compensation hearings. *See Smith,* 494 U.S. at 884. Or, as the Court suggests, whenever general speech claims would also be threatened. *Id.* at 878-80.

106 *See id.* at 890.

107 *See id.* at 877. The Court explained that the free exercise of religion means "[t]he government may not compel affirmation of religious belief . . . [or] impose special disabilities on the basis of religious views . . . or lend its power to one or the other side in controversies over religious authority." *Id.* at 877 (citations omitted).

108 Justice O'Connor has suggested that in light of our largely majoritarian political system, the laws that result from the political process, notwithstanding Establishment Clause limits, reflect the religious beliefs of the dominant political groups. *See* Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring). *See also supra* note 103. Some examples of laws that reflect Christian values include adultery, sodomy, drug use, and suicide. *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503, 520 (1986) (Brennan, J., dissenting) ("[t]he visibility test [regarding military uniform gear] permits only individuals whose outer garments or grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties"). For a discussion of the problem of external preferences in the decisionmaking process, see DWORKIN, *supra* note 4, at 132.

109 *See Smith,* 494 U.S. at 885-86 n.3.

110 "To make an individual's obligation to obey such a law contingent upon the law's *coincidence* with his religious beliefs . . . [permits] him, by virtue of his beliefs, 'to become a law unto himself.' " *Id.* at 885 (emphasis added) (citing Reynolds v. United States, 98

ing conflict for religious minorities confronting majoritarian norms through the political process. *Smith* virtually deconstitutionalizes religious claims under the law.

C. Religion as Politics and the Analogy to Political Speech

By equating religion with politics, the neutrality standard subsumes Free Exercise doctrine into general First Amendment speech doctrine.[111] Drawing on its earlier constitutional jurisprudence regarding proselytizing speech, the *Smith* Court limits the Free Exercise mandate by restricting it to the protection of religious expression as speech.[112] Linking the protection of religious liberty with the protection of speech implies a limited conception of the nature of religious expression and similarly limited constitutional protections. Under First Amendment speech doctrine, legislation is prohibited only when it discriminates among particular religious beliefs.[113] *Smith* draws a bright line between a sacred sphere of protected communication and a virtually unprotected sphere of conduct. Under the rubric of speech, *Smith's* protection of Free Exercise claims dovetails neatly with the developments in the Establishment Clause doctrine.[114] According to some members of the Court,[115] the purpose of the Establishment Clause is to insure only against government "proselytization."[116] What is considered im-

U.S. 145, 167 (1878)). This part of the *Smith* opinion glosses over the distinction between the alignment of majoritarian values with a generally applicable statute and the claim to an individual exception.

[111] *Id.* at 880-81.

[112] > "*The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.* Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief. . . . punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. at 877 (emphasis added) (citations omitted).

[113] *See id.* at 877-78 (indicating that it is the process, not the effect, of the legislation that should be examined). This new standard will be very difficult to meet.

[114] In a line of cases concerning prayer in public universities and schools, a majority of the Court equated religious worship to expression. *See* Widmar v. Vincent, 454 U.S. 263, 269 (1981) (stating that religious worship and discussion are "forms of speech and association protected by the First Amendment."); *see also id.* at 267; Board of Educ. of the Westside Community Sch. v. Mergens, 496 U.S. 226, 249-51 (1990).

[115] Four justices: Rehnquist, Scalia, White, Kennedy. See Justice Kennedy's concurring opinion in *Allegheny*, which was joined by Chief Justice Rehnquist, Justices Scalia, and White. County of Allegheny v. ACLU, 492 U.S. 573, 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[116] *See id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). Viewpoint discrimination regarding religion emerges as the sole constitutional constraint. *See supra* note 84 and accompanying text.

permissible establishment is the expression of a sectarian governmental message.[117]

Under *Smith's* political speech analogy, the religious practice that merits constitutional protection is the communication of religious doctrine.[118] The remaining forbidden governmental burden on freedom of exercise—just as forbidden establishment—is the "governmental regulation of religious beliefs as such."[119] For religious beliefs requiring observance by practices other than communication, *Smith*'s political speech analogy offers no protection.[120]

The hypothetical about idolatry posited in the *Smith* opinion illuminates the implications of limiting protection to the profession of religious belief. For the *Smith* majority, the regulation of idolatry presents a clear case of interference with belief, and therefore presents a constitutionally coguizable burden on free exercise.[121] Nevertheless, the *Smith* Court's invocation of idolatry expresses neither a general nor a neutral understanding of which religious practices merit constitutional protection.[122]

The Court's new standard under both religious clauses equates secular and religious claims—by either individuals or the state. The standard subsumes religious liberty concerns under freedom of

---

117 For a commentator advocating this view, see William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983). *See also Smith*, 494 U.S. at 877 ("The free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires."). For a critique of this conception, see Tushnet, *supra* note 62, at 714 (referring to the speech approach to religious liberty as "reductionist"). For my critique of religious expression conceived as "discourse," see *infra* parts V, VI, VII.

118 *See Smith*, 494 U.S. at 878-79.

119 *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

120 *Id.* at 879 ("Laws . . . are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."). In *Smith*, the formalist dichotomy between belief and action tracks the framework of Protestant theory as it evokes early religion clause jurisprudence. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *see also supra* part II.

121 *See Smith*, 494 U.S. at 877.

122 *Id.* The Court's idolatry illustration reflects the connection between the category of legislation against religious beliefs and the category of hybrid-mixed religion/speech rights. To the *Smith* Court, idolatry, defined as bowing before a golden calf, presents a clear case of regulation of belief. *Id.* at 877-78. Idol worship is considered symbolic speech that expresses a religious belief. *Id.* Another example offered by the *Smith* Court are oaths and pledges. *Id.* at 882 (citing West Virginia v. Barnette, 319 U.S. 624 (1943)). *See generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989) (distinguishing between communicative and performative acts); Robert M. O'Neil, *Religious Expression: Speech or Worship—or Both?*, 54 MO. L. REV. 501, 505-06 (1989).

Smith invokes an inexplicably limited understanding of idolatry, one firmly grounded in biblical allusion. *See Exodus* 20:4. But, idolatry is a potentially expansive category that could include all actions reflecting loyalty to God or other deities. *See* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS (1993). Under the *Smith* Court's definition, the exemption for idolatry offers only a reductive and preferential protection of religious freedom.

speech principles. The constitutional mandate under both clauses is the protection of beliefs and of the profession of those beliefs.[123]

By merging religion claims with general speech principles, the Court accomplishes absolute doctrinal consistency under the First Amendment.[124] But this is ultimately of little guidance. The case law is ambiguous on how religious expression should be analyzed as a speech category: does it present regulation of subject matter or viewpoint?[125] The answer to this question ultimately depends on the judicial conception of the baseline relation of religion and politics.

Smith heralds a new baseline: religion as politics. With the protection of religious freedom relegated to the political process, the constitutional mandate is redefined and radically limited.[126] All remaining constitutional constraints prohibit government discrimina-

---

123 *See supra* notes 64, 112-22 and accompanying text.

124 This responds to the putative "incoherence" problem raised by several justices and commentators. This argument suggests that the longstanding Religion Clause analysis is flawed because judges employ ostensibly conflicting standards. *See* Wallace v. Jaffree, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting). Interestingly, other justices claim that the inquiry under the Establishment Clause is absolutist and simplistic. *See* Lynch v. Donnelly, 465 U.S. 668 (1984). This suggests the prevalence of paradoxical thinking in this area, even within the Supreme Court.

But the issue of the perception of doctrinal incoherence begs the question of whether principled adjudication of religious claims might necessitate special consideration, and requires some unavoidable threshold level of doctrinal divergence when employing First Amendment analysis. To some extent, commentators maintaining doctrinal confusion arguments seem to adopt a position that religious claims should not be afforded special treatment. *See* MARK TUSHNET, *The Constitution of Religion*, *in* RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 247-49 (1988) (providing a useful collection of arguments and referring to the constitutional law of religion as being "in significant disarray"). *See generally* Laycock, *supra* note 62 (providing helpful analysis of the varying understandings of neutrality on the Court and in the interpretive community of religion scholars).

125 *See Smith*, 494 U.S. at 872; *see also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545-46 (1992) (distinguishing between content discrimination and viewpoint discrimination); Widmar v. Vincent, 454 U.S. 263, 269 (1981) (discussing exclusion of religious speech generally as content-based regulation). *Compare id.* at 281 (Stevens, J., concurring) (referring to the government exclusion as viewpoint discrimination) *with id.* at 284 (White, J., dissenting) (characterizing the restriction as subject-matter discrimination, under a lower standard of scrutiny). *See generally* Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197-207, 239-42 (1983). For the position that exclusion of religion constitutes viewpoint discrimination, see Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 419 [hereinafter McConnell, *Religious Disestablishment*]. *See also* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991) [hereinafter McConnell, *Selective Funding*] (juxtaposing religious and secular schools). For an analysis of religious opinion as subject-matter regulation, see Ruti Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 188-89 (1986).

126 Under Establishment or Free Exercise review, *Allegheny* and *Smith* suggest that religious discrimination claims will be very difficult to make out. *See, e.g., Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part)

tion in the political process.[127] The jurisprudence, like the movement within the political and religious communities, converges on a conception of religion as politics.

IV
THE DISCOURSE MODEL

In Parts I, II and III, developments in the political-legal sector, the religious sector, and in constitutional jurisprudence are presented. These developments point to a unified conception of religion as politics. Previously, these developments were considered as independent phenomena, but analyzed together, they reflect a coherent, albeit radical rethinking of the role of religion in public life. The emergent framework equates both religious and political claims to participation in public life.

This section focuses on religious engagement as "discourse" in public life. The four elements of the discourse model's framework for religious participation include: dialogue, equality of access to the public realm for dialogue, a duty to dialogue, and civility in dialogue. These commitments, however, present a limited and sectarian understanding of religion and affect our understanding of how religion engages in politics.

A. The Call to Conversation

The religion and politics debate centers on the extent to which religion should engage in the public realm.[128] Yet proponents of religious involvement in politics evade the threshold inquiry on the significance of engagement in public life. "Politics," "public sphere," "public life", "public realm," and the "public square" are terms that have been employed interchangeably.[129] The undifferentiated use of these terms signals confusion over what is understood by "engagement in public life" and affects the debate over religious participation.

(stating that even a permanent religious symbol display would not necessarily present a coercive message sufficient to raise an establishment claim).

127 *See generally* JOHN H. ELY, DEMOCRACY AND DISTRUST (1980) (proposing a process-based understanding of the constitutional mandate).

128 What is the proper role, if any, of religious-moral discourse in the politics of a religiously and morally pluralistic society like the United States? If religious-moral discourse should not be excluded from "the public square," how should it be included: In particular, how should such discourse be brought to bear on the practice of political justification?

PERRY, LOVE AND POWER, *supra* note 11, at 5.

129 *See* NEUHAUS, *supra* note 18; PERRY, LOVE AND POWER, *supra* note 11, at 45; THE WILLIAMSBURG CHARTER, *supra* note 18, at 19 (characterizing public life as a "public square").

The Williamsburg Charter offers the leading proposal for engagement in the religion and politics debate.[130] The Charter characterizes religious engagement as a conversation: "a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse."[131] This conception of engagement is dialogic.[132]

B. The Commitment to Conversation

Defining engagement in public life as dialogue obfuscates the underlying purpose of engagement, religio-moral consensus. Subsequent sections explore the implications of seeking moral consensus through engagement.

The predominant model for religious engagement offers a conception of participation that combines elements of liberal, classical, and neo-republican political theory.[133] Both theories converge on a conception of participation that privileges conversation, but there are significant differences in the theories, including the objectives of the proposed conversation.[134] The role of conversation in liberal theory is pluralistic; whereas in both classical and neo-republican theory it is consensual.[135] The discourse model draws on both plu-

---

130 Examples of this model may be found in ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 11, at 11-12, 13-14, 40, 112; PERRY, *supra* note 11. *See also supra* notes 46-47 and accompanying text.

131 *See* THE WILLIAMSBURG CHARTER, *supra* note 18, at 18. Michael Perry also writes of this conception: "[t]he public square is where ecumenical political discourse or dialogue must take place." PERRY, LOVE AND POWER, *supra* note 11, at 45. Furthermore, he also refers to American society generally as a "public square." *Id. See also* Michael J. Perry, *Toward an Ecumenical Politics*, 60 GEO. WASH. L. REV. 599, 600-01 (1992).

132 Perry writes about a "dialogical imperative," 'the imperative to seek dialogue and to be open to dialogue wherever and from whomever it is offered.' " PERRY, LOVE AND POWER, *supra* note 11, at 50. "We come to the *truest* knowledge of ourselves—of who we truly are, both as individuals and as members of communities, and of how we should therefore live our lives, of what choices we should make—dialogically, not monologically." *Id.* In the same paragraph Perry asserts: "[N]ot even robust internal dialogue displaces the need for vigorous external dialogue as well." *Id.* at 49.

133 With its overlapping of liberal and republican theory—individual choice and a communitarian value system—proponents of the discourse model assert that it offers the hope of a post-modernist relationship of religion to politics. *See* PERRY, LOVE AND POWER, *supra* note 11, at 45 (referring to "ecumenical politics" as "above all, both dialogic and communitarian").

134 *See* Sunstein, *supra* note 21, at 1550 (deliberation under republican theory is premised on freedom of speech). The discourse model's commitment to equality of access aligus itself with the republican belief in political equality. *Id.* at 1552. But the model also draws from core marketplace theory, in which equal access, or public participation, is considered to advance self-governance. *See* ACKERMAN, *supra* note 4, at 359 ("a dialogically satisfying path to the liberal state"); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 28 (1979).

135 *See infra* note 142 and accompanying text. Making a claim for dialogic-republican constitutional theory, see Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988) ("I mean by pluralism the deep mistrust of people's capacities to communicate

ralist and consensus objectives of conversation, managing to avoid directly addressing the connection between the postulated conversation and the ultimate role religion is expected to play in public life.[136]

C. The Commitment to Equality of Access

Under the discourse model, the central commitment is to "equality of access."[137] Religion is a form of expression considered to have been wrongfully excluded from political deliberations.[138] According to the discourse model, such exclusion distorts the marketplace of value choices and may be corrected by restoring religion to the public conversation through equal access.[139] But the model's mixed metaphors to marketplaces and public squares[140] obscure the ultimate purposes of the proposed conversation.[141]

Drawing upon both liberal and republican political theory, the model embodies different conceptions of how religious discourse should operate. Under a liberal conception, equal access operates to ensure equal opportunity for the exchange of diverse secular and religious views. In contrast, under a republican conception, the proposed discourse has a transformative function. Discourse offers the potential for moral consensus. It provides the process by which

---

persuasively to one another their diverse normative experiences. . . .") (emphasis omitted).

136 The conflicting statements of purpose are evident in the text of the Charter. *Compare* THE WILLIAMSBURG CHARTER, *supra* note 18, at 19 ("[D]emocratic pluralism requires an agreement to be locked in public argument over disagreements of consequence within the bonds of civility.") *and id.* at 15 *with* prmbl. *id.* at 7 (proposing "a vision of public life that will allow conflict to lead to consensus. . .").

137 *See id.* at 15, 18-19. In this regard, the Charter relies on First Amendment Doctrine. The marketplace is the central metaphor in First Amendment doctrine. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3-4.

138 *See* THE WILLIAMBURG CHARTER, *supra* note 18, at 20; *supra* part I. Discourse in classical marketplace theory is thought to lead to truth, to self-governance, or both. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-46 (1982) (discussing the connection between the argument from democracy and the argument from truth); *see also* New York Times v. Sullivan, 376 U.S. 254, 269-72 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a classical articulation of this view, see JOHN S. MILL, ON LIBERTY (Penguin Books 1982) (1859).

139 "Political equality, in republican terms, is understood as a requirement that all individuals and groups have access to the political process. . . ." Sunstein, *supra* note 21, at 1552.

140 "A key to democratic renewal is the fullest possible participation in the most open possible debate." THE WILLIAMSBURG CHARTER, *supra* note 18, at 25. *But see id.* at 21 (referring to the organizing analogy of the public square).

141 Although the Charter's conception is dialogic, Part VI suggests that the issue in the religion and politics debate is equal access for another purpose, namely, for representation or display. The public square and the marketplace are inapposite metaphors. Unlike the marketplace, the public square signifies a place for display or representation.

individual views are merged into broad agreement on a public good.[142] The principle of equal access legitimizes the resulting religio-moral consensus. The Charter's call for discourse never expressly addresses the competing conceptions; instead it simply assumes the goal of transformation into consensus.

D. Of Duty and of Civility

In addition to the commitments to conversation and to equal access, the remaining elements of the Charter engagement model are the commitments to debate as a political duty and to civility as a principle of discourse within the debate.[143]

Proponents of greater religious engagement in public life also characterize discourse as a political obligation.[144] They maintain that the "commitment to persuasion" derives from the Constitution's religion clauses.[145] But conceptualizing religious engagement as a duty is problematic. Although it is possible to talk about political participation as a duty, the nature of this obligation is itself a subject for debate.[146] It is yet another matter to posit a duty of religious participation in politics. To do so is to prefer religions with a commitment to persuasion of nonadherents.[147]

In addition to proposing a duty to debate, the Charter model advances a distinct conversational process. Engagement propo-

---

142 *See* PERRY, LOVE AND POWER, *supra* note 11, at 44 ("Ecumenical politics' aspires to discern or achieve, in a religiously and morally pluralistic context, a common political ground."); *see also* H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1707 (1988); Sunstein, *supra* note 21, at 1550.

143 *See* Sunstein, *supra* note 21, at 1554 (referring to the republican belief in "universalism": aiming for public good through discussion); *see also* THE WILLIAMSBURG CHARTER, *supra* note 18, at 13 (regarding connection between personal religious beliefs and political virtue).

The Charter seeks debate in a "civil manner." *See id.* at 19 ("[D]emocratic pluralism requires an agreement to be locked in public argument over disagreements of consequence *within the bonds of civility*.") (emphasis added); *see also supra* notes 148-49 and accompanying text.

144 *See* THE WILLIAMSBURG CHARTER, *supra* note 18, at 19 (asserting the "responsibility to debate"). The Charter also refers to the "responsibility to persuade." *Id.* at 21; *see also* PERRY, LOVE AND POWER, *supra* note 11, at 83.

In republican theory, the commitment to equality of access is related to an understanding about a citizen's obligation to political participation. *See* Sunstein, *supra* note 21, at 1556. Debate is understood as an obligation. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (referring to political debate as a "duty").

145 *See* THE WILLIAMSBURG CHARTER, *supra* note 18, at 21 ("The natural logic of the Religious Liberty provisions is to foster a political culture of persuasion. . . .").

146 *See generally* CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970) (comprehensively discussing the conflicting representative and participatory theories of democratic governance). For articulation of a classical theory of the role of participation in a democracy, see JEAN J. ROUSSEAU, THE SOCIAL CONTRACT (1762).

147 *See supra* part II.

nents claim that the debate about religion and politics has been exacerbated by the present style of debate.[148] They propose new "civil" rules of discourse: " 'Civility' obliges citizens in a pluralistic society to take great care in using words and casting issues."[149]

Yet demanding "civility" in political deliberations begs the question at the heart of the debate about the role of religion in politics. According to the separation model, civility depended on public advocacy conducted in exclusively secular terms.[150] But the Charter distances itself from this view by redefining "secularity," a central term in the debate. Notwithstanding the ordinary understanding of secular as nonreligious, the Charter adopts the view that a secular purpose signifies a "public" purpose,[151] underscoring the model's transformative conception of religion in politics. An individual's religious views somehow emerge from the political deliberative process as public purposes.[152]

E. Engagement Towards Moral Consensus and a Critique

1. *Ecumenical Politics*

Although the discourse model endorses a republican view of political participation,[153] the model rests precariously on republican principles regarding religion. In classical republican thought, religion was specifically excluded from political deliberations for two reasons: personal preferences regarding religion were not to be subordinated to civic goals; and any agreement on a public good was thought to have some discriminatory impact upon religion.[154]

---

148 *See, e.g.*, THE WILLIAMSBURG CHARTER, *supra* note 18, at 11.

149 "[T]he shared prior understanding within which the American people can engage their differences in a civil manner. . . ." *Id.* at 12. The Charter asserts that the commitment to civility derives from the Constitution. Yet the relation of the Constitution's religion clauses to the model's rules about discourse is utterly unsupported. *Id.* at 12.

150 *See supra* notes 4-5 and accompanying text.

151 Presumably this occurs by following the rules of discourse defined by the Charter, such as universality of access and civility in debate. The Charter's understanding of secularity implies that all public purposes are, by definition, "secular." This seems to parallel the direction of the constitutional jurisprudence under the First Amendment Establishment Clause. The Court's inquiry into the nature of governmental purpose reflects only a superficial concern with the norm that there should be public rather than sectarian purposes for governmental action. *See infra* part IV.

152 *See* THE WILLIAMSBURG CHARTER, *supra* note 18, at 14.

153 *See supra* notes 21-22 and accompanying text; *see also* THE WILLIAMSBURG CHARTER, *supra* note 18, at 7 ("It is a call to a vision of public life that will allow conflict to read the consensus.") "The American republic depends upon the answer to two questions. By what ultimate truths ought we to live? And how should these be related to public life? The first question is personal, but has a public dimension because of the connection between beliefs and public virtue." *Id.* at 11.

154 In the neo-republican revival, the classical approach of the role of religion in public deliberation has been reaffirmed. *See* Sunstein, *supra* note 21, at 1555. Sunstein

Interestingly, this exclusion has not been reconsidered in the republican revival; the contemporary theorizing adheres to classical republican principles by continuing to exclude religion from political deliberations.[155]

By contrast, proponents of the discourse model attempt to avoid the problems posed by a republican vision of participation by not articulating the ultimate goal of discourse. The model acknowledges "conflicts over the relationship between deeply held beliefs and public policy."[156] It identifies the goal of political participation as religio-moral consensus. The ultimate objective of greater involvement in politics is not merely dialogue as such; but that the debate be "reordered in accord with . . . considerations of the common good. . . . It is a call to a vision of public life that will allow conflict to lead to consensus."[157] Ultimately, the Charter proposes a republican conception of religious participation in politics.

---

specifically makes this point regarding the role of religion in political deliberations under a republican model. "[G]roups will frequently be unable to resolve their disagreements through conversation. . . . [S]ome issues—*religion is a familiar example*—should be entirely *off-limits* to politics." *Id.* (citations omitted) (emphasis added); *see also* Charles Taylor, *Religion in a Free Society, in* ARTICLES OF FAITH, ARTICLES OF PEACE, *supra* note 11, at 100.

155 *See* BERLIN, *supra* note 21, at 66 (For Machiavelli "[p]ublic life has its own morality, to which Christian principles (or any absolute personal values) tend to be a gratuitous obstacle."). In fact, Berlin sees Machiavelli's core achievement in understanding Christian religious values and civic values, to be independent sources of norms, and not in need of reconciliation. Similarly, in the *Virginia Bill of Religious Freedom*, Thomas Jefferson wrote that "the religious opinions of men are not the object of civil government, nor under its jurisdiction." Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159, 169-70 n.60 (1990) (reviewing the legislative history of Jefferson's Bill for Religious Freedom). *See* Richard Vetterli & Gary Bryner, IN SEARCH OF THE REPUBLIC 110, 111 (1987) (discussing the role of religion in creating virtue). Vetterli and Bryner find that "De Tocqueville came to see an inseparable relationship between the American democratic republic and the *body of those universal principles* that, having emerged from the evolution of modern Christianity, had permeated American society and had become a moral structure of generally accepted beliefs." *Id.* at 112 (emphasis added).

Of course, the republican argument could be strengthened. The argument could be made that unlike areas in which the community may have no self-interest, the area of religion naturally lends itself to communitarian decisionmaking. Many communities have a communal religious life, as distinguished, for example, from a communal sex life. *See* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 498 (1989) (noting weak republican response to liberalism regarding the development of communal norms regarding sex).

156 THE WILLIAMSBURG CHARTER, *supra* note 18, at 12.

157 *See* THE WILLIAMSBURG CHARTER, *supra* note 18, at 21. "For persuasion to be principled, private convictions should be translated into publicly accessible claims. Such public claims should be made publicly accessible for two reasons: first, because they must engage those who do not share the same private convictions, and second, *because they should be directed toward the common good*." *Id.* (emphasis added). Religio-moral consensus is also the direction endorsed by leading engagement proponents. *See, e.g.*, PERRY, LOVE AND POWER, *supra* note 11, at 83-127.

Engagement proponent Michael Perry has called for "ecumenical political dialogue"[158] to achieve moral, even religious, consensus. "An 'ecumenical' theology is one that aspires to discern or achieve in a theologically pluralistic context, a common ("universal") theological ground, mainly through a dialogic or dialectical transcending of 'local' or 'sectarian' differences."[159] Religious and political commitments can be transformed through the public deliberation process and the search for moral consensus.

2. *Fallibilism, Conversion, and Consensus*

The objective of religio-moral consensus is predicated on the possibility of religious conversion through adoption of a fallibilist posture.[160] To accomplish a common good, participants in ecumenical political dialogue must be willing to change even their most fundamental religious commitments.[161] The model contemplates different communities "meet[ing] one another and exchang[ing] or modify[ing] practices and attitudes."[162] Both "good" politics and "good" religion are premised on a fallibilist posture.[163] Both engagement in politics and an authentic faith commitment imply modification and even transformation.

A fallibilist posture draws from American political tradition,[164] and even constitutes a point of convergence in liberal and republican theory. And the commitment to fallibilism in religious involve-

---

158 PERRY, LOVE AND POWER, *supra* note 11, at 83-127.

159 *Id.* at 44. "Ecumenical political dialogue . . . aspires to discern or achieve . . . in a religiously/morally pluralistic context, a common ground that transcends 'local' or 'sectarian' differences." *Id.* at 47.

Perry refers to the " 'integrating' potential of ecumenical political dialogue." *Id.* at 97.

160 "Religious people must be more than prepared to see their religious beliefs challenged in the case of political argument. . . . [R]eligious people must actively submit their relevant beliefs, especially religious-moral beliefs, to challenge." *Id.* at 104. Perry also writes about the importance of a "hermeneutic of suspicion." *Id.* at 193 n.65; *see also* Robin W. Lovin, *Perry, Naturalism and Religion in Public*, 63 TUL. L. REV. 1517, 1538 (1989) (Religious engagement "opens the way . . . for recasting of religious beliefs in light of other, non-religious knowledge.").

161 *See* PERRY, LOVE AND POWER, *supra* note 11, at 100 ("To be a fallibilist is essentially to embrace the ideal of self-critical rationality . . . For the same reason it supports ongoing political critique, religious faith also supports self-critical reflective practices.").

162 *Id.* at 97. "[E]cumenical political dialogue can be an occasion of 'a fusion of horizons.' " *Id.*

163
> "[R]eligious faiths also suggest self-critical reflective practices. A religious community no less than a political one can tend to absolutize itself and, so, can need reminding 'that even basic premises are subject to revision as human understanding grows.' *Authentic religious faith and the virtue of fallibilism are intimately connected.*"

Id. at 101 (emphasis added); *see id.* at 144.

164 It contemplates the possibility of change in even core political commitments. *See* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671 (1990).

ment in politics also coincides with our constitutional commitments and reflects a widely shared understanding of the sources of truth.[165] But, as a result, fallibilism is both an epistemological approach and a theological commitment that is compatible only with particular religions.[166]

As a principle of engagement, fallibilism raises substantial questions about the preservation of religious equality in the public sphere. First, fallibilism presents an approach to truth not shared among religious communities.[167] While some religions are avowedly evangelical, others are just as staunchly opposed to proselytizing. Because the commitment to persuade nonadherents is specific to particular religions, it implies a preference for those religions compatible with a fallibilist method. Second, a commitment to a fallibilist posture implies an added preference. The consensus-making process contemplates transformation through syncretism or the fusing of religious tenets. Common or shareable tenets will be those aligned with the norms of the political majority.[168]

V
THE DISCOURSE MODEL AND SECTARIAN POLITICS

In this part, the premises of the dialogical model are explored through an example of engagement in public decisionmaking. This example suggests that engagement in public life cannot be considered unless a particular conception of religion is adopted. But this premise ignores differences in political and religious engagement and, in particular, the role of the religious community.

Notwithstanding the claims of the discourse model, the threshold questions of participation in public life, and the extent of such participation, cannot be understood as a duty. Questions about whether and how to engage depend upon underlying theological and epistemological understandings about the sources of a religion's norms and the relationship of those norms when there is a communal structure to those of the general polity.

A. The Theological Problem

The momentum for religious participation in public life has two primary goals: to provide an independent authority for lawmaking

---

165 *See, e.g.*, SCHAUER, *supra* note 138, at 44 ("Criticism may help the majority or its designates see error, and recognize their fallibility"); *see also* Frederick Schauer, *Free Speech and the Argument from Democracy*, *in* LIBERAL DEMOCRACY NOMOS XXV (J. Roland Pennock & John W. Chapman eds. 1983).

166 *See infra* notes 269-74 and accompanying text.

167 *See infra* notes 280-96 and accompanying text; *see also* PERRY, LOVE AND POWER, *supra* note 11, at 139-42.

168 *See infra* notes 280-96 and accompanying text.

and to create moral consensus.[169] But for religious communities, the question of whether to engage in politics depends upon the answer to a threshold theological and epistemological inquiry: whether religious tenets can properly serve to connect the general polity as a moral community?[170]

Communitarian religions distinguish between the norms governing the religious community, and those governing the general society. The delineation of spheres is drawn at the communal level. The framework is of two social contracts.[171]

Nevertheless the conception of dual norms does not avoid questions about the role to be played by engagement. A communitarian approach to the epistemological question about the connection between communal norms and those of the general polity may be an attitude of engagement or of forbearance.[172]

When the religious community conceptualizes the law for society as a moral threshold, allowing for the preservation of autonomous communal norms, different avenues remain for decisionmaking on public participation. Dual norms—one for the religious community, and another for the general society—are compatible with limited public participation in the development of the general laws. It is also compatible with public participation directed to the development of a unitary moral standard. The Charter model posits participation towards a unitary standard.

Of course, the concept of a public square is an abstraction, an idealization of the real world. Religious involvement in the creation of general societal norms should not be evaluated in the hypothetical. An example of religious involvement in the abortion debate

---

169 *See supra* part I.

170 In Christianity, what is divine is considered a universal truth; there is a related imperative to persuade nonadherents of these religious norms. But in Jewish thought, what is divine is not necessarily considered to be a universal truth. *See* Joseph B. Soloveitchik, *The Lonely Man of Faith*, 7 TRADITION at 23 (Summer 1965) ("[T]he word in which the multifarious religious experience is expressed does not lend itself to standardization or universalization"). *See also The Code of Maimonides*, THE BOOK OF JUDGES (Abraham M. Hershman trans., 1949); URBACH, *supra* note 35, at 541-53; Suzanne Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1990). Proponents of a natural law ethic in Jewish thought include those for whom the ethic implies a particular duty in its exegesis, or a communal obligation to engage in public participation in the development of general societal norms.

171 *See* HAIM H. COHN, JEWISH LAW IN ANCIENT AND BIBLICAL ISRAEL 45-46 (1971); *see also* J. DAVID BLEICH, CAPITAL PUNISHMENT IN THE NOACHIDE CODE, 2 CONTEMPORARY HALAKHIC PROBLEMS 341-67 (1983) (illustrating the distinction between communal norms and those applicable to the general polity in the context of the death penalty debate). For another example from the abortion rights debate, see *infra* notes 173-80 and accompanying text.

172 For example, Protestant theology overlaps with the liberal scheme in its conception of a private sphere for individual religious norms. For the discussion of the theological origins of the separation model, see *supra* notes 23-29 and accompanying text.

permits a critique of the commitment to engagement toward moral consensus.

B. Engagement in the Abortion Rights Debate

Engagement in the abortion rights debate illustrates some of the implications of public participation in debate over social norms from the perspective of a communal order. This example explores how decisionmaking about participation in public life is made in a minority religious community. For an orthodox minority religion,[173] deciding to engage in the abortion rights debate requires considering the norms of the religious community and the relation of these communal norms to those of the general society. The theological perception of divergent moral obligations for the religious community and the general polity has long impeded participation in the general debate.[174]

But the new religious engagement reflects a radical change in the response to the dilemma of public participation. Thus, for example, recent participation by a number of religious groups in the abortion case of *Webster v. Reproductive Health Services*[175] illustrates the varying approaches to theological views of communal and societal norms, and the corresponding possibilities for communal public involvement. An *amicus* brief for the Orthodox Jewish community in *Webster* proposes divergent standards for minority religions and for society. The *amicus* proposes that the question of abortion rights should be considered a political question and accordingly for the legislature, but adds that there should be constitutional exemptions when religious beliefs conflict with legislative requirements.[176] Although the *amicus* intervention for the religious community occurs in litigation-setting norms for the general laws, the *amicus* proposes

---

173 I will examine the involvement of the Orthodox Jewish community because I am best acquainted with it. However, the questions raised here extend beyond this community.

174 For an understanding of dual obligations, see *supra* notes 170-72 and accompanying text. Despite the longstanding debate over participation, public participation has recently increased. Competing justifications are offered. One justification is that the moral climate reflects a waning adherence to religious norms, and therefore necessitates a turn to politics to enforce religious norms. The alternative argument is that the moral climate justifies the development of a stronger consensus and enforcement of secular law as the only norm recognized by the religious community and the general society. The latter justification would support participation in debates over general policymaking. *See* DAVID NOVAK, LAW AND THEOLOGY IN JUDAISM 124 (1977).

175 Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). The paradox is that some engagement proponents justify political involvement for promoting communal norms, while others justify involvement for advancing general norms.

176 Brief of Agudath Israel of America as *Amicus Curiae* at 10-11, *Webster*, 492 U.S. at 490.

two standards—one for its particular religious community and another for the general polity.

A second *amicus* brief in *Webster*, filed on behalf of a coalition of religious organizations, offers a different accommodation of divergent communal and societal norms.[177] This *amicus* argues that, in light of the substantial theological disagreement over the permissibility of abortion, the abortion rights question should not be relegated to the political process.[178] Instead, the *amicus* seeks a constitutional standard that would entrust to the individual the question of applicable norms.[179] For this coalition of religious groups, the existence of substantial discord on the question within the religious community detracts from the usefulness of public participation[180] and necessitates a unitary standard that constitutionalizes abortion rights. In this way, the understanding of the sources for the community's theological commitments determines the nature and direction of public participation.

Though this illustration concerns constitutional litigation rather than direct political involvement, the threshold issue in the abortion litigation has been over the extent to which the question should be politicized. Accordingly, the intervention does serve to illustrate divergent approaches to engagement.

C. Ecumenical or Sectarian Politics

The abortion rights illustration suggests a picture of public participation at odds with the assumptions of the discourse model.[181] The model proposes that the process of public participation can transform sectarian interests into agreement on a public good.[182] By contrast, the abortion rights illustration suggests that religious engagement occurs along sectarian lines. This instance of participation challenges a theory of engagement that assumes political in-

---

[177] *See* Brief *Amicus Curiae* for American Jewish Congress, Board of Homeland Minorities—United Church of Christ, National Jewish Community Relations Advisory Counsel, the Presbyterian Church (U.S.A.) by James E. Andrews as Stated Clerk of General Assembly, The Religious Coalition for Abortion Rights, St. Louis Catholics for Choice, and thirty other religious groups at 20-22, *Webster*, 492 U.S. at 490 (No. 88-605).

[178] *Id.*

[179] *Id.* at 7-10.

[180] *Id.* at 10-20. The Supreme Court made a similar point in Roe v. Wade, 410 U.S. 113, 116-17 (1973). Some commentators argue instead that internal theological differences might be worked out in the general political process. *See* PERRY, LOVE AND POWER, *supra* note 11, at 101-03.

[181] *See supra* part IV.

[182] Other examples of sectarian political involvement include recent state legislation concerning domestic relations and diet. *See, e.g.*, N.J. ADMIN. CODE tit. 13 § 45A-21 (1986 & Supp. 1990) (regulating the sale of kosher products); N.Y. DOM. REL. LAW § 253 (McKinney 1986) (requiring attestation to religious divorce as a condition for civil divorce judgment).

volvement by individuals rather than religious associations[183] and elides the question of the relation between communal and general societal norms.

Moreover, the illustration depicts a sectarian capture of the political process. Greater participation in the political process does not necessarily signify a commitment to the development of a moral consensus. Just as political fragmentation appears to have stimulated a turn to religion,[184] religious fragmentation has animated the turn to politics for legitimation of select religious norms and the enforcement of those religious norms.[185] But the turn to politics for the enforcement of religious norms may actually limit the attainment of public purposes.

1. *A Paradox About Engagement*

Engagement's impact on the religious community entails a second order of consequences. Under the engagement model, the autonomy afforded the religious sector by the separation model[186] is displaced by the possibilities offered by alignment with secular institutions and law. For areas of divisive theological debate, such as abortion, the turn to politics offers an alternative source of authority. In light of the fragmented religious sector, there is the appeal of the alternative source of power. The extent of alignment will depend on the relative political strength of the religious community. Engagement in public life for coercive state authority enables the forging of consensus from without, and forces interdenominational agreement on religious norms.[187]

Nevertheless, alignment with secular institutions and parties presents a paradox. Although turning to politics may be intended to advance religious norms in the society's political processes, the

---

183 This Article analyzes the connection between principles of engagement and the preservation of religious organizational autonomy and pluralism. As a doctrinal matter, the Supreme Court does not appear to distinguish between free exercise claims of an individual, and those of a church or community. *Compare* Wisconsin v. Yoder, 406 U.S. 205 (1971) (Free Exercise Clause protects decision of Amish parents to withdraw their children from school in violation of attendance laws) *with* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (state law granting tax exemption to property owned by religious groups does not violate the First Amendment). Just as the Court has narrowed free exercise protection for individual claims, so it has narrowed protection of church autonomy. *Compare* Employment Division v. Smith, 494 U.S. 872 (1990) *with* City of Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991). *See also* Mary A. Glendon & Paul Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

184 *See supra* part I.

185 *See supra* part II. Use of the political process for sectarian purposes also presents, at least from the classical republican perspective, the danger of factionalism. *See* THE FEDERALIST No. 10, at 57 (James Madison).

186 *See supra* parts I, II.

187 *See supra* part II.

turn to secular law for its coercive possibilities often has the paradoxical effect of undermining communal norms and structures. Participation in politics can limit the development of substantive theological principles and structures within the community and threaten independent, coherent religious value systems.[188]

Consequently, the abortion rights example suggests that mere religious involvement in public affairs does not necessarily promote the development of consensus moral standards. The illustration does not conform with, and stands in substantial contrast to, the discourse model's expectations about ecumenical politics. Rather than manifesting participation in a conversation towards moral norms for the general polity, the illustration demonstrates alignment along sectarian interest group or religious faction lines. It reflects sectarian and not ecumenical politics. Furthermore, it has the further paradoxical effect of simultaneously reinforcing and weakening religious communal norms. Thus, religious engagement has the effect of jeopardizing the autonomous mediating structures that have played an important part in shaping opinion in our democracy.

VI
An Alternative Model: Engagement as Representation in the Public Sphere

Earlier in this Article, the emergent model and its conception of religion as politics and of engagement as communicative was discussed and critiqued as a reductive and discriminatory view of religious engagement. In this part, an alternative interpretation of the meaning of engagement in public life is proposed. This interpretation may be best understood as a struggle for representation in public life. This notion of representation will be analyzed through several recent Supreme Court decisions concerning religion in the public sphere.

Representation has a number of different meanings. In the debate over knowledge, representations (signs, symbols, images) are

---

188 *See* de Tocqueville, *supra* note 50, at 293-305. *See generally* Charles Murray, In Pursuit of Happiness and Good Government (1988) (suggesting a paradox in the republican ideal of community creation through the political process).

Religious communities presently understate the consequences of turning to the state. A good historical example of the evisceration of autonomous communal norms and structures occurred in France at the time of emancipation. The price to pay for full political emancipation provided in the Rights of Active Citizens of France granted to French Jewry in 1791 was the displacement of the religious marital laws by the prevailing French civil laws on marriage and divorce. *See* Engel v. Vitale, 370 U.S. 421, 425-27 (1962) (discussing the effect of legislation on the religious community); *Transactions of the Parisian Sanhedrin: Convoked at Paris By An Imperial And Royal Decree* (May 30, 1806). *See generally* Leo Landman, Jewish Law in the Diaspora, Confrontation and Accommodation 136-38 (1968).

juxtaposed to an objective outside reality and to the political processes. A third sense of representation is broader than recognition in politics and includes representation of religious claims in culture. This Article's use of the term "representation" rejects the earlier dichotomies.[189] Religious representations in the public sphere are not simply signs of another reality; they have independent significance. The term is now used in its third sense: representation in public culture.

A. What Does the Public Sphere Signify?

Controversies in the area of church-state relations tell us something about the significance of religious involvement in the public realm. Commentators have characterized litigation over public funding of religious symbols, practices, and ceremonial acts as a peripheral and distorted area of constitutional law.[190] But the enduring struggle over these controversies and the disproportionate public attention they generate suggest that such controversies are illustrations of the significance of the public sphere.[191]

Given the intensity of the debate over governmental funding of religious activities and other church-state controversies, the discourse model's concept of public life as dialogical is inapt. The public sphere does not primarily operate as a place for political or other conversation. Instead, the public sphere may be better understood as a forum for representation. This alternative conception implies a rethinking of the principles for public participation.

B. The Public Sphere as Representational

The discourse model's inability to account for actual religious engagement stems in part from the model's imprecise langnage. The model fails to distinguish between the terms "public" and "politics":[192] public is conflated with political, and the public as

---

[189] For a critique of the term representation as dichotomous with reality, see LYOTARD, *supra* note 9, at viii.

[190] *See* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 68-70 (1976) (discerning that "separationist" litigation receives disproportionate attention); Glendon & Yanes, *supra* note 183, at 478.

[191] *See* Tushnet, *supra* note 124, at 275 (listing commentators characterizing *Engel v. Vitale*, the landmark school prayer decision, as trivial).

[192] *See, e.g.*, NEUHAUS, *supra* note 18; REICHLEY, *supra* note 2.

Although most proponents of greater religious public participation address the debate in philosophical terms, there are exceptions. *See generally* HUNTER, *supra* note 55, at 49-56:

> Though the conflict derives from differences in assumptions that are philosophical and even theological in nature; the conflict does not end as a philosophical dispute. This is a conflict over how we are to order our lives together. This means that the conflict is inevitably expressed as a clash over national life itself. . . .

political is then confounded with a sense of the public as publicity.[193] As a result, the model is viewed as dialogic, but the dialogical view is reductive and distorted.

Continuous and substantial litigation over religious symbol displays at public sites and over religious practices in public education indicates a different conception of engagement. Viewing the public sphere as a site for representation more accurately explains the nature of actual religious participation.[194] The conception is inspired by Juergen Habermas' understanding of the public sphere. Habermas suggests that, in contemporary society, the public sphere does not constitute a place that enables democratic deliberations; rather, it is a place for nondemocratic and nondialogic communications. Whether by the media or other associations, it is a place for representations.

C. Public Displays

Controversies over the use of public sites or funding for religious symbol displays illustrate a representational understanding of religion in public life.[195] These disputes have become a significant part of the Court's church-state docket. The cases inform our understanding of the public realm; and the deeply fractured opinions reflect judicial uncertainty over the significance of greater access to the public domain.

> [T]he contemporary culture war is ultimately a struggle over national identity—over the meaning of America. . . .

Id. at 49-50.

193 *See* THE WILLIAMSBURG CHARTER, *supra* note 18, at 22, 26.

194 *See* JUERGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 200-01 (Thomas Burger trans., 1989). "The public sphere becomes the court before whom public prestige can be displayed—rather than in which public critical debate is carried on." *Id.* at 201. "Publicity work is aimed at strengthening the prestige of one's own position without making the matter on which a compromise is to be achieved itself a topic of public discussion." *Id.* at 200. "Political competition for the scarce resource 'meaning' has narrowed the distance between politics and culture." JUERGEN HABERMAS, THE NEW CONSERVATIVISM 196 (1990); *see* ROBERT C. HOLUB, JUERGEN HABERMAS: CRITIC IN THE PUBLIC SPHERE 6 (1991); Juergen Habermas, *Further Reflections on the Public Sphere*, *in* HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992).

Joseph Raz has recently addressed the nature of public expression. Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEG. STUD. 303 (1991). In elaborating the justifications for free expression, Raz touches upon the question of representation as I understand it here, although he does not characterize it as such. Raz characterizes portrayals in the public media as a paradigmatic form of expression, and argues that public portrayal serves an important validating function. *Id.* at 306-07. Raz emphasizes the communicative function of the public portrayal but does not distinguish between public and private means of expression. *Id.* at 313. I understand the public portrayal outside of the traditional speech framework as representational not communicative.

195 The controversies over public symbol displays reflect their significance in American culture. *See generally* HUNTER, *supra* note 192, at 54-55.

In *Lynch v. Donnelly*,[196] the Supreme Court upheld local government funding for the display of a creche, spurring a campaign for access to public sites for religious symbol displays.[197] In determining whether the display violated the Establishment Clause, the Court inquired whether there was government support for religion. Both the majority and the dissent drew the relevant distinctions along governmental/private lines. For the Court, what is public coincides with what is governmental—there is no third space or independent conception of the public realm.[198]

The Court's subsequent decision in *County of Allegheny v. ACLU*[199] reflects a similar understanding of the significance of the public sphere.[200] In *Allegheny*, a majority of the Court upheld the constitutionality of a joint Christmas-Hanukkah holiday display at a city hall while simultaneously striking down a Nativity display at a county courthouse. Their reasons are stated in separate opinions that reflect widely divergent understandings of the significance of the engagement.[201] As in *Lynch*, the Court focused its Establishment Clause inquiry on whether the message of the display was an expression of governmental or of individual opinion.[202] In both *Lynch* and *Allegheny*, the governments claimed that the commitment of their resources was minimal. In *Lynch*, the Court upheld the display of a government-financed creche on private property. In *Allegheny*, the Court struck down a privately owned but publicly displayed scene.[203]

In an opinion by Justice Kennedy, a bloc of four justices urged that the religious symbol displays constituted an expression of indi-

---

196 Lynch v. Donnelly, 465 U.S. 668 (1984) (upholding government financing of a display against First Amendment Establishment Clause challenge and characterizing the display of a creche as a tradition).

197 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989); McCreary v. Stone, 759 F.2d 712 (2d Cir. 1984), *aff'd*, 471 U.S. 83 (1985). *See also infra* note 211.

198 *See Lynch*, 465 U.S. at 686. "The 'primary effect' of including a nativity scene in the city's display is . . . to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche." *Id.* at 701 (Brennan, J., dissenting).

199 *Allegheny*, 492 U.S. 573 (1989).

200 At issue was the constitutionality of two displays: a freestanding Nativity scene in a courthouse, and a Christmas Tree-Hanukkah Menorah display at a city hall. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy would have found both displays constitutional. *Id.* at 655. Justices Brennan, Marshall, and Stevens would have found both displays unconstitutional. *Id.* at 637. Justices Blackmun and O'Connor held the creche unconstitutional but found the menorah constitutional. *Id.* at 621.

201 *See supra* note 200.

202 *Allegheny*, 492 U.S. at 594.

203 *Compare* Doe v. Small, 964 F.2d 611, 617-20 (7th Cir. 1992) (upholding display of sixteen privately funded religious paintings in the city park as permissible private religious speech in a public forum) *with* Hewitt v. Joyner, 940 F.2d 1561, 1564 (9th Cir. 1991) (striking display in county park of immovable religious statuaries depicting New Testament scenes), *cert. denied*, 112 S. Ct. 969 (1992).

vidual opinion. This bloc conceptualized the display of a minority holiday symbol at city hall as an exercise of individual access to the marketplace.[204] Under this marketplace conception, the site is simply a place to display a private message, the city has merely supplied a forum. The message of the public display is the message of its individual sponsors.[205] Under this conception of the public sphere, neutrality is protected through the commitment to principles of equality of access.[206]

Under a competing understanding of the city hall display, five justices viewed city hall as a government site, not as a forum for individual expression.[207] According to these justices, the message of the display is not that of its individual sponsors but rather that of the city.[208]

What do these decisions tell us about the Court's understanding of the significance of public religious symbol displays? The *Lynch/Allegheny* line of precedent reflects a strained marketplace analogy and the absence of guiding principles for engagement in the public sphere. The jurisprudence illustrates the Court's reluctance to address directly the question of the siguificance of engagement in public life.

Does the question of establishment depend on whether the government maintains the display? If the display involves little or no government funding or property, is the expression then simply con-

---

204 The plurality along with Justices Blackmun and O'Connor, upheld the Hanukkah display in front of Pittsburgh's city hall. Writing for this bloc, Justice Kennedy said that "[t]he fact that the creche and the menorah are both located on government property, *even at the very seat of government,* is likewise inconsequential." *Allegheny*, 492 U.S. at 666 (Kennedy, J., concurring in part and dissenting in part) (emphasis added). Justice Kennedy relies on the marketplace metaphor, noting that "in some circumstances the First Amendment may require that government property be available for use by religious groups." *Id.* at 667. At the same time, Justice Kennedy avoids any reference to the role of government. *See generally* MARK YUDOF, WHEN GOVERNMENT SPEAKS (1983) (discussing the "dying metaphor" of the marketplace because of the increased role of government).

205 *Allegheny*, 492 U.S. at 663-65 (Kennedy, J., concurring in part of the judgment and dissenting in part).

206 *See infra* part VII.

207 This conception is shared by Justices Blackmun, O'Connor, Brennan, Marshall, and Stevens even though Justices Brennan, Blackmun, Stevens, and O'Connor wrote separate opinions.

Although Justices Brennan, Marshall, and Stevens dissent from the judgment upholding the display of the menorah at city hall, their opinions share Justices Blackmun and O'Connor's view of the public domain. For these justices, what distinguishes this case from prior cases is "government recognition of not one but two religions." *Id.* at 646 (Stevens, J., concurring in part and dissenting in part).

208 *See* Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987). In both cases, the Courts of Appeals held that the religious holiday displays constituted impermissible government endorsement of religion.

sidered to be "private"?[209] The fractured opinions reflect a Court struggling to understand the significance of religious access to the public sphere.

Characterizing the public sphere either as a site for individual expression or as a site of governmental expression fails to account for the heated struggle over this aspect of the public sphere. How does one characterize the benefit of representation in our national culture?[210] And relatedly the benefits of access and of publicity? What principles might govern religious symbol representation in the public domain? Litigation over public symbol displays in the Court's present docket reflects the ongoing controversy over these issues.[211]

---

209 The Supreme Court has struggled to reconcile the *Lynch* and *Allegheny* holdings. "Nor can I comprehend why it should be that placement of a goverument-owned creche on private land is lawful while placement of a privately owned creche on public land is not." *Allegheny*, 492 U.S. at 667 (Kennedy, J., concurring in part of the judgment and dissenting in part).

210 A potentially helpful analogy to a museum display appears in the opinion for the Court in *Lynch v. Donnelly*. A government financed Nativity scene displayed on private land is analogized to the display of a religious painting in a government funded gallery. *See* Lynch v. Donnelly, 465 U.S. 668, 683-85 (1984) ("[T]he creche, like a painting, is passive."); *see also id.* at 692 (O'Connor, J., concurring) ("The overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious context of a religious painting, negates any message of endorsement."). Although references to the analogy appear in various places in the *Lynch* opinion, the Court fails to explore what the analogy conveys about the benefit of religious representation in national culture.

The analogy to a museum suggests a conception of the public sphere as a place for display. But the dissenting justices in *Allegheny* rely on marketplace principles suggesting that publicly owned land must serve as a public fornm for religious displays. The Establishment Clause inquiry that Justice O'Connor proposed asks about the effect on the reasonable observer to issues related to the understanding of display function representation. *See* Thorton v. Calder, 472 U.S. 703, 711 (O'Connor, J., concurring); *Allegheny*, 492 U.S. at 573.

The value of public representation may be first recognized with religious symbols of racial hatred. *See* David Margolich, *Klan's Plan for Cross Stokes Anger in Cincinnati*, N.Y. TIMES, Dec. 18, 1992 (reporting that the KKK sought to display a cross by a display of a menorah at a public square); *see also* Peter Applebome, *Enduring Symbols of the Confederacy Divide the South Anew*, N.Y. TIMES, Jan. 27, 1993, at A16.

211 In 1992, two circuits split on the question of religious symbols in public forums. *Compare* Americans United for Separation of Church and State v. City of Grand Rapids, Mich., 980 F.2d 1538 (6th Cir. 1992), *reh'g granted*, 1992 U.S. LEXIS 14571 (6th Cir.) (upholding display of a privately funded 20-foot menorah in a public square) *with* Chabad-Lubavitch of Vermont v. Miller, 976 F.2d 1386 (11th Cir. 1992), *reh'g granted*, No. 92-8008, 1993 WL 101421 (11th Cir. Apr. 5, 1993) (ruling that a 15 foot menorah in the Georgia state capital is impermissible establishment). A large number of circuit court decisions concerning holiday and symbol displays were denied certiorari in the 1991 Supreme Court Term. *See, e.g.*, Chabad-Lubavitch of Vermont v. City of Burlington, 936 F.2d 109 (2d Cir. 1991) (display of Chanukah menorah violates Establishment Clause), *cert. denied*, 112 S. Ct. 3026 (1991); Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991) (Christian cross on a city insignia does not violate the Establishment Clause), *cert. denied*, 112 S. Ct. 3028 (1992); Harris v. City of Zion, Kuhn v. City of Meadows, 927

D. Public Schools

Much of the debate over religion in the public sphere occurs over education. The debate about the role of religion in education has been an enduring one in this country's history.[212] The two strands to the controversy include the questions about the use of public education for religious teaching and practices, and questions about other forms of public support, such as funding for parochial school education. A comprehensive analysis would encompass virtually all of the church-state jurisprudence. Nevertheless, a few leading cases may illustrate the representation function of this aspect of public life.

The debate over the constitutionality of religion in the public schools began with the creation of the public schools and a related dispute over public assistance for private religious schools.[213] The Court has recounted this history in the early school financing[214] and school prayer opinions.[215]

F.2d 1401 (7th Cir. 1991) (religious imagery on municipal seal violates Establishment Clause), *cert. denied*, 112 S. Ct. 3025 (1992).

The Court denied certiorari in two additional holiday cases: Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) (state statute designating Good Friday as an official holiday, currently law in 13 states, does not violate the Establishment Clause), *cert. denied*, 112 S. Ct. 3027 (1992); Village of Crestwood v. Doe, 917 F.2d 1476 (7th Cir. 1991) (municipal sponsorship of Catholic Mass as part of weekend cultural festival violates the Establishment Clause), *cert. denied*, 112 S. Ct. 3025 (1992).

Recently the public display controversy has involved numerous conflicts over parades. In major urban areas, such as Boston and New York, litigation over including gays in Saint Patrick's Day Parades illustrates the struggle over cultural representation. The lower court decisions uphold the cities' right to exclude characterizing the parades as private expression. These decisions fail to account adequately for the city's imprimatur and the public's right to representation. *See, e.g.*, New York County Bd. of the Ancient Order of Hibernians v. Dinkins, 1993 WL 54832 (S.D.N.Y. 1993).

212 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (silent prayer); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state aid to private schools); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart). *See* BERNS, *supra* note 190, at 33-77; ROY J. HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON (1964).

213 *See* McCollum v. Board of Educ., 333 U.S. 203, 214 (1948) ("In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught"). The connection between these two controversies evinces the broader struggle over the transmission of religious values in public life through educational institutions, whether private or public. *See* BERNS, *supra* note 190.

214 *See, e.g.*, *Lemon*, 403 U.S. at 621; *McCollum*, 333 U.S. at 213; *Everson*, 330 U.S. at 9-15 (1947); *see also* DIANE RAVITCH, THE GREAT SCHOOLS WARS (1974).

215 *See, e.g.*, School Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (bible reading); *Engel*, 370 U.S. at 421 (school prayer).

Decisions addressing the role of religion in education reveal different understandings of the significance of public access. Beginning with the question of religious practices in public education, the longstanding separation doctrine had excluded the use of public schools as sites for religious representation.[216] During the last decade, this approach has been challenged.

Questions of whether religious practices, such as worship meetings, should be conducted in the public schools trigger underlying issues about the significance of the schools as public institutions. As in the analysis of religious symbol displays, the Court's decisionmaking concerning the use of public schools as sites for religious representation reveals a similarly impoverished understanding of what is actually at stake in disputes over the public sphere—expanding access for religious representation.

In *Widmar v. Vincent*,[217] a landmark decision about access for student worship meetings at a public university, the Court characterized the dispute as one over Free Speech rights. In requiring a state university to open its facilities for worship meetings as it did for other groups,[218] the Court analogized the public university to a marketplace and labeled it a "public forum."[219] The Court found the questions of access to a public forum implicated two forms of speech: worship and discussion.[220] But the Court did not address the significance of public representation for the Christian worship group. The Court also failed to explore the university's role as both a public institution and a constitutive element of the public domain.[221]

The significance of school recognition for student prayer groups resurfaced in *Board of Education of Westside Community Schools v. Mergens*,[222] but again the Court avoided the issue. The Court's opinion upheld the rights of a student worship club to meet in a public high school and characterized the Establishment Clause inquiry as one presenting a choice between individual and governmental ex-

---

216 *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (ruling that antievolution statute violates the Establishment Clause); *McCollum*, 333 U.S. at 203 (striking religious instruction in the public schools).

217 454 U.S. 263 (1981).

218 *Id.* at 274.

219 *Id.* at 267 n.5. "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." *Id.* at 267.

220 The majority expressly finds that worship constitutes speech. *Id.* at 269 n.6.

221 To the contrary, the Court analogizes the benefit in question to the benefit of public sidewalk repair. *See Widmar*, 454 U.S. at 275. *But see id.* at 280 (Stevens, J., concurring).

222 Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990).

pression.[223] The Court held that access to the worship club constituted private speech, but failed to identify the significance of benefits sought by the student worship group—namely, access to the school site and public school recognition.[224]

As with other aspects of the public sphere, the Court's analysis is conducted entirely in terms of dichotomous categories: the public versus the private sphere is synonymous with the state versus the individual. For a majority of justices, the marketplace constitutes the controlling analogy for understanding the stakes in the education debate. As a result, public secondary schools are simply potential marketplaces for the communication and exchange of private views.

Another conception suggests that the public schools are official governmental entities.[225] Pursuant to this view, the constitutionality of school worship meetings depends upon the coercive impact of proposed practices on individual students.[226] But framing the con-

---

223 *See Mergens*, 496 U.S. at 250 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

224 *See id.* The issue in *Mergens* was whether students could form a school-sponsored Christian Club. The bulk of recent church-state litigation has been over the uses of the schools for prayer, although alternative sites have been offered in many disputes. In light of the availability of alternate meeting sites, it is clear that the disputes involve a benefit other than minimal governmental funding or property. *See* Brief of the Anti-Defamation League and the American Civil Liberties Union at 36, *Mergens*, 496 U.S. 226 (1990) (No. 88-1597) (contending that the issue is the constitutionality of public school recognition of a Christian Prayer Club); *see also* Gay Rights Coalition v. Georgetown; 536 A.2d 1 (D.C. App. 1987).

225 This is similar to the division in *Allegheny* over the understanding of the space at city hall. *See supra* notes 208-09 and accompanying text; *see also* Lemon v. Kurtzman, 403 U.S. 602, 621-22 (1971); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 555 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986). *Compare Mergens*, 496 U.S. at 251 *with id.* at 284 (Stevens, J., dissenting) (Stevens distinguished between individual and governmental speech in public schools. Schools can "control" a message by clarifying that "official recognition . . . evinces neutrality."). For an analysis of the constitutionality of equal access in the public schools, see Teitel, *supra* note 80.

The debate over football prayer reflects a similar decision over another aspect of student prayer groups in the high schools. *See, e.g.*, Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989) (holding unconstitutional a school "equal access" plan with the practice of delivering religious invocations before high school football games), *cert. denied*, 490 U.S. 1090 (1989).

226 *See* Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (invoking Cantwell v. Connecticut, 310 U.S. 296 (1940) (proselytization by legislatures constitutionally prohibited)).

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.

Id. at 52.

A critique of the *Wallace* approach to religious uses of the public schools has been leveled by William Galston. Galston argues that a concern for coercion ought not un-

stitutionality of religion in public education in public/private dichotomy terms evades independent evaluation of the significance of religious representation in the public sphere.[227]

In its 1991-92 term, the Court again considered the characterization of public education. In *Lee v. Weisman*,[228] the Court addressed the constitutionality of prayer at public school graduations, casting the issue in terms of the extent of the governmental role in the prayer and its impact on individual students.[229] This dichotomous characterization avoids a more profound analysis of the societal implications of the representation of religion in the public sphere.[230] The shift would be away from the impact on an individual petitioner to the broader inquiry of the principles governing religious representations in public life. Relevant aspects of such an inquiry would require evaluation of public access as an independent benefit. Further inquiry would require ensuring religious equality in the access to such benefits.

1. *The Private or the Public Sphere*

The analogy to speech in Religion Clause jurisprudence fails to account adequately for the nature of actual religious engagement in the public realm. In conflicts over the use of public property, the characterization of the forum has become virtually a technical exercise, with the constitutionality hinging on the ownership or funding of a site, and any regulations affecting its use.[231] But the parameters

---

duly limit the possibilities for religious persuasion. *See* GALSTON, *supra* note 11, at 262, 281-89.

227 A related dichotomy is freedom and coercion. An example of this approach is seen in Justice Kennedy's opinions in Lee v. Weisman, 112 S. Ct. 2649 (1992) and County of Allegheny v. ACLU, 492 U.S. 573 (1989).

228 *Weisman*, 112 S. Ct. at 264.

229 *See id.* (invalidating as unconstitutional establishment ecumenical public school graduation prayer). *Compare* Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991) (upholding a Texas school district's "student-choice" policy of allowing, at the discretion of the graduating class, a student volunteer to deliver a nonsectarian prayer at graduation under the Establishment Clause), *vacated*, 112 S. Ct. 3020 (1992), *aff'd*, 977 F.2d 963 (1992) *with* Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409 (6th Cir. 1987) (upholding ceremonial invocation at public school commencement ceremony).

The question of the constitutionality of public school graduation prayer remains uncertain following the decisions in *Weisman* and the post-*Weisman* conflict in the circuits. These developments underscore the ongoing struggle in the Court over the significance of this aspect of the public sphere.

230 Reframing the question would redirect the development of church-state jurisprudence, particularly the Establishment Clause standard away from its present direction. The analysis would move from the government/individual and its related freedom/coercion dichotomies and would focus instead on the nature of the recognition sought in the public sphere. *See infra* notes 249-54 and accompanying text.

231 A similar case in the public schools is May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105 (7th Cir. 1986) (stating that the claim of access to the public schools for

of constitutionality are not reasonably justified by the presence of minimal governmental support. Understanding what is signified by "public" is so dependent on First Amendment speech categories, that there is little or no independent analysis of the meaning conveyed by religious expression in the public sphere.[232] Amazingly, the constitutional analysis depends on whether the state controls the expression. If not, then the question is one of individual rights—notwithstanding the role of the public institution. When the expression is not governmental, the Court considers it to be personal.[233] The jurisprudence clings to a judicial fiction by not acknowledging the presence of publicity as a fact to be evaded.

The strained speech analogy obscures the consequences of the pursuit of representation of religious claims in public life. If the Court acknowledged conflicts of public access as struggles over representation, it would be able to analyze meaningfully the implications of the pursuit of recognition. The rethinking of the significance of access would imply a corresponding rethinking of the relevant constitutional principle from a concern with freedom of expression to a principle of equality. I consider the implications for religious equality in Part VII of this Article.

Viewing the debate over access as a struggle for representation in our national culture better explains the prevailing disputes over church-state relations. Understanding what is at stake in these cases would enable the development of a more sensible judicial approach to these questions.

E. The Supreme Court

The cases analyzed above reveal the Court's understanding of its own role as a constitutive element of the public sphere.[234]

---

teacher prayer meetings, should not be an issue of governmental funding). "The issue, we repeat, is not the incremental costs of electricity and maintenance; these we assume are zero." *Id.* at 1111.

232 *See supra* part IV. Notwithstanding the forceful arguments of some engagement proponents, see generally HUNTER, *supra* note 55; NEUHAUS, *supra* note 18; Gedicks, *supra* note 19; Gedicks & Hendrix, *supra* note 51, at 1585 (arguing there is a lack of religious symbols and language in American culture).

233 The understanding is reminiscent of the origins of the public/private distinction. *See* The Civil Rights Cases, 109 U.S. 3 (1883). For a general discussion of the development of public/private distinctions in constitutional doctrine, see Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

234 Recent heated controversies over appointments to the Supreme Court suggest the extent to which there is understanding of the Court's function as an important constitutive element of the public sphere. *See* Ronald Dworkin, *From Bork to Kennedy*, N.Y. REV. OF BOOKS, Dec. 17, 1987, at 36; Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENTARY 283 (1990); Gary J. Simson, *The Bork Nomination: Essays and Reports*, 9 CARDOZO L. REV. 5 (1987).

Through its decisionmaking in the disputes regarding abortion, symbol displays, and religion in the schools, the Court has played an important role in recognizing and legitimizing religious values in the public realm.[235]

Additional analysis of the *Allegheny* decision illustrates the judicial role in the recognition of religion.[236] In *Allegheny*, the Court had the opportunity to recognize both the majority and minority religious traditions contending for representation. In the various opinions, an American "winter-holiday" and a minority religious holiday and symbols were recognized as part of a civil tradition. The Court was divided on the religious nature of the holiday in question.[237]

In symbol display cases, the Court asks two questions: whether the holidays and symbols are "sacred" or "secular" and whether the sponsorship is governmental or private.[238] But the Court has left unanswered the underlying question of what perspective it should

---

235 *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (regarding abortion regulations, 67 religious organizations filed *amicus* briefs); *see also* Cruzan v. Director of Mo. Dept. of Health, 497 U.S. 261 (1990) (regarding right to die).

236 Analysis of the judicial role also has further implications regarding the recognition of other aspects of the public sphere. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668, 674 (1984) ("There is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."). *See also* Bowers v. Hardwick, 478 U.S. 1039 (1986) (Judeo-Christian values); Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (reference to Sabbath observer); *Lynch*, 465 U.S. at 677 (1984) (nativity scene as Christian tradition); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday laws as "secular"); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release time laws). "We are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313.

237 *See Allegheny*, 492 U.S. 573, 665 (Kennedy, J., concurring in part of the judgment and dissenting in part) (religious holiday symbols had acquired secular status). Several justices have noted that such judicial recognition is a by-product of adjudication under the religion clauses. *Id.* at 643 (Brennan, J., concurring in part and dissenting in part) ("Pittsburgh's secularization of an inherently religious symbol, aided and abetted here by Justice Blackmun's opinion, recalls the effort in *Lynch* to render the creche a secular symbol.").

In *Lynch*, when a divided Court upheld a nativity display scene, Justice Brennan's dissent compared the Court's recognition of the nativity scene with its recognition of Christianity in Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892), in which the Court said "this is a Christian nation." *Lynch*, 465 U.S. at 718 (Brennan, J., dissenting). In *Lynch*, Justice Brennan recognizes the Court's Establishment Clause standard as potentially legitimizing. *Id.* at 717-19.

The *Allegheny* opinion illustrates the possibilities for the recognition of minority religions. Justice Blackmun devotes a large portion of his opinion to a review of the history, rituals, and symbols of the Jewish holiday at issue. Five of the nine justices address the question of the religiosity of the holiday's rituals and symbols. Of the five justices, four declared the holiday to be religious. For example, Justice O'Connor writes that "Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday." *Allegheny*, 492 U.S. at 633 (O'Connor, J., concurring in part).

238 *See Lynch*, 465 U.S. at 668. For a discussion of the development of the Establishment Clause Standard, see *supra* part III.

adopt when addressing these cases.[239] The current debate over this issue sheds light on the extent to which the Court has acknowledged its own role in the public sphere, as well as its own conception of the public sphere.

In *Allegheny*, the judicial perspective proposed by Justice Blackmun is from the vantage point of the reasonable viewer[240] or nonadherent observer.[241] The perspective of the observer has since been defined as one educated about the particular conflict at issue.[242] Therefore, an observer is an outsider, but also something of an insider. Under this approach, a court must adopt the perspective of an educated outsider and become informed about minority traditions to evaluate the constitutionality of the display. Justice Blackmun's perspective, by assuming this obligation, serves to legitimize the religious position.[243]

Justice Kennedy's opinion in *Allegheny* offers a very different view—one that essentially ignores the Court's legitimizing role. Kennedy adopts a neutral judicial perspective, assuming that the judicial opinion can avoid taking a position on the religious message of its individual sponsors.[244] He sees the Court's view of its role like the city—as a neutral vehicle in the decisionmaking process.

---

239 The question of judicial perspective in addressing these questions becomes particularly important when the claim at issue is from a minority or otherwise nonrepresented tradition. Thus in *Allegheny*, Justice Blackmun adopted the Jewish perspective, a minority unrepresented on the Court. *See generally* Frank I. Michelman, *Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4, 74-75 (1986) (suggesting that the Court has an obligation to recognize minorities in order to convey that they are protected under the law).

240 *See Allegheny*, 492 U.S. at 595 (citing *Lynch*, 465 U.S. at 692) (O'Connor, J., concurring).

241 *Id.* at 597.

242 *See, e.g.*, Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226, 249 (1990) (referring to "an objective observer in the position of a secondary school student . . .") (O'Connor, J., concurring); *see also Lynch*, 465 U.S. at 692.

243 *Compare Allegheny*, 492 U.S. at 614 *with Lynch* at 678 (Kennedy, J., concurring in the judgment in part and dissenting in part) (suggesting Blackmun's evaluation of the significance of the Menorah purports to turn the Court "into a national theology board"). Although Kennedy's tone is caustic, the analogy to a "theology board" is evidence of some acknowledgement of the Court's legitimation role. Interestingly, Kennedy recognizes the role only in the opinion's references to the minority holiday; he fails to concede any judicial legitimation of majoritarian holidays and symbols.

244 Kennedy's understanding of judicial neutrality comports with the Court's early Religion Clause jurisprudence. In a series of cases rejecting free exercise and establishment challenges to the Sunday laws by Orthodox storekeepers, the Court failed to evaluate the tenets of the minority religion at issue. The Court has discussed the tenets of Judaism and other minority religions only in recent years. *Compare Allegheny*, 492 U.S. at 573 *and* Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting) (Brennan defined the tradition of yarmulke wearing as "one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God.") *with* Braunfeld v. Brown, 366 U.S. 599, 602 (1961) (cursory reference to Sabbath obser-

The Blackmun/Kennedy division over the significance of the judicial role aligns with their respective positions in the broader judicial debate over the significance of the public sphere. Under a weak view of the public sphere, the Supreme Court's place in public life is neutral, or simply reflects governmental or individual expression. Under a stronger view of the public sphere, the Court offers the potential of a representational function in society.

Whether in its characterization of its own role, or of other constitutional aspects of the public sphere, the Supreme Court has played a critical role in setting the boundaries of the private and public spheres that have enabled the engagement debate to arrive at its present juncture.[245]

VII
Representation in the Public Sphere and Religious Equality

As suggested above, conflicts over religious access to the public sphere are best understood as a struggle for representation in national culture. This alternative conceptualization of the public sphere implies principles of engagement different from those of the discourse model.

Under the conception of religion as politics, elaborated in Parts I, II and III, equal access is the pre-eminent principle guiding public participation. But equal access raises questions about whether it is a workable principle for religious engagement both in theory and as applied. Because of its preferential implications, equal representation in the public sphere is elusive, and equal access encourages the development of a syncretist religion. This development suggests a significant departure from our prevailing religious pluralism.

A. Why Equal Access?

The equal access principle dominates the discussion of the rules for religious engagement in public life, because, as noted earlier, it is where liberal and republican conceptions of public life converge.[246] Under either a liberal conception of public life as a marketplace, or a republican conception as a town meeting, the threshold requirement for public participation is the commitment to

---

vance as a "basic tenet of the Orthodox Jewish faith") *and* Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961) (reference to Jewish food).

245 *See* Louis M. Seidman, *Public Principle and Private Choice*, 96 Yale L.J. 1006, 1007 (1987) ("[C]onstitutional law allows us to live with contradiction by establishing a shifting, uncertain, and contested boundary between distinct public and private spheres within which conflicting values can be separately nurtured").

246 *See supra* notes 133-42 and accompanying text.

equal access.[247] This commitment is also justified by the epistemological theories underlying our commitment to the constitutional protection of freedom of speech.[248] But under any of these theories, applying the equality of access principle raises difficult issues about what is equality for religious claims.

1. *What Is Equal Access?*

The equal access principle may remedy the prior separation model's unequal treatment of religion.[249] This argument, however, begs the threshold question of whether inequality exists.

Under the discourse model, religious claims have been understood as an excluded viewpoint.[250] Such exclusion is presumptively invalid under the First Amendment[251] and gives rise to a mandate to restore equality of access.[252]

Under a competing understanding of religious claims, these claims are considered as a speech category. Consequently, to the extent that religious reasons are excluded from the public realm, the

---

247 *See* discussion *supra* part IV. A governmental role in defining the public sphere mandates equal access to public schools, universities, city halls, and courthouses. *See also* Ingber, *supra* note 137, at 37. *See generally Mergens*, 496 U.S. at 226 (ruling that Equal Access Act forbids discrimination against proposed club based upon religious purpose); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that state university's exclusionary policy violates principle that state regulation should be content neutral).

248 *See generally* SCHAUER, *supra* note 138 (suggesting that the argument from democracy for freedom of speech is a subset of the argument from trnth); E. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Schauer, *supra* note 165. For the classical articulation of the political justification for the civil liberty, see MILL, *supra* note 138.

249 I contend that the inequalities are more pervasive under the engagement model. *See supra* part IV.

250 For cases suggesting that religious opinion constitutes a viewpoint, see *Widmar*, 454 U.S. at 269 n.6 (1981); May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1117 (7th Cir. 1986). Interestingly, these cases suggest religion constitutes a viewpoint, with political opinion as its counterpoint. For commentators who appear to adopt the viewpoint position, see Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. REV. 1 (1986); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. REV. 146 (1986). I differ with Laycock and McConnell on this question. *See* Teitel, *supra* note 125.

251 *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

252 Justice Kennedy has defined government speech about religion as like "any other form of government speech." Allegheny County v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., dissenting). Justice Kennedy also notes that "recognition of only the secular aspect would signify the callous indifference towards religious faith . . ." *Id.* at 663-64. *See also* Mozert v. Hawkins County Pub. Sch., 579 F. Supp. 1051 (E.D. Tenn. 1984) *rev'd*, 765 F.2d 75 (6th Cir. 1985) (religion and secularism as opposing viewpoints); McConnell, *Religious Disestablishment*, *supra* note 125, at 418 (characterizing religion as an outlook opposed by "secularism"). For discussion of First Amendment principles distinguishing subject-matter and viewpoint discrimination, see Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 83, 108 (1978); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 206 (1983).

exclusion would not imply a discriminatory message.[253] Whether religion is deemed to implicate viewpoint issues or subject matter affects what will constitute religious equality in representation in the public sphere.[254]

2. *Equality of Access: Religion as Politics*

As a category of expression, equal access for religious claims has been measured against other subject matter categories, such as political opinion.[255] To what extent can political positions be equated with religious representation? When political representation is conceived as the baseline, should political parties be analogized to churches or religious organizations for equality purposes?[256] Should equal representation be considered for each religion or for each individual?[257] Equal access advocates have not addressed any of these questions. Furthermore, the analogy to politics is confusing because the analogy does not account for representation in the broader sense, not simply in the political processes but in public life more generally.

An instance in which political opinion has been taken as the measure of equality in the public sphere is the recent adoption of the principle of equal access in the public schools.[258] The enactment of federal equal access legislation, as well as the judicial treat-

---

253 *See Allegheny*, 492 U.S. at 657 (acknowledging that the secular "send[s] a clear message of disapproval") (Kennedy, J.). *See* Teitel, *supra* note 125.

254 The Court has recently addressed the viewpoint/category distinction. *See, e.g.*, *R.A.V.*, 112 S. Ct. at 2543; Miller v. California, 413 U.S. 15 (1973) (obscenity category). *See generally* Frederick Schauer, *Comparative Constitutionalism Symposium*, 14 CARDOZO L. REV. 865 (1993).

255 *See* Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. at 226 (1990) *with* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972). The Equal Access Act adopts this approach. *See infra* note 259. For arguments supporting a political baseline for evaluating equality of religious representation, see Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1106 (1979) (Kamenshine calls for limits to government support of political expression: "[p]olitical establishment . . . threatens the primary object that the freedom-of-speech clause was desigued to protect; a free marketplace of ideas necessary to true self-government."); McConnell, *Religious Disestablishment, supra* note 125 (calling for political disestablishment along the lines of the religious disestablishment mandate of the First Amendment Religion Clauses); *see also* McConnell, *Selective Funding, supra* note 125 (contending that the financing of religious schools balances the financing of secular public education).

256 This would be an analogy only for purposes of accuracy for equality in the political process. *See* Kamenshine, *supra* note 255, at 1119; *see also* McConnell, *Religious Disestablishment, supra* note 125, at 419. If political parties are the analogy, equality would require application of a principle of proportionality. *See generally* Davis v. Bandemer, 478 U.S. 109 (1986). Whether engagement proponents would advocate parties constituted along religious lines has been a divisive question in Eastern Europe, where many of the new constitutional drafts expressly prohibit such party formation.

257 *See* Teitel, *supra* note 125.

258 *See Mergens*, 496 U.S. at 258 (Kennedy, J. concurring).

ment of religion in the public schools in a series of recent decisions establishes this approach.

The Equal Access Act, enacted in 1984, presents the first federal regulation of religious practices in public schools and ensures the equal treatment of religious and political claims in the public schools.[259] Under the Act, public schools must grant equal access for student meetings without regard to the "religious, political, philosophical or other content of the speech."[260]

Since its passage, the Act has spawned substantial litigation over prayer club access to the public schools.[261] In *Mergens*, the Court adopted a marketplace conception of the public schools and affirmed the equal access principle for religious participation.[262]

But the Act also raises questions about whether and to what extent a principle of expanded access advances the cause of religious equality. The Court's marketplace analogy[263] requires equal treatment,[264] but the equal access principle does not afford a threshold or any other absolute level of access.[265] Rather, the enforcement of the equal access principle iguores the role played by the public schools in the public sphere.

If public schools are places of representation, to what extent should the representation of political and religious claims be equated? Public education inculcates principles of democracy and

---

259 The Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 11 1984) ["EAA"]. The EAA provides that

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Id. § 4071(a). *See generally* Teitel, *supra* note 80 (analyzing the Establishment Clause implications of the equal treatment principle to student prayer clubs).

260 20 U.S.C. § 4071.

261 *See, e.g., Mergens*, 496 U.S. at 226; Garnett v. Renton Sch. Dist., 865 F.2d 1121 (9th Cir. 1989), *vacated*, 496 U.S. 914 (1990); Clark v. Dallas Indep. Sch. Dist., 671 F. Supp. 1119 (N.D. Tex. 1987); Perumal v. Saddleback Valley Unified Sch. Dist., 198 Cal. App. 3d 64, *cert. denied*, 488 U.S. 933 (1988).

262 The Court has said it will treat religious speech just as it does secular speech. *See Mergens*, 496 U.S. at 248-50; Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981).

263 *See, e.g., Mergens*, 496 U.S. at 239-40.

264 *See* Kamenshine, *supra* note 255, at 1105.

265 The purpose of public education suggests a threshold level would be necessary. *See* YUDOF, *supra* note 204, at 225 ("Most educational institutions, of course, would find a total ban inconsistent with their institutional mission; hence this equal-protection analysis tends to expand rather than to contract the scope of expression and association in public educational institutions."). *But see* United States v. Kokinda, 497 U.S. 720 (1990) (illustrating how the forum analysis has been used to contract access rights).

citizenship.[266] Should education in civic values be equated with education in religious values? Viewing the public schools as sites for representation would necessitate constitutional distinctions in the treatment of political and religious claims in the public sphere.[267] The Court recently affirmed that government is an active participant in speech in the public schools as to political values but not as to religious values.[268]

B. Equality of Access and Preferential Representations

Although the justification for the discourse model's commitment to equal access is to rectify a pre-existing imbalance, the equal access commitment can accomplish the work of restoring religious equality only if access presents a benefit for all religions. Access, however, does not present a universal, or even a general benefit. Religions have strikingly different views on the value of access to the public realm; therefore, expanding access with an eye to equality presents intractable religious inequalities. It cannot serve as the organizing principle for religious involvement in public life. If expanding access was thought to restore delegitimated religion, application of the access principle implies selective delegitimation.

True equality of access is unattainable because access to public life is of an indeterminate value. Controversies over representation in the public sphere are waged over particular issues of concern to particular religions. Because access cannot be understood as an objective benefit for the religious community, some religions will accept the benefit, others will decline. The extension of particular benefits, whether to religious or non-religious groups, offers only a specious equality.[269]

Engagement proponents concede the model "works best" with religions committed to external dialogue.[270] For religions commit-

---

266 The Court has recognized that government is a proper active participant in speech in the public schools involving political values, and not religious values. *See* Lee v. Weisman, 112 S. Ct. 2649, 2656-58 (1992); JOHN DEWEY, DEMOCRACY AND EDUCATION (1916); AMY GUTMANN, DEMOCRATIC EDUCATION (1987).

267 Under a traditional marketplace conception, the relevant distinction would be drawn along curricular/noncurricular lines, with the noncurricular viewed as a marketplace. *See* discussion *infra* part VII.B (regarding equal access). This distinction is currently under attack. *See* McConnell, *Selective Funding*, *supra* note 125.

268 *See Weisman*, 112 S. Ct. at 2657-58.

269 *See supra* part IV.

270 *See* PERRY, LOVE AND POWER, *supra* note 11, at 49 ("Not even robust internal dialogue displaces the need for vigorous external dialogue as well."); Lovin, *supra* note 160, at 1532 (distinguishing between proclamation, articulation, and conversion). Perry concedes the term "external dialogue" includes persuasion or proselytizing of nonadherents. PERRY, LOVE AND POWER, *supra* note 11, at 49. But he suggests that in addition to persuasion, external dialogue also includes "justification." *Id.* According to Perry, justification consists in the explanation of religious norms outside of the community. *Id.*

ted to converting nonadherents, expanded access to public institutions and other sites, such as schools, universities, and courthouses constitutes a real benefit.[271] But for nonevangelizing religions, such access may not provide a benefit,[272] and it could even conflict with core theological tenets.[273]

For representation purposes as well, access is of an indeterminate value. Not all religions seek public displays, public prayer, or other public celebrations. These religions may oppose public symbolic representations.[274]

The equal access principle suggests that the public square can and should effectively represent religious pluralism.[275] But to what extent does the equal access principle enable religious pluralism in the public sphere? Serious distortions result from attempting to secure equal representation of minority traditions. Majoritarian traditions become the measure for judicial determination of defining

---

This reflects Perry's notions about the epistemology of religious norms; but the approach is particular to certain religions and is not widely shared. *See supra* part IV.

271 *See* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (illustrating the significance of access to public fair grounds for the Ishkar church). For a crusading religion, being allowed a booth at the fair would not be enough, meaningful access would necessitate an opportunity to walk about the fair and persuade nonadherents.

272 Persuasion is an obligation for some religions, and a prohibition for others. *Compare* Jesus' final command to his apostles: "[g]o, therefore, and make disciples of all nations," *Matthew* 28:18-19, *with* Hinduism's prominent ethos against evangelizing. Similar commands to refrain from proselytization exist in Islam and in Judaism. *See* ANN E. MAYER, ISLAM AND HUMAN RIGHTS 77, 158, 164 (1991) (dismissing the "Sharia" ban on conversion or "apostasy" and criticizing examples of Iran and Saudi Arabia's criminalization of this religious ban); 16 CODE OF MAIMONIDES 90-91 (Leon Nemoy ed., 1965).

273 Hinduism not only imposes no duty to persuade nonadherents, it even prohibits the persuasion of nonadherents. *See, e.g.*, NEPAL CONST. pt. 3, § 14, *reprinted in* AMOS J. PEASLEE, 2 CONSTITUTIONS OF NATIONS 775 (1974) ("Every person may profess his own religion as handed down to him from ancient times and may practice it having regard to the traditions. Provided that no person shall be entitled to convert another person from one religion to another."). Persuasion of nonadherents is prohibited, because it suggests that Hindis may also be converted to other religions.

The strategy adopted by minority religions concerning access to the public sphere reveals the dilemma behind expansion of access. The approach to equal representation has often been to oppose the access sought, rather than to gain further expansion of access. *See, e.g.*, Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Widmar v. Vincent, 454 U.S. 263 (1981); *see also* McCollum v. Board of Educ., 333 U.S. 203 (1948) (expanding access to public schools did not equalize treatment for those churches not committed to educating religiously).

274 *See generally* McConnell, *Religious Disestablishment*, *supra* note 125, at 405.

275 The equal access struggle has been waged in the context of Christianity and Judaism. "[A]dding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, . . . the city . . . conveyed a message of pluralism . . . during the holiday season." *Allegheny*, 492 U.S. at 635 (O'Connor, J., concurring in part and concurring in judgment).

equal representation.[276] But distinguishing between the sacred and the secular, the public and the private, aspects of religious traditions does not adequately describe the nature of minority communitarian religious observances.[277]

Substantial religious fragmentation further complicates the potential for equality of religious representation in the public domain.[278] Although the Court avoids addressing ecclesiastical questions,[279] recoguizing religion in the public sphere often implies endorsement of religious doctrine issues and preferential treatment on a denominational basis.[280] For example, in *Allegheny*, a majority of justices recognized the minority evangelical denomination's conception of the symbol at issue. In the public display cases, the Court assumes that simply expanding access translates into greater equality. The principle of expanded access does not translate to religious equality without a related principle of universal access, which has no bearing on our actual religious life. Broader access suggests greater representation of religious diversity,[281] but differences within and among religions about the significance and mode of public representation imply favoring one religion or denomination over another.

---

276 Thus, for example, in *Allegheny*, the constitutionality of the Jewish symbol is evaluated in the shadow of a larger Christian symbol and the centrality of the Christmas holiday. Three justices declare that the significance of a minority holiday symbol simply varies with its context; moreover the proximity of Christmas defines the significance of Hanukkah. The justices dissenting as to this symbol display suggest it promotes a "Christianized version of Judaism." 492 U.S. 573, 645 (Brennan, J., dissenting).

277 *See* discussion *supra* part II for the origins of these antinomies in Christian thought. For example, notwithstanding the *Allegheny* Court's judgment on this question, most Jewish holidays include both religious and secular aspects. Further, most holidays and rituals have both private and public observances to symbolize the parallel familial and communal attributes of the religion. For example, Hanukkah, the holiday analyzed in *Allegheny*, derives from an ancient secular agricultural celebration, but also involves a religious miracle. Furthermore, the holiday's central candle-lighting ritual includes both private and public elements.

278 *See supra* part II.

279 *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (property dispute in the Presbyterian congregation). This fragmentation made establishing religion difficult in colonial times. *See* BAILYN, *supra* note 21, at 246-72. "The most advanced pre-Revolutionary argnments for disestablishment—arguments that would eventually bear fruit in all the governments of the new nation—were unstable compounds of narrow denominationalism and broad libertarianism." *Id.* at 257. Additional examples of recent judicial evasion of ecclesiastical questions include Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725 (1976), *reh'g denied* 429 U.S. 873 (1976); Presbyterian Church v. Hull Memorial Church, 393 U.S. 440, 445-52 (1969).

280 *See Amicus Curiae* Brief of the Chabad, *Allegheny* (No. 87-2050); *Amicus Curiae* Brief of the Anti-Defamation League, *Allegheny* (No. 87-2050).

281 *See supra* note 275. *See generally* Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 (1974) (discussing the growth of the "access doctrine" and its application in non-mass-media fora).

C. Syncretic Representations

The pursuit of equality of representation in the public sphere through expanded access is fraught with preference and heightens religious inequality. The difficulty in reaching equality through the application of an equal access principle stimulates the development of hybrid or syncretic religious representations. Because all religious viewpoints cannot be represented pursuant to equal access principles engagement proponents argue for shared religious traditions in the public sphere. The pursuit of religio-moral consensus also animates the movement from independent religious claims toward ecumenical religious representations in public life.[282]

To what extent can representations in the public sphere display religio-moral consensus?[283] In recent cases, the Court has adopted representation of consensus religious values, and justified these as the traditions of the political majority.[284] For example, in *Allegheny*,[285] the Court found that commonality lies in shared "Judeo-Christian" traditions.[286] Although shared symbols can be extracted

---

282 Perry's idea of ecumenical politics contemplates a shared religious tradition. PERRY, LOVE AND POWER, *supra* 11, at 47, 83-91. "The great religious traditions tend to converge with one another". *Id.* at 81. Some commentators suggest that civic republicanism fosters the development of a civil religion based upon Judeo-Christian traditions. *See, e.g.*, NEUHAUS, *supra* note 18, at 230 (The term "Christianize" also means to advance principles of justice and equality.); RICHARD VETTERLI & GARY BRYNER, PUBLIC VIRTUE AND THE ROOTS OF AMERICAN GOVERNMENT 89 ("In America, the public philosophy or the general religion reflects to a significant extent the Judeo-Christian influence characteristic of Western civilization.").

283 *See* PERRY, LOVE AND POWER, *supra* note 11, at 65.

284 *Allegheny*, 492 U.S. at 573. The Court has also used consensus religious values in its recent First and Fourteenth Amendment decisionmaking. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia sodomy statute because of "Judeo-Christian" moral standards).

In Employment Div. v. Smith, 494 U.S. 872 (1990), the Court moved toward religious consensus by limiting the constitutional protection for adherents to minority religions under the law. Scalia's opinion implies that religious diversity is divergence, and seems to ridicule nonmajoritarian traditions. Paradoxically, the very breadth of the nation's pluralism serves as the touchstone for the Court's adherence to a vision of uniformity. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs . . . permitting him, by virtue of his beliefs, 'to become a law unto himself'. . . contradicts both constitutional tradition and common sense." *Id.* at 885 (citation omitted). "Any society adopting such a system would be courting anarchy, *but that danger increases in direct proportion to the society's diversity of religious beliefs. . . . Precisely because we are a cosmopolitan nation* made up of people of almost every conceivable religious preference." *Id.* at 888 (emphasis added) (citation omitted).

There is a similar trend in decisionmaking under the Establishment Clause. In recent decisions, the Court has applied a more permissive Establisbment Clause standard for majoritarian traditions. *See* Teitel, *supra* note 84.

285 *Allegheny*, 492 U.S. at 645.

286 *See also Bowers*, 478 U.S. at 186 ("Proscriptions against sodomy have very ancient roots . . . condemnation of the practices is firmly rooted in Judeo-Christian moral and ethical standards.").

from a number of traditions, the commonality of fire symbols, for example, cannot do the work of a substantive message of moral consensus.[287] This is an ecumenicism of the medium, without any shared underlying message of religious or moral import. In fact, much of what the public sees as religion in public life are syncretic symbols and rhetoric.[288]

Debates in public institutions also reveal the movement toward a civic religion. For example, in the public schools, the campaign for school prayer, moments of silence,[289] curricular changes, and graduation prayer[290] demonstrate efforts at syncretic religious representation. In addition, the campaign for a document entitled the "Joint Statement on Moral Education in the Public Schools" calls for "a widespread dialogue about moral education in the public schools" toward the enunciation of "shared moral values."[291]

---

287 For a commentary suggesting that the term "Judeo-Christian" is not meaningful theologically but simply reflects a political artifice, see ARTHUR COHEN, THE MYTH OF THE JUDEO-CHRISTIAN TRADITION (1970). For additional arguments, see Martin E. Marty, *A Judeo-Christian Looks at the Judeo-Christian Tradition*, *The Christian Century* 858, 859 (Oct. 8, 1986).

> [I]n areas of justice it is hard to think of anything distinctive that the tradition contributes. [T]he *motives* for being just and ensuring justice are distinctive in Jewish and Christian faiths, and that is terribly important. . . . The issue, then, is that of the place of religious motivations in the public realm. Privileging the "Judeo-Christian tradition" means putting a premium on a particular scriptural revelation not open to all. . . . To turn Jewish and Christian faiths into generic philosophies for civil purposes is to misunderstand whatever in them gave people hope or power, and amounts to a desecration. That result is a high price to pay for attaining a momentary political advantage.

Id.

288 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 676 (1984); PERRY, LOVE AND POWER, *supra* note 11, at 88-90 (discussing Lincoln's speeches). Existing examples of "governmental acknowledgement of our religious heritage" include presidential holiday proclamations, the Pledge of Allegiance, national holidays, and days of prayer. These examples have been referred to as part of our "civil religion."

289 *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down Alabama moment of silence law because of improper legislative purpose to advance religion).

One commentator proposes the adoption of moments of silence "as a principled resolution of a bitter controversy." *See* GALSTON, *supra* note 11, at 282. Galston advocates a political compromise: an accommodation between "functional traditionalism" and a liberal approach to religious observance. *Id.* at 280-81. Although reconciliation of an area of cultural conflict is salutary for political and social benefits, it is nevertheless difficult to understand what a clearly syncretized religious "tradition" offers a liberal society. Galston never tells us. He simply assumes that moments of silence in the public schools will enable civic virtue. He makes this assumption despite his other arguments about the plight of contemporary society, and the fact that there are moments of silence in public schools.

290 In Lee v. Weisman, 112 S. Ct. 2649 (1992), the Court struck down the practice of giving nonsectarian prayers of graduation ceremonies.

291 *See* NATIONAL CONFERENCE OF THE BISHOP'S COMMITTEE FOR ECUMENICAL AND INTERRELIGIOUS AFFAIRS OF THE CATHOLIC BISHOPS AND THE SYNAGOGUE COUNCIL OF AMERICA, "A LESSON OF VALUE": A JOINT STATEMENT ON MORAL EDUCATION IN THE PUBLIC SCHOOLS [hereinafter Joint Statement on Moral Education].

Despite the effort to develop a syncretic religion to be taught in the public education system, these efforts still reflect select elements of Judeo-Christian traditions. The efforts to represent religious pluralism through syncretic representations also presents a problem of preference.[292]

Syncretic religio-moral norms in the public schools tend to be structured around the Bible because "bible-based" values are thought to be shared moral values.[293] Proponents contend the text is universal: "biblical language belongs to no one church, denomination or sect."[294] In this way, the language of Catholic theology is characterized as the language of moral consensus and, therefore, of engagement in public life.[295] But notwithstanding the claims of engagement proponents, the bible-based language is nonneutral. Similarly, the rules for religious debate are also particular to select traditions.[296]

As a result, the pursuit of syncretic representations implies a retreat from prevailing religious pluralism. The impetus to syncretism presents a threat to the preservation of minority traditions because to avoid exclusion, internally fragmented churches must consolidate their beliefs and align themselves with majoritarian norms.

---

292 This point has been recognized by the Court, with a majority affirming that ecumenical efforts at syncretic representation are preferential. *See Weisman*, 112 S. Ct. at 2656-57.

> We are asked to recognize the existence of a practice or nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint . . . .
>
> Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones . . . . precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

Id.

293 Joint Statement on Moral Education, *supra* note 291.

294 *See* PERRY, LOVE AND POWER, *supra* note 11, at 89.

295 As Robert Bellah has noted:

> [w]e can try to understand better that which we share, above all the Hebrew Bible. This does not mean arguing for some early notion of the 'Judeo-Christian traditions' in which Jews are inevitably subordinated to Christian understandings. But it does mean moving toward a conception of a community of communities that includes both.

Robert N. Bellah, *Conclusion: Competing Visions of the Role of Religion in American Society*, UNCIVIL RELIGION 228 (Robert N. Bellah & Frederick E. Greenspahn eds., 1987).

296 *See* discussion *supra*, at parts V, VI.

The construct of a hybrid religion in American culture predates the recent engagement movement; it had been termed "civil religion."[297] The new concept builds on the past, takes in the present fragmentation of contemporary religion, and with the greater momentum for religion in public life, constitutes an affirmation of syncretic public religion.

1. *Selective Representations*

Understanding religious engagement in public life as a struggle over representation implies that the path to religio-moral consensus does not operate as a one-way street. Greater participation in public life will have the effect of selectively legitimizing particular religious tenets. Despite the discourse model's rhetoric about equal access, participation in "ecumenical politics"[298] is necessarily limited to preferred religions. Religions eligible to participate according to engagement proponents are those sharing a commitment to the discourse model, including a fallibilist method of debate, and a commitment to forge a public morality.[299] The influence of a Christian majority, with its commitment to persuasion of non-adherents will imply its dominance in the public sphere—a sub silentio establishment.

Another prerequisite for representation in national culture is that substantive religious tenets coincide with threshold political commitments such as the protection of equal rights and the guarantee of certain fundamental rights.[300] The equal protection principle

---

297 *See* HERBERG, *supra* note 54 (referring to independent American civil religion).

298 *See supra* notes 158-59 and accompanying text.

299 *See* discussion *supra* part IV. This also implies a particular epistemological approach as discussed above in part V. For contrast of Christian and Jewish approaches, see *supra* note 170.

300 An example of an activity that would not satisfy this threshold test would be racial discrimination. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Under the separation model, the problem is minimized, whereas under the engagement model, the preference problem is much more pervasive.

Even engagement proponents have had to concede that there are some constraints on public participation. This will necessarily narrow the field of religious participants even further. Perry refers to "fundamental standards of political morality":

> Notwithstanding its substantial religious/moral pluralism, American society *is* a genuine political community. There *are* underlying grounds of political judgment—grounds concerning how the life in common is to be lived—which we Americans, *qua* members of a judging community, share, and which can and do serve to unite us in dialogue, notwithstanding our (sometimes radical) disagreements. The most apparent such shared standards of political judgment derive from our constitutional tradition, especially from that part of the tradition concerned with the rights of citizens and others against the state—standards concerning, for example, religious liberty; political freedom, including the freedoms of speech and of the press; racial and others sorts of discrimination, "due process" and other procedural rights . . . . Such constitutional standards are, for most

presents minimum standards for religious involvement in public life by excluding from representation racially discriminatory norms.[301] When the principle's scope includes discrimination on the basis of gender or sexual orientation, various branches of Protestantism, Catholicism, and Judaism would be excluded.[302] The development of religio-moral consensus norms will also be dominated by rights-based religions,[303] to the exclusion of religions with minority views: for example on children's rights, freedom of conscience, and animal rights.[304] Even what courts have long considered the essence of

---

> of us Americans, fundamental standards of political morality. . . . But it would be a mistake to conclude that constitutional norms are morally authoritative for us because they are legally authoritative for us. Rather they are legally authoritative for us . . . because they are morally authoritative for us. The fundamental standards of American political morality with which I am principally concerned in this book . . . derive from the religious traditions of American society, in particular the biblical heritage.

PERRY, LOVE AND POWER, *supra* note 11, at 87-88.

Despite Perry's contentions, it is difficult to understand how the traditions he invokes can be constitutive when constitutional norms in our society have themselves been subject of great contention. Perry may be referring to a past constructive note. For a response to this argument, see Ed Foley, *Tillich and Camus, Talking Politics*, 92 COLUM. L. REV. 954 (1991) (book review) ("The fact that religion has played this role does not mean, however, that it should continue to do so.").

301 The pre-reform Mormon church would be excluded under this example. For a description of discriminatory practices of the Mormon Church prior to its reform, see EDWIN B. FIRMAGE, ZION IN THE COURTS (1988). An anti-discrimination standard would also exclude some evangelical denominations. *See, e.g., Bob Jones Univ.*, 461 U.S. 574, 603-04 (1983) (upholding IRS decision to revoke tax exempt status of a private religious university that discriminated racially).

Scholarship on civic republicanism reveals some of the consequences for speech of a greater inclusion of religio-moral norms in public life. *See* Robert Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); Marty Redish, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

302 For a case on gender discrimination, see Bollenbach v. Board of Educ., 659 F. Supp. 1450 (S.D.N.Y. 1987) (deploying only male bus drivers to Hasidic Village advances religion in violation of the Establishment Clause); *see also* Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879) (polygamy); Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. App. 1987) (sexual orientation).

303 *See generally* LEON KLENICKI & RICHARD NEUHAUS, JEWISH-CHRISTIAN ENCOUNTER 61 (1989); Gary T. Amos, *Unalienable Rights: The Biblical Heritage*, 8 J. CHRISTIAN JURISPRUDENCE (1990) (explaining the development of a Christian rights theory).

304 For a description of recent court challenges, see David Margolick, *In Child Deaths, a Test for Christian Science*, N.Y. TIMES, Aug. 6, 1990, at A1. *Compare* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding prohibition of child labor as applied to Jehovah's witnesses) *with* Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish school children from compulsory education). On the debate regarding animal rights, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989) (upholding municipal ordinance barring ritual animal sacrifice), *cert. granted*, 112 S. Ct. 1472 (1992) The tension between dietary practices and animal sacrifice in the Caribbean church also conflict with the claims of animal rights groups. For a discussion of the tension between the two interests, see generally Brief of the Petitioner in *Church of the Lukumi Babalu Aye*, (No. 91-948).

religious beliefs—the totality of the faith claim upon the individual[305]—poses problems of representation in the culture of a liberal democracy.[306]

Representation of such a claim is the antithesis of a communicative posture. Religious representation in public life will evolve into politically acceptable syncretic representations. When such beliefs combine, particular religions are likely to prevail, making a significant departure from those conditions that have enabled our religious diversity.

Understanding religion in public life primarily as a question about representation, triggers a further inquiry: what principles should govern the representation of religion in the public sphere.[307] Specifically, should the principle beyond equality of access provide equal representation?

These questions are distinguishable from those previously raised about the role of religious justification in political discourse. Though cast in language about political discourse, proponents for greater religious participation urge uses of religion in public life in exactly this Article's sense of a representation function. This Article's critique is leveled at the implications of shifting from the representation of religious values chiefly in the private sphere to the public sphere.[308] We must still evaluate the consequences of selective and syncretic religious representations in the public sphere.

VIII
EPILOGUE: THE PART OF RELIGION AND POLITICS IN OUR CONSTITUTIONAL DEMOCRACY

The emerging scholarly understandings of religion's place in public life cannot explain the nature of engagement in the public

[305] *See* Gillette v. United States, 401 U.S. 437 (1971); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of the Sisters, 268 U.S. 510 (1925).

[306] *See generally* Foley, *supra* note 300, at 960 (criticizing Perry's view that a place for religion exists in political discourse).

[307] Galston openly invokes a consequentialist argument for religion in the public sphere. *See* GALSTON, *supra* note 11, at 280. He explains "functional" traditionalism as "[c]ertain moral principles and public virtues or institutions are needed for the successful functioning of a liberal community." *Id.*

[308] An aggressive approach to representation would use public institutions to transmit democratic norms. *See* GUTMANN, *supra* note 266, at 14 ("Since the democratic ideal of education is that of *conscious* social reproduction, a democratic theory focuses on practices of deliberate instruction by individuals and on the educative influences of institutions designed at least partly for educational purposes.").

This approach requires close scrutiny of the representation of religious norms when teaching sectarian norms, ranging from creationism to so-called "family values," such as gender equality. Whether from a secular perspective or from a liberal Catholic perspective one must select those religious values worth representing in the public sphere, making the establishment of the preferential and syncretic representations discussed above.

sphere. The struggle over religious public participation requires thinking about public life as a place for representation of our religious and cultural values. This then requires reexamination of the principles by which religious values should be represented in public life.

Through analysis of controversies over aspects of the public realm, I have identified some implications of greater religious engagement, particularly for minority traditions. For the reasons discussed above, I suggest that the interjection of religious claims in public life will erode religious equality and religious pluralism. The impact of greater religious participation in public life to create and maintain autonomous religious communal norms is questionable, as is the extent to which the shift to an engagement model will threaten pluralism in religious representations.[309]

Rethinking the role of religious engagement in the public sphere departs from the prevailing approach to religious claims; but viewed historically it returns to preconstitutional views about the role of religious and political claims in public life.

The preconstitutional view that religion should remain separate from public life is derived from a particular understanding of religious and political opinions. The framers regarded both as "pas-

---

[309] A comprehensive analysis of this question lies outside the scope of this Article. Under a liberal view, religio-moral diversity is a good. *See* Ronald Dworkin, Liberalism, Public & Private Morality 113 (1978); David A.J. Richards, Toleration and the Constitution (1986). Under a republican view, the reverse is true. *See* Sunstein, *supra* note 21. For some engagement advocates, representation of religious pluralism evinces ethical relativism. For a related discussion, see Symposium, *Law, Community and Moral Reasoning*, 77 Cal. L. Rev. 475; John Ladd, *Politics and Religion in America: The Enigma of Pluralism*, *in* Religious Morality and the Law: Nomos XXX 263, 278 (J. Roland Pennock & John W. Chapman eds., 1988).

The value of religious pluralism should be evaluated in light of our political traditions. Our federal system protects diversity of religious values; it permits any compatible or harmless ideology. For the founders, religious pluralism met this condition. *See* Thomas Jefferson, Notes on the State of Virginia 150-54 (Harper Torchbooks 1964) (1861); Locke, *Toleration*, *supra* note 28. "[T]he magistrate has no power . . . to forbid the use of such rites and ceremonies as are already received, approved, and practised by any Church. . . . The part of the magistrate is only to take care that the commonwealth receive no prejudice. . . ." *Id.* at 12-13.

Early American political thought emphasizes the protection of religious choice, implicating the concept of pluralism. Some commentators identify religious choice as the crux of the Establishment Clause. *See* Richards, *supra*, at 102-60 (identifying the principle of the "primacy of religious toleration"). Richards noted that

> [t]he specific concern of the antiestablishment clause is that, in contexts of belief formation and revision, the state not illegitimately (nonneutrally) endorse any one conception (whether religious or secular) from among the range of conceptions of a life well and humanely lived that express our twin moral powers of rationality and reasonableness.

Id. at 149; *see also* McConnell, *supra* note 32 (arguing that the primary purpose of the Establishment Clause is to prevent coerced adherence to government-sponsored religion).

sions,"[310] and thought both promoted undesirable "self-interested" factions.[311] The framers also subscribed to "the principle of countervailing passion,"[312] that a "multiplicity" of political and religious groups is critical to national stability.[313] All such contending

---

310 *See* THE FEDERALIST No. 10, at 56-59 (James Madison); ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 9-20 (1978) (discussing passion as part of society). *See generally* WHITE, *supra* note 29, at 102-13 (1987) (analyzing passions and interests as motives).

311 "In a free government, the security for *civil rights* must be the same as for *religious rights*." THE FEDERALIST No. 10 (James Madison) (emphasis added). "The latent causes of faction are thus sown in the nature of man. . . ." *Id.* at 58. "A zeal for *different opinions concerning religion, concerning Government* and many other points, . . . have in turn divided mankind into parties . . . and rendered them much more disposed to vex and oppress each other, than to co-operate. . . ." *Id.* at 58-59. "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated hy some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 57.

To the framers, religious and political opinions were understood as ideological and therefore unhelpful to deliberations ahout the public good. *Id.*; *see also* HOLMES, *supra* note 5, at 43-50 (discussing the exclusion of religious opinion, hut not the treatment of political opinion, as ideological); Sunstein, *supra* note 21.

312 *See* HIRSCHMAN, *supra* note 310, at 20-31. "Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . . ." THE FEDERALIST No. 10, at 64 (James Madison). "This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public." THE FEDERALIST No. 51, at 349.

The framers thought that factions, if numerous enough, could serve a stabilizing function. Hirschman has analyzed the development from "passions" to "interests." HIRSCHMAN, *supra* note 310. But interestingly, no one has studied the similar development from "multiplicity," to today's "pluralism." *See generally* MARTIN E. MARTY, ANTICIPATING PLURALISM: THE FOUNDERS' VISION 2 (1986).

> Pluralism as we are using the term here builds on that diversity, but in addition, as noted, refers to a policy, a program, a way of life. Pluralism in this sense is a value that helps assure civil concord when a republic is made up of individuals and groups who do not share each others' outlooks on life on what Paul Tillich called matters of 'ultimate concern'.

Id.

313 *See* THE FEDERALIST No. 10, at 56-59 (James Madison); WHITE, *supra* note 29.

The argument for multiplicity was strategic. "Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." THE FEDERALIST No. 10, at 56 (James Madison). "[O]ne sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." Wallace v. Jaffree, 472 U.S. 38, 96 (1985) (Rehnquist, J., dissenting) (quoting JAMES MADISON, 1 ANNALS OF CONGRESS 731 (Joseph Bales ed., 1789)). In a free government, the security for civil rights must be the same as for religious rights.

> It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may he presumed to depend on the extent of country and number of people comprehended under the same government.

THE FEDERALIST No. 51, at 351-52 (James Madison).

Permissive treatment of ideological factions was part of the novelty of the American experiment. The founders believed that in sufficient numbers, factions play an affirmative role in our political structure. This understanding has since become central to our

groups, however, were to be kept separate from power. Preconstitutional political theory sought to limit both religious and political representation in the public domain.[314]

After the writing of the Constitution, the treatment of religious and political participation in public life diverged. Political norms became accepted elements of public life; religious norms continued to be excluded.[315] The recent call for religious engagement suggests we have come full circle.

The movement from separation to engagement is not simply a matter of intellectual history. The change will make public what was privatized and make political what was constitutionalized. There are implications for the private sphere, for the religious community, for politics and the public sphere, and for our understanding of American constitutional democracy. Because this development is recent, all of the implications of the rethinking cannot be comprehensively

---

national political tradition. *See* ROBERT A. DAHL, THE DILEMMAS OF PLURALIST DEMOCRACY 31-36 (1982) (suggesting democracy on a large scale requires the existence of autonomous organizations).

314 Indeed, the founders even opposed political parties as a manifestation of faction. *See* THE FEDERALIST No. 10 (James Madison); GARY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981); A.M. Schlesinger, Jr., *Introduction* to 1 HISTORY OF U.S. POLITICAL PARTIES (1973).

315 The different treatment is clear from the text of the Constitution. The separation theory was ratified in the Constitution's Establishment Clause: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. Notwithstanding vigorous argument by various commentators, there is no comparable political non-Establishment Clause.

> It is also clear, however, that the Founders knew it had to be solved—knew that Americans would have to agree with them that religion must play only a subordinate, even if necessary, role in their lives—before free government could be successfully established in the United States. It is this official subordination of religion that underlies the principle of the absolute freedom of religious opinion. Because the country was not founded on religious truth, it could—and indeed must—permit a variety of religious opinions. Instead of founding itself on what was claimed to be religious truth, the country was founded on political truths respecting man and his natural rights, truths held to be "self-evident." It follows from this that whereas the extent of the freedom accorded religious opinion could and must be absolute, the extent of the freedom accorded political opinion could not and must not be absolute. Political opinion must be compatible with the self-evident truths regarding man and government on which the country was founded. . . .
>
> Thus, the Founders drew a distinction between the liberty of religious and political opinion: the former was absolute while the latter, of necessity, was not.

Walter Berus, *Religion and the Founding Principle*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 228-29 (Robert H. Horwitz ed., 1986). *But see* LEONARD W. LEVY, LEGACY OF SUPPRESSION (1960).

The relation between constitutional structure and the vitality and diversity of religious rights is clear, for example, in our studies of federalism. There is a direct vitality of connection between the nature of the institutional framework, and the level of cultural and religious pluralism. For a perspective analysis, see Minow, *supra* note 34, at 96.

addressed. But I have identified the development and proposed an approach for addressing this change.

How we think about the sources of our norms is related to our vision of democracy. Rather than debating the standards for political discourse, we must decide to what extent we wish to recognize our religious norms in our public sphere.