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TOWARD A GENERAL THEORY OF THE ESTABLISHMENT CLAUSE

Daniel O. Conkle

TOWARD A GENERAL THEORY OF THE ESTABLISHMENT CLAUSE

*Daniel O. Conkle**

I have pity for the heathens who sit on
the Supreme Court, pity for their
damned souls and blighted minds.
—Bob Jones III[1]

He drew a circle that shut me out—
Heretic, rebel, a thing to flout.
But Love and I had the wit to win:
We drew a circle that took him in.
—Edwin Markham[2]

We are in the midst of a flourishing academic—and increasingly public—debate concerning the proper role of the Supreme Court in imposing constitutional limitations on government action. The "originalists," advocates of what former Attorney General Edwin Meese III has called a "jurisprudence of original intention,"[3] contend that the Court

* Associate Professor of Law, Indiana University School of Law—Bloomington. Professors Craig M. Bradley, Daniel A. Farber, Richard Fraher, John H. Garvey, Donald Gjerdingen, Ira C. Lupu, Michael J. Perry, William D. Popkin, Richard B. Saphire, Michael B.W. Sinclair, and Mark V. Tushnet each were kind enough to read and comment upon earlier versions of this Article. I also received helpful input from a number of other colleagues during and following my presentation of this Article to a faculty workshop. I am grateful to all these persons. Finally, I wish to thank Jane A. Henegar for her research assistance, and Indiana University and its School of Law for the financial support that they provided for this work.

1 *Quotes*, 69 A.B.A. J. 1016 (1983).

2 E. MARKHAM, *Outwitted*, in SHOES OF HAPPINESS AND OTHER POEMS 1 (1915).

3 Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (text of speech to American Bar Association in Washington, D.C., July 9, 1985) (emphasis omitted). The Attorney General's well-publicized 1985 arguments evoked public responses from Justices Brennan and Stevens. *See* Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986) (text of speech at Georgetown University, October 12, 1985); Stevens, *The Supreme Court of the United States: Reflections After a Summer Recess*, 27 S. TEX. L. REV. 447 (1986) (text of speech to Federal Bar Association in Chicago, October 23, 1985). *See also Addresses Construing the Constitution*, 19 U.C. DAVIS L. REV. 1 (1985); Shenon, *Meese and His New Vision of the Constitution*, N.Y. Times, Oct. 17, 1985, at 10, col. 3 (city ed.); Taylor, *Administration Trolling for Constitutional Debate*, N.Y. Times, Oct. 28, 1985, at 12, col. 3 (city ed.). In 1987, moreover, President Reagan made a dramatic, but unsuccessful, attempt to put the Attorney General's theory into practice by nominating Robert H. Bork to the Supreme Court. The Meese-Brennan-Stevens debate, and especially the Bork nomination, have transformed what was a largely academic topic into a matter of prominent public and political discussion. *See, e.g.*, Greenhouse, *What Went Wrong: Reagan's Popularity Was Not Enough to End Fears of Shift on Social Issues*, N.Y. Times, Oct. 7, 1987, at 10, col. 1 (city ed.); Lewis, *The Bork Surprise*, N.Y. Times, Sept. 24, 1987, at 27, col. 5 (city ed.); Lewis, *The Larger Message*, N.Y. Times, Oct. 8, 1987, at 39, col. 5 (city ed.). *Cf.* Price, *Preface*, 9 CARDOZO L. REV. 1, 1 (1987) ("[T]he

must limit itself to an historical inquiry—that it ought not recognize a constitutional limitation on majoritarian action[4] unless the framers and ratifiers of the Constitution intended that limitation.[5] "Nonoriginalists," on the other hand, argue that the Court should not be confined to an historical search for original intentions. Instead, the Court properly may expound the meaning of evolving constitutional norms for policing the actions of majorities in our modern society.[6]

Simultaneous with this general debate about the proper role of the Supreme Court in the exercise of judicial review, another matter also has risen to the forefront of academic and public discourse: the role of religion in American politics[7] and the proper relationship between church and state.[8] This controversy is intimately connected to the debate con-

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debate over the nomination of Judge Robert H. Bork to the Supreme Court resulted in the most extraordinary national seminar on the Constitution and the role of the Court since, perhaps, the debate over secession.") (preface to special issue devoted to Bork nomination).

[4] For purposes of this Article, "majoritarian" action means action taken by legislative or executive officials. In a representative democracy such as ours, we must assume that such action tends to reflect the will of a majority of the people. In any event, it tends to be more reflective of that will than the decisions of the unelected and life-tenured justices of the Supreme Court.

[5] This Article is concerned primarily with originalist and competing theories of judicial review not as they relate to questions of federalism or the proper separation of government powers, but rather as they relate to constitutional restraints that apply to all levels of American government. *See infra* text accompanying note 15. For academic statements of the originalist position concerning various restraints of this latter type, see, for example, R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); and Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1 (1976).

[6] *See, e.g.*, E. CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587 (1985); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

Robert H. Bork recently has stated that the question of whether courts should limit themselves to an originalist inquiry "has been a topic of fierce debate in the law schools for the past thirty years. The controversy shows no sign of subsiding. To the contrary, the torrent of words is freshening." Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986). Bork believes that judges who decide constitutional cases should pay more heed to general theories of constitutional interpretation, and he hopes that they are beginning to do so. *See id.* at 823-24.

[7] Norman Dorsen and Charles Sims have suggested that "the activity and influence of religious groups in the nation's political life [have] reached a level probably unparalleled since prohibition." Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 837.

[8] These issues were an important source of controversy and debate during the 1984 national election campaign. *See* A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 1 (1985). As Professor Joel M. Gora has noted:

> With a president committed to prayer in schools, a vice presidential candidate defending her position on abortion in the face of her church's opposition, and major national figures like New York's Gov. Mario Cuomo and John Cardinal O'Connor weighing in with highly publicized

cerning judicial review, for judicial review has become the primary vehicle for determining and enforcing church-state relations in the United States. Thus, in a range of decisions over the last forty years, the Supreme Court has imposed the requirements of the first amendment's establishment clause[9] on state as well as federal action,[10] and it has used the clause to enforce a wavering, but relatively strict, separation of church and state[11] at all levels of American government.

While many scholars have dealt generally with the theoretical underpinnings of judicial review[12] and others have addressed the merits of the Supreme Court's establishment clause doctrine,[13] too little attention has been paid to the intrinsic relationship between these inquiries.[14] Yet one cannot fully evaluate the merits of the constitutional doctrine propounded by the Court without considering why, or how, the Court should be undertaking to decide these issues in the first place. In this Article, I attempt to fill this void by directly considering the relationship between the Supreme Court's establishment clause doctrine and various theoretical models of judicial review.

In Part I, I sketch the broad outlines of originalism and the competing nonoriginalist theories of judicial review, including process-oriented theories, theories that call for the Supreme Court to enforce common societal values, and theories that would engage the Court in a more open-

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public commentary, issues of separation of church and state clearly had moved from the quiet deliberation of law to the rough-and-tumble of politics.

Gora, *The Delicate Matter of Religion*, 71 A.B.A. J. 84, 84 (1985). More recently, this debate was fueled by the 1988 presidential campaigns of religious leaders Jesse Jackson and especially Pat Robertson. *See generally* King, *Robertson Promises Not to Impose His Religious Views on Americans*, N.Y. Times, Mar. 4, 1988, at 10, col. 5; Toner, *Hosannas to God and Votes for Jackson*, N.Y. Times, Mar. 7, 1988, at 10, col. 1.

9 This clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The first amendment also includes the free exercise clause, which precludes Congress from "prohibiting the free exercise" of religion. *See id.*

10 *See* Everson v. Board of Educ., 330 U.S. 1, 8, 15-16 (1947).

11 In this Article, I use the phrases "church and state" and "religion and government" interchangeably.

12 *See, e.g., supra* notes 5-6.

13 A number of recent symposia have been devoted to establishment as well as free exercise issues. *See, e.g., Perspectives on the Religion Clauses of the First Amendment*, 1986 B.Y.U. L. REV. 245; *Religion and the Law Symposium*, 18 CONN. L. REV. 697 (1986); *Symposium: The Tension Between the Free Exercise Clause and the Establishment Clause of the First Amendment*, 47 OHIO ST. L.J. 289 (1986); *Religion and the State*, 27 WM. & MARY L. REV. 833 (1986). *See also Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606 (1987).

14 This is not to say that scholars have ignored this relationship altogether. Indeed, at least one scholar has begun to address some of the same types of basic questions that I confront here, although our analyses and conclusions have little in common. *See* M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 247-76 (1988) (arguing that conventional theories of constitutional interpretation are inadequate in the area of the religion clauses and that the republican political tradition provides important insights). *See also* Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986); Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221 (1987).

ended consideration of political-moral principles and policies. Defining judicial activism as the frustration of majoritarian decisionmaking, I also evaluate the extent to which each of these theories endorses an activist judicial role. Using this criterion, I conclude that originalism is the least activist theory, but that the process-oriented and common values versions of nonoriginalist theory can nonetheless be considered relatively "nonactivist" when compared to the political-moral reasoning models.

Part II describes the Supreme Court's establishment clause doctrine, a doctrine that is primarily separationist, but that includes a contradictory subtheme permitting the government to favor religion in certain circumstances. In Part III, I address the relationship of this doctrine to the comparatively nonactivist theories of judicial review, including originalism and the process-based and common values models of nonoriginalist review. I conclude that none of these theories can adequately explain the Supreme Court's establishment clause doctrine, and that this doctrine, if defensible at all, must be justified on a theory of political-moral reasoning.

Finally, in Part IV, I present and defend a political-moral reasoning model of the establishment clause, a model that calls for an extremely activist judicial role. I argue that at least in its broad features, the Supreme Court's establishment clause doctrine, including both its dominant separationist component and its contradictory subtheme, can be explained and justified as a resolution of church-state issues that makes America stronger, both politically and morally. More specifically, I contend that the Court's doctrine works to ensure a proper respect for the religious and irreligious beliefs of individuals, supports our important societal interest in maintaining a religiously inclusive political community, and, at the same time, does not disserve the valuable role of religion in our country. I therefore endorse the Court's performance of this political-moral function in the context of the establishment clause, and I attempt to justify the judicial activism that results.

I. THEORETICAL MODELS OF JUDICIAL REVIEW

As construed by the Supreme Court, the establishment clause does not concern questions of federalism or the proper separation of government powers. Instead, it imposes constitutional restraints that apply at all levels of American government.[15] As a result, the relevant considerations of constitutional theory are those that apply to the recognition of such restraints on majoritarian government, restraints that typically coincide with the recognition of constitutionally protected individual rights.

[15] *See* Everson v. Board of Educ., 330 U.S. 1, 8, 15-16 (1947).

A. Originalist Theory

Originalist constitutional theory would limit constitutional restraints on government to those restraints that were originally intended by the framers and ratifiers of the Constitution (including its various amendments).[16] On this view, the Supreme Court properly may check the majoritarian process, but only when the government action under attack is prohibited by the Constitution as it was originally intended.[17] Absent evidence that a government practice thus violates the original understanding of one or more constitutional provisions, the Court should defer to the majoritarian process and permit the government to proceed as it sees fit.[18]

B. Nonoriginalist Theories

Nonoriginalist theories would permit the Court to go beyond the

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16 Hereinafter, when I refer generally to "the Constitution," I include its amendments.

17 For a more detailed discussion of the nature and limitations of originalist judicial review, see Conkle, *supra* note 6, at 591-601.

18 The originalist meaning of a constitutional provision depends in the first instance on its language, read in the light of its original context. As a result, originalist judicial review roughly approximates what Professor Reed Dickerson, an expert in the field of statutory interpretation, would call the courts' "cognitive function" in extracting meaning from a legal text. *See* Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773, 776-82 (1987). Given the perceived need for deference to the majoritarian process, however, originalist constitutional theorists would be more reluctant than Dickerson to recognize "built-in leeway" for the judiciary, in the performance of its cognitive function, to fill out the meaning of "general" and "vague" constitutional provisions. *See id.* at 780. Instead, at least with respect to constitutional *restraints* on majoritarian action, originalists would be inclined to limit the *judicial* role in interpreting such provisions to a determination of the more specific ends that the framers and ratifiers originally intended to accomplish, as revealed, for example, in the "legislative" history of the constitutional provision in question. *Cf.* Bork, *supra* note 5, at 8 ("Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.").

In Dickerson's terms, this position might be explained in terms of a (rebuttable, but unrebutted) factual assumption that the framers and ratifiers of constitutional provisions respect the principle of majoritarian self-government and have a corresponding distrust of unconstrained judicial policymaking in contravention of that basic value. *Cf.* Dickerson, *supra*, at 778 ("There may . . . be presumptions, peculiar to constitutions, based on tacit assumptions of fact that are relevant to resolving uncertainties of constitutional meaning.") If so, then many of the general and vague provisions of the Constitution may properly be subject to narrow *judicial* interpretation: to the extent that such provisions are directed to the judiciary at all, they might implicitly require the judiciary to construe them narrowly, and to give them no more meaning than their original context unequivocally requires. On this view, any "built-in leeway" in construing these power-restraining provisions is not for the courts in the exercise of judicial review, but is rather for legislative and executive officials as they determine for themselves—without regard to judicial enforceability—what they regard as the constitutional limitations on their power. For similar reasons, originalism would be quite reluctant to recognize any type of open-ended judicial authority on the basis of a "delegation" of constitutional lawmaking power to the judiciary. *See generally id.* at 794-95 (suggesting that general constitutional language may imply a delegation of lawmaking power to the judiciary).

original understanding and enforce constitutional limitations on government action that the framers and ratifiers did not intend.[19] Process-oriented theories defend nonoriginalist review to the extent that it works to enhance the fairness of the democratic process. Substantive theories, by contrast, focus more directly on the appropriate *content* of nonoriginalist constitutional law and the source or sources from which nonoriginalist constitutional values properly may be drawn.

1. *Process-Oriented Theories.*—Process-oriented theories of nonoriginalist review analyze the political process and attempt to identify the types of defects in that process that might require judicial intervention. To a large extent, these theories build upon the Supreme Court's *Carolene Products* footnote, in which the Court announced that heightened judicial scrutiny might be appropriate for government action that "restricts [the] political processes" or that reflects "prejudice against discrete and insular minorities . . ., which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[20] Whether under the *Carolene Products* formulation or otherwise,[21] process theories attempt to identify deficiencies in the political process that can and should be rectified by judicial action.[22] These theories thus defend nonoriginalist review to the extent that it works to "correct" a political process gone awry, as, for example, when the interested parties were not fairly represented in that process.

2. *Substantive Theories.*—Substantive theories of nonoriginalist judicial review focus directly on the appropriate *content* of nonoriginalist constitutional law. Although these theories do not ignore considerations of process, they concentrate instead on the proper method of identifying substantive constitutional values. More precisely, they focus on the source or sources from which such constitutional values properly may be drawn.

One group of substantive theories calls for the Supreme Court to derive its decisional norms from values widely held in American society. These "common values" theories[23] differ in chronological focus. Some are primarily backward-looking, calling for the Supreme Court to protect traditional American values against encroachment by modern govern-

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19 Nonoriginalist judicial review roughly approximates what Professor Dickerson would call the courts' "creative function" in adding meaning to a legal text. *See* Dickerson, *supra* note 18, at 782-95.

20 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

21 For a critique of the *Carolene Products* formulation, see Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

22 *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

23 *See generally* M. TUSHNET, *supra* note 14, at 133-43; Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1537-38 (1985); Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339 (1987).

ment.[24] Others look more to the present and future, enlisting the Court in the cause of American societal development by permitting it to recognize constitutional rights on the basis of contemporary and emerging national values.[25]

Another group of substantive theories would have the Court move beyond the enforcement of common American values by engaging in a process of political-moral reasoning and analysis. According to these "political-moral reasoning" theories, the Court should play an active role in *developing*, not merely reflecting, the values that ought to be protected from majoritarian rule. Some theorists call these values "public values."[26] Others rely more openly on notions of political and moral philosophy.[27]

C. Levels of Judicial Activism

Judicial activism may be defined as the use of judicial power[28] to override or frustrate the decisions of legislative or executive officials—decisions reflecting, at least presumptively, the process of (representative) majoritarian rule.[29] Any judicial enforcement of constitutional limitations tends to frustrate majoritarian rule, and therefore any form of judicial review constitutes judicial activism.[30] The various models of judicial review, however, do permit differing *levels* of judicial activism, varying with the nature of the Supreme Court's decisionmaking process and the scope of permissible judicial decisions. The level of judicial activism varies quantitatively with the number of judicial invalidations that result

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24 *See, e.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1039-50 (1979).

25 *See, e.g.*, Conkle, *supra* note 6, at 626-37.

26 *See, e.g.*, Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). *See generally* M. TUSHNET, *supra* note 14, at 160-68; Tushnet, *supra* note 23, at 1539-44.

27 Professor Ronald Dworkin, for example, has argued for "a fusion of constitutional law and moral theory." R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977). *See generally* E. CHEMERINSKY, *supra* note 6, at 129-41 (advocating "open-ended modernism" as a method of constitutional interpretation).

28 This Article is concerned primarily with the power of the Supreme Court.

29 This definition does not embrace all of what might be called "judicial activism." It does not consider, for example, the propensity of judges to overrule established precedent. For recent discussions of the role of precedent in constitutional adjudication, see, for example, Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENTARY 123 (1985); Hazard, *Rising Above Principle*, 135 U. PA. L. REV. 153, 162-67 (1986); Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); and Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979). *See generally* Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). For a discussion of the various possible meanings of judicial activism and restraint, see R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198-222 (1985).

30 *Cf.* E. CHEMERINSKY, *supra* note 6, at 18 (noting that "any ruling overturning decisions by popularly elected officials is, by definition, undemocratic").

from judicial review in accordance with a particular model. It varies qualitatively with the extent to which the Court's method of decision dishonors majoritarian values.

In quantitative terms, originalism plainly describes the least activist form of judicial review. The Supreme Court is authorized to recognize and protect only a closed set of constitutional values, those values placed in the Constitution at the time of its adoption.[31] Moreover, most of these values command a nearly universal consensus in our modern society, and majoritarian institutions are therefore likely to honor them. As a result, the occasions on which originalist judicial review leads to the invalidation of majoritarian action are exceedingly few in number.[32]

Although nonoriginalist judicial review, in general, is quantitatively more activist than originalist review, it is more difficult to quantify the comparative activism of the differing models of nonoriginalist review. One might suspect, however, that the process-oriented theories and the common values theories would be less likely to permit judicial invalidations than the political-moral reasoning models. Process theories permit judicial activism only when there is a defect in the political process that is amenable to judicial correction, a circumstance that presumably is the exception, not the rule. Common values substantive theories call for the judicial invalidation of majoritarian decisions that deviate from widely shared values. Yet because majoritarian decisions normally *reflect* widely shared values, this type of judicial activism also is likely to operate with relative infrequency. By contrast, political-moral reasoning models of nonoriginalist review do not limit the occasions for judicial invalidation to the correction of defects in the political process or to the enforcement of common values. As a result, political-moral reasoning models permit the broadest possible range of judicial activism, and therefore are likely to result in the largest number of judicial invalidations.

Judicial activism, and the competing theoretical models of judicial review, also may be analyzed in qualitative terms. Although all judicial review is countermajoritarian, some methods of review do less violence than others to America's basic commitment to majoritarian policymaking. At this level of analysis, the focus must be on the nature of the Supreme Court's decisionmaking process and its relationship to majoritarian values.

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31 *See* Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 14-15 (1985).

32 *See, e.g.*, M. PERRY, *supra* note 6, at 19; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 (1980). In certain areas, the Supreme Court apparently has refused to enforce even the originalist meaning of constitutional limitations on government action. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding legislation that the framers and ratifiers of the contract clause apparently intended to prohibit). For discussions of the implications of such a refusal, see Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735-38 (1984), and Sandalow, *supra* note 6, at 1060-68.

The originalist model of judicial review permits the Court to protect certain values from majoritarian transgression, but they must be values originally placed in the Constitution by virtue of (super-) majoritarian government processes.[33] Nonoriginalist models cannot claim the same pedigree.[34] Even in the nonoriginalist domain, however, certain models of judicial review can be said to promote majoritarian values even as the Court acts to invalidate majoritarian actions. According to the process models, for example, judicial review can operate to correct defects in the majoritarian process, thereby arguably permitting that process to operate more effectively than it otherwise would.[35] Likewise, the common values substantive models call for the Court to enforce widely held societal values, values that—in some sense at least—are majoritarian in nature.[36]

The most activist models of judicial review under this qualitative analysis are, again, the political-moral reasoning models of nonoriginalist review. These models cannot claim support from the majoritarian actions that resulted in the adoption of the Constitution. They do not purport merely to correct defects in the majoritarian process, nor do they tie the Court to values that are widely held among the American people. Rather, they engage the Court in a process of political-moral decisionmaking that lacks any direct connection either to the majoritarian process or to majoritarian values.

Based on both quantitative and qualitative considerations, then, it is possible to arrange the competing theoretical models on a continuum of judicial activism. Although there could be differing views on the placement of particular theories, the general thrust of the continuum seems clear. The originalist model represents the least activist form of judicial review. The most activist models, on the other hand, are the political-moral reasoning models of nonoriginalist review. Somewhere in between lie the process-oriented and the common values nonoriginalist theories.

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33 *Cf.* Bork, *supra* note 5, at 3 ("Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution."); Lupu, *supra* note 24, at 1042 ("The entire body of the Constitution, amendments and all, is a series of judgments by an extraordinary majority that limit the power of future political majorities.").

34 *Cf.* Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 697 (noting that there is no persuasive evidence that the framers and ratifiers intended the judiciary to develop constitutional limitations on majoritarian government that the framers and ratifiers did not themselves provide).

35 Professor John Hart Ely, for example, claims that his process theory "is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy." J. ELY, *supra* note 22, at 102.

36 If a common values theory calls for the Court to use national societal values as its source of decision, it is advocating a source of decision "that is 'majoritarian' in the sense that it derives from *American* values, albeit values that may conflict with the will of temporary or local majorities." Conkle, *supra* note 6, at 658 (emphasis in original).

II. THE SUPREME COURT'S ESTABLISHMENT CLAUSE DOCTRINE

The first words in the Bill of Rights are those of the establishment clause: "Congress shall make no law respecting an establishment of religion . . . ."[37] Despite its place of special prominence in the Constitution, however, the establishment clause drew little note in the Supreme Court for more than 150 years. The clause emerged from obscurity only in 1947[38] in the seminal case of *Everson v. Board of Education*.[39]

In *Everson*, a taxpayer challenged a state statute and local school board resolution permitting reimbursement for bus fares incurred by parents in transporting their children to Roman Catholic schools.[40] Although the Supreme Court rejected the constitutional challenge on a five-four vote, all nine Justices agreed on two critical determinations concerning the scope and application of the establishment clause. First, they determined that the establishment clause, applicable by its terms only to federal government action,[41] would be applied to the states as well, based on a finding that the fourteenth amendment—which applies to state action—"incorporated" the provisions of the establishment clause.[42] Second, the Justices read the establishment clause, as applied to both state and federal action, to state a principle requiring the separation of religion and government, a principle that prohibited public aid and support for religion.[43]

Speaking for the majority in *Everson*, Justice Black elaborated the prohibitions that he found in the establishment clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or

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37 U.S. CONST. amend. I. The first amendment also provides that Congress shall not prohibit the "free exercise" of religion. *Id.*

38 The Court did discuss the establishment clause in a few cases prior to 1947. *See, e.g.*, Quick Bear v. Leupp, 210 U.S. 50, 81-82 (1908); Bradfield v. Roberts, 175 U.S. 291 (1899); Davis v. Beason, 133 U.S. 333 (1890).

39 330 U.S. 1 (1947).

40 Reimbursement was available for transportation to public schools as well. *See id.* at 3, 17.

41 *See* Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

42 This "finding" of incorporation was little more than a bare assertion, for neither the majority nor the dissent engaged in any significant analysis of this issue. *See Everson*, 330 U.S. at 8, 14-15 (majority opinion); *id.* at 29 (Rutledge, J., dissenting).

The Court had previously applied the free exercise clause to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940). Although the question of whether the establishment clause also should be incorporated into the fourteenth amendment was not at issue in *Cantwell*, the Court spoke in broad language that appeared to endorse the finding of incorporation that it later made in *Everson*. *See id.* at 303-04.

43 *See Everson*, 330 U.S. at 15-16 (majority opinion); *id.* at 31-33 (Rutledge, J., dissenting).

> professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[44]

The dissenters agreed, arguably stating the matter even more forcefully: "[T]he object was broader than separating church and state in [a] narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[45]

Everson thus established the Supreme Court's basic approach to the establishment clause. The clause would be applied to state as well as federal action. It would be construed to prohibit not only the establishment of official churches, but also lesser forms of aid and support for particular religions to the exclusion of others. Finally, it would operate even more broadly to prevent government from furthering the general cause of religion, even when the government action suggested no preference for any particular religion or religious group.

The separationist[46] doctrine enunciated in *Everson* evolved over time into a three-pronged test for evaluating whether a statute (or other government action) can be upheld in the face of an establishment clause challenge.[47] As stated in *Lemon v. Kurtzman*[48]: "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 governmental entanglement with religion.' "[49] A failure to satisfy any one of these prongs is sufficient to require the statute's invalidation.

Using the *Everson* doctrine and the *Lemon* test, the Supreme Court has invalidated numerous government practices, many of them relating to public and private education. The Court has prohibited spoken group

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44 *Id.* at 15-16.

45 *Id.* at 31-32 (Rutledge, J., dissenting).

46 For convenience, I use the term "separationist" to suggest not only a policy of keeping religion and government separate, but also, and perhaps even more fundamentally, a policy of strict government neutrality toward religion. For recent discussions of terminology and proposed typologies of church-state arguments, see Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, and McConnell, *You Can't Tell the Players in Church-State Disputes Without a Scorecard*, 10 HARV. J.L. & PUB. POL'Y 27 (1987).

47 The first two prongs of the test derive from School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

48 403 U.S. 602, 612-13 (1971).

49 *Cf.* Larson v. Valente, 456 U.S. 228, 244-55 (1982) (calling for test of "strict scrutiny" when challenged government action prefers certain religions over others).

prayer and Bible reading in the public schools,[50] it has invalidated a statute authorizing a moment of silent prayer at the opening of the school day,[51] and it has refused to permit the states to mandate the teaching of "creation-science" theory alongside the theory of evolution.[52] At the same time, the Court has made it extremely difficult for states to provide financial aid to parochial schools, striking down numerous legislative efforts to support these educational programs.[53]

Three recent cases illustrate the force and vitality of the three-pronged *Lemon* test. In *Wallace v. Jaffree*,[54] the moment-of-silence case, the Supreme Court focused on the first prong of the test, which requires that a statute have a secular legislative purpose. At issue was an Alabama statute permitting public school teachers to announce a minute of silence "for meditation or voluntary prayer."[55] Reaffirming the *Everson* principle that government may not prefer religion over irreligion,[56] the Supreme Court concluded that the "actual purpose" of the Alabama legislature was a constitutionally impermissible "endorsement" of religion.[57] Because it lacked a secular purpose, the statute was invalid under the first prong of *Lemon*, and no further analysis was required.[58]

The Court used the second and third prongs of the *Lemon* test in *Grand Rapids School District v. Ball*[59] and *Aguilar v. Felton.*[60] In these cases, the Court invalidated government programs under which publicly

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50 Engel v. Vitale, 370 U.S. 421 (1962); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

51 Wallace v. Jaffree, 472 U.S. 38 (1985).

52 Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

53 *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); *Lemon*, 403 U.S. 602.

54 472 U.S. 38 (1985).

55 ALA. CODE § 16-1-20.1 (Supp. 1984).

56 *Jaffree*, 472 U.S. at 52-53 & n.37.

57 *Id.* at 56. The Court cited statements by the sponsor of the legislation that he intended to " 'return voluntary prayer' to the public schools." It also noted that the legislation was passed to supplement an existing statute that had already provided for a moment of silence "for meditation"—but not explicitly "for prayer"—and that the Alabama legislature, through yet another enactment, had attempted to authorize spoken group prayer in the public schools. *Id.* at 56-60.

58 *Id.* at 56 ("[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.").

Justice Stevens' majority opinion in *Jaffree* expressed the view of five justices. Justice Powell, although he joined the majority opinion, also wrote a separate concurrence indicating that he would have upheld the statute if, in addition to its religious purpose, "it also had a clear secular purpose." *Id.* at 66 (Powell, J., concurring). Justice O'Connor, concurring only in the judgment, suggested that she would approve a "moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others." *Id.* at 76 (O'Connor, J., concurring in the judgment). Chief Justice Burger and Justices White and Rehnquist wrote dissenting opinions.

The Supreme Court's "creation-science" decision in Edwards v. Aguillard, 107 S. Ct. 2573 (1987), also was grounded on the first prong of *Lemon*. *See Edwards*, 107 S. Ct. at 2578-83.

59 473 U.S. 373 (1985).

60 473 U.S. 402 (1985).

funded teachers taught secular subjects in religious schools. The Court found that the challenged programs had the purpose of supporting secular education, thereby satisfying the first prong of *Lemon*.[61] The Court concluded, however, that the programs could not survive the remainder of the *Lemon* analysis.

The Supreme Court found that the *Grand Rapids* programs violated the *Lemon* test's second prong by having the primary or principal *effect* of promoting religion.[62] The Court reasoned that the publicly funded teachers might knowingly or unwittingly "conform their instruction to the environment in which they teach," thereby furthering the religious mission of the private schools.[63] The program challenged in *Aguilar*, on the other hand, was designed to avoid this vice. It included a system of government monitoring to ensure that the classes taught by the publicly funded teachers would remain entirely secular.[64] That very system of monitoring, however, led the Court to find an excessive government entanglement with religion in violation of the *Lemon* test's third prong.[65]

The Supreme Court's recent opinions in *Jaffree*, *Grand Rapids*, and *Aguilar* indicate the Court's basic commitment to a forceful interpretation of the establishment clause, an interpretation that the Court first embraced in *Everson* and that has generally prevailed since that time. This is not to suggest that this interpretation of the establishment clause—including the *Lemon* test through which it typically is implemented—is one of easy application. To the contrary, the Court has had great difficulty applying the *Everson* doctrine and the *Lemon* test, especially in cases involving aid to parochial schools.[66] Differences of opin-

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61 The Court made this finding explicit in *Grand Rapids*. *See* 473 U.S. at 383. A similar finding doubtless was appropriate in *Aguilar*. *See* 473 U.S. at 408-09 (describing programs challenged in *Aguilar* as similar to those at issue in *Grand Rapids*). Indeed, the finding of a secular purpose has become routine in the Supreme Court's parochial aid cases, forcing the analysis into the second and third prongs of the *Lemon* test. *Cf. Grand Rapids*, 473 U.S. at 383 ("As has often been true in school aid cases, there is no dispute as to the first test.").

62 *Grand Rapids*, 473 U.S. at 384-97.

63 *See id.* at 388. The Court also suggested that the children attending the schools, as well as the public at large, might perceive a "symbolic union of church and state" suggesting a government endorsement of religion, *id.* at 390, and that the programs impermissibly advanced the "sectarian enterprise" of the schools because the effect of the aid was "direct and substantial." *Id.* at 392-97.

64 *See Aguilar*, 473 U.S. at 409. The Court left open the question of whether the monitoring system was successful in avoiding a violation of the "effect" prong of *Lemon*. *Id.*

65 *See id.* at 409-14. Justice Rehnquist's dissenting opinion lamented the "Catch-22" that he believed the Court had created. *Id.* at 420-21 (Rehnquist, J., dissenting). *Cf.* Bowen v. Kendrick, 108 S. Ct. 2562, 2577-78 (1988) (rejecting " 'Catch-22' argument" in finding that monitoring of grants under Adolescent Family Life Act of 1981 would not necessarily lead to impermissible entanglement problems).

66 *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 18-19 (1978-79); Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C.L. REV. 917, 929-34 (1987). Professor John Gar-

ion on questions of application, moreover, might well reflect differing commitments to the basic philosophy of separation that the Court espoused in *Everson*.[67] Nonetheless, that philosophy stands as the central theme in the Court's establishment clause jurisprudence.

Beneath the central theme of separation, however, lurks an important subtheme, evidenced by certain decisions that simply cannot be reconciled with the *Lemon* test and the *Everson* philosophy from which it arose. In *Marsh v. Chambers*,[68] for example, the Supreme Court approved the practice of prayer in state legislatures by publicly paid chaplains. Likewise, in *Lynch v. Donnelly*,[69] it upheld the use of a Christian nativity scene in a municipal Christmas display. In *Marsh*, the Court completely ignored the *Lemon* test; in *Lynch*, it purported to apply the test after describing it as one of several possible lines of analysis.[70] In each case, however, the challenged practice obviously advanced the cause of religion, both in purpose and primary effect, thereby requiring invalidation under any meaningful application of *Lemon*'s requirements.[71] The Court's decisions upholding these practices therefore reflect an important deviation from the *Lemon* test—and from the *Everson* philosophy of separation that the *Lemon* test is designed to further.[72]

The primary thrust of the Supreme Court's establishment clause doctrine, then, is to require a careful separation of religion and govern-

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vey has developed an analytical framework that might permit a more coherent and consistent treatment of parochial school aid cases. *See* Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61. For a more general proposed reformulation of *Lemon*, see Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987).

67 In each of the three recent cases discussed in the text, for example, the justices were deeply divided. *See also, e.g.*, Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (5-4 decision rejecting "facial" challenge to Adolescent Family Life Act of 1981).

68 463 U.S. 783 (1983).

69 465 U.S. 668 (1984).

70 *Lynch*, 465 U.S. at 679.

71 In *Marsh*, the Supreme Court made no claim that the challenged practice of legislative prayer could survive the first two prongs of *Lemon*, but rather ignored the *Lemon* test entirely. In *Lynch*, on the other hand, the Court stated that the city's display of the nativity scene had secular purposes—"to celebrate the Holiday and to depict the origins of that Holiday," *Lynch*, 465 U.S. at 681—and that the city had not violated the "primary effect" test because the benefits to religion were insubstantial, *see id.* at 681-83. But if Christmas has come to include both secular and religious components, the display of a nativity scene can serve no purpose except to promote the *religious* character of the holiday. For the same reason, the *primary* effect of such a display is to promote religion, regardless of whether that primary effect is substantial or modest. *See generally* Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 MD. L. REV. 352, 363-78 (1986) (criticizing *Lynch* as an "abandonment" of the principle of government neutrality with respect to religion); Dorsen & Sims, *supra* note 7, at 855 (arguing that Court improperly ignored "the particular mischief—favoritism to a *particular* religion, Christianity—of which plaintiffs were complaining") (emphasis in original).

72 These recent cases are not the only examples of this deviation. Earlier examples might include Zorach v. Clauson, 343 U.S. 306 (1952) (upholding public school "released time" for religious instruction); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws); and Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for religious organizations).

ment. This separation was first endorsed in *Everson* and has been implemented through the *Lemon* test. At the same time, however, the Court has permitted government to favor religion in selected circumstances, creating a contradictory subtheme in its doctrine.

III. THE ESTABLISHMENT CLAUSE AND THE LESS ACTIVIST MODELS OF JUDICIAL REVIEW

Taking the value of majoritarian rule as a given,[73] and accepting my earlier definition of judicial activism as the use of judicial power to frustrate that value,[74] judicial activism stands as "a deviant institution in the American democracy."[75] This deviance, however, is not uniform for all types of judicial review. Originalist review is less activist than nonoriginalist review, and the process-oriented and common values approaches to nonoriginalist review are less activist than the political-moral reasoning models.[76]

Attempts to defend judicial review, in essence, are attempts to justify the deviation from majoritarian rule that they entail. The greater the deviation, the more difficult the defense. Before attempting to defend a political-moral reasoning approach to the establishment clause, therefore, it is appropriate to consider whether less activist theories of judicial review could justify the same doctrinal result. More specifically, it is appropriate to consider whether originalism or the less activist models of nonoriginalist review are sufficient to justify the Supreme Court's establishment clause doctrine.

A. Originalism

The theoretical legitimacy of originalist judicial review has recently come under serious attack.[77] Whatever its ultimate appeal, however,

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[73] Professor Erwin Chemerinsky contends that constitutional scholars have given too much weight to this value. *See* E. CHEMERINSKY, *supra* note 6, at 3-11. *See also* M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 160-69 (1988) (arguing that the American political tradition includes an aspiration to justice as well as an aspiration to electorally accountable government); Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401 (1986) (arguing that a philosophy of "democratic collectivism" is inconsistent with the text and the original understanding of the Constitution). A defense of majoritarian rule and an evaluation of its importance relative to other values lie beyond the scope of this Article. But it seems reasonable to assume that majoritarian rule is at least important enough to justify a general presumption in favor of majoritarian decisionmaking. Under such a presumption, those who advocate deviations from majoritarian rule must shoulder the burden of justifying those deviations in functional terms or otherwise. *See generally* E. SPITZ, MAJORITY RULE (1984).

[74] *See supra* notes 28-29 and accompanying text.

[75] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

[76] *See supra* notes 28-36 and accompanying text.

[77] *See, e.g.*, Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 636-45 (1985); Simon, *The Authority of the*

originalism at least reflects popular conceptions of the decisionmaking role of judges, and it also represents the least activist form of judicial review. As compared to other models of judicial decisionmaking, originalism does less violence to the principle of majoritarian rule and—on that criterion—is comparatively less controversial.[78]

1. *The First Amendment.*—Is the Supreme Court's establishment clause doctrine a product of originalist judicial review? The Court seems to think so, for it has grounded its doctrine squarely on the shoulders of the framers.[79] In *Everson*, for example, the Court cited the views of James Madison and Thomas Jefferson.[80] Shortly before the adoption of the Constitution, Madison and Jefferson had spearheaded the drive for disestablishment in Virginia, a drive that had culminated in the enactment of the "Virginia Bill for Religious Liberty."[81] According to the Court in *Everson*, the people of Virginia had "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[82] And "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[83]

Unwilling to accept the received wisdom of *Everson*, Justice Rehnquist recently issued a forceful challenge to the Court's historical conclusions. In his dissenting opinion in *Wallace v. Jaffree*,[84] Rehnquist noted that Jefferson was not even present in the United States when the Bill of Rights was proposed and ratified, and therefore hardly could have played a "leading role" in the passage of the first amendment.[85] As for Madison, Rehnquist conceded that he "was undoubtedly the most im-

Framers of the Constitution: Can Originalist Interpretation Be Justified?, 73 CALIF. L. REV. 1482 (1985). Professor Richard S. Kay recently has discussed several common objections to originalism and has offered responses to each. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988).

78 *See supra* notes 28-36 and accompanying text.

79 *Cf.* Everson v. Board of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."). In other areas of its jurisprudence, the Court has been more willing to rely on nonoriginalist considerations. *See* Conkle, *supra* note 6, at 639-48.

80 *Everson*, 330 U.S. at 11-13.

81 *Id.*

82 *Id.* at 11.

83 *Id.* at 13. Although they wrote at greater length, the dissenters in *Everson* followed essentially the same historical analysis as the majority, and they reached a similar conclusion concerning the intended meaning of the establishment clause. *See id.* at 33-43 (Rutledge, J., dissenting).

84 472 U.S. 38 (1985).

85 *See id.* at 92 (Rehnquist, J., dissenting).

portant architect among the Members of the House of the Amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution."[86] Instead, Madison intended the establishment clause "to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion."[87] According to Justice Rehnquist, it was widely believed at the time of the first amendment's adoption that it was proper for government to further and support the cause of religion; thus, the First Congress would not have approved a general separation of religion and government, such as that reflected in *Everson* and in the *Lemon* test.[88]

In evaluating this historical debate, one must begin by recalling the majoritarian foundation of originalist judicial review. In the exercise of such review, the Court is protecting values that may conflict with contemporary government policies, but they are values that were once endorsed by a majoritarian process—the process of constitutional enactment.[89] As a result, appeals to the original understanding must be appeals to the *collective* intentions of the framers and ratifiers, that is, the collective intentions of the officials who voted to propose the enactment as well as those who voted to ratify it.[90] Thus, the norms originally embodied in the establishment clause are the norms that the framers and ratifiers collectively—and not merely Madison or any other individual—intended the clause to embrace. Conversely, if the inclusion of any norm would have caused the provision to fail in Congress or in the ratification process, that norm cannot be said to fall within the original understanding of the clause.[91]

Properly conceived, the issue that separates Justice Rehnquist from *Everson*'s historical analysis concerns the collective intentions of the framers and ratifiers. According to Rehnquist, they intended merely to prohibit certain forms of government aid for particular religions to the exclusion of others. The *Everson* Court, by contrast, found a broader

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86 *Id.* at 97-98.

87 *Id.* at 98.

88 *See id.* at 99-114.

89 *See supra* note 33 and accompanying text.

90 There is evidence that the framers and ratifiers of the original Constitution themselves might have attached special importance to the "intentions" of the ratifying states, viewed as political entities. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). *See also* Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988).

91 *Cf.* Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 802 ("The relevant intention must be the narrowest of any necessary members of the coalition that approves the language."). *See generally* Kay, *supra* note 77, at 245-51. As Justice Rehnquist suggested in his dissenting opinion in *Jaffree*, it is relevant to consider the role of legislative compromise in undertaking this analysis. *Jaffree*, 472 U.S. at 92-101 (Rehnquist, J., dissenting).

intention to prevent government from furthering religion generally, even in the absence of discrimination among religions.

Needless to say, it can be exceedingly difficult, if not impossible, to determine the original understanding of a provision in the Bill of Rights. The evidentiary materials are woefully incomplete,[92] and it is difficult to determine the relevance and relative weight of the various types of evidence that do exist.[93] The historical question addressed in the *Everson*-Rehnquist debate is one that falls prey to these evidentiary and analytical problems; as a result, it is difficult to say whether the framers and ratifiers of the establishment clause intended to adopt a broad or a more narrow prohibition on congressional action.[94] In this instance, however, the framers' and ratifiers' lack of clarity is quite understandable, for the issue that separates Rehnquist from the *Everson* Court was of only secondary importance to those who supported the establishment clause. Indeed, to focus on this issue is to ignore the motivating reason for the clause and thereby to misapprehend its original meaning.

At the time of the first amendment's adoption, the newly created American states reflected divergent views concerning the appropriate relationship between religion and government. Virginia had recently expressed a separationist philosophy in its Bill for Religious Liberty,[95] and six other states[96] also embraced anti-establishment policies. The remaining six states,[97] however, continued to maintain or authorize established religions.[98] In these latter states, at least, the prevailing political philoso-

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92 *See* L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT app. at 187-89 (1986).

93 *See* Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 772-78 (1983). A number of scholars have suggested that the difficulties inherent in the required historical inquiry render originalism an impracticable constitutional theory. *See, e.g.*, M. TUSHNET, *supra* note 14, at 32-45; Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 648-55 (1985); Brest, *supra* note 32, at 221-22; Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981). Other scholars, to the contrary, have defended the practicability of originalist interpretation. *See, e.g.*, M. PERRY, *supra* note 73, at 122-31; Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, app. at 597-602 (1985). Kay, *supra* note 77, at 236-59; Monaghan, *supra* note 5, at 377. *See generally* Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (emphasizing the need for judgment and choice in originalist interpretation).

94 For scholarly commentary supporting the conclusion reached by the Court in *Everson*, see, for example, L. LEVY, *supra* note 92, and Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986). For scholarly commentary supporting the conclusion reached by Justice Rehnquist in *Jaffree*, see, for example, C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT (1964); G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); and M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978).

95 *See* Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947).

96 Delaware, New Jersey, New York, North Carolina, Pennsylvania, and Rhode Island.

97 Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, and South Carolina.

98 A fourteenth state, Vermont, was admitted to the union after the first amendment had been

phy thus permitted the use of public power for the support and furtherance of religion.

Given this widespread and deep division, how could Congress and the ratifying state legislatures[99] have reached agreement on the establishment clause? It was supported, after all, both by separationists and by those who were committed to programs of state-sponsored religion. These various political actors simply could not have agreed on a general principle governing the relationship of religion and government, whether it be the principle endorsed in *Everson* or any other. If the establishment clause had embraced such a principle, it would not have been enacted. What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that *Congress* was not to legislate on the subject of religion,[100] thereby leaving the matter of church-state relations to the individual states.[101] This purpose honored the anti-establishment policies of states such as Virginia, but it also protected the existing state establishments from congressional interference.[102] The appropriate breadth—or at least

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passed by Congress, but before it had been ratified by the states. Vermont also maintained a system of established religion, meaning that seven of the fourteen states in existence at the time of ratification endorsed such policies.

Professor Leonard W. Levy has carefully detailed the establishment policies that prevailed in the original thirteen states, as well as Vermont, at the time of the first amendment's adoption, and I have based my summary on his work. *See* L. LEVY, *supra* note 92, at 25-62. According to Professor Levy, all of the states that maintained or authorized established religions at this time in fact endorsed policies of "multiple establishment," pursuant to which more than one denomination could receive government sponsorship and support. *See id.*

99 Among the required three-fourths of the states that ratified the first amendment were Maryland, New Hampshire, South Carolina, and Vermont, each of which maintained or authorized established religions. The other three establishment states, Connecticut, Georgia, and Massachusetts, delayed their ratification of the Bill of Rights until the twentieth century. Their original failure to ratify, however, apparently was premised not on a disagreement with the proposed limitations on national power, but rather on a belief that the proposed limitations were superfluous, the national government being already confined to the exercise of its enumerated powers. *See* L. LEVY, *supra* note 92, at 85-86.

100 *Cf.* Kurland, *supra* note 66, at 13 ("The primary purpose of the amendment was to keep the national government out of religious matters."). *See generally* Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 843-44 (1986).

101 As a result, the establishment clause could be supported even by those who endorsed a policy of state support for religion, a view most prominently associated with the New England states:

> [A]t least in New England, a view of government prevailed which not merely permitted but required a state's public power to be exercised for the advancement of religion. Nothing in the materials with which I am familiar would indicate, however, that any New England statesman or churchman saw that power as one appropriate to the federal government. Parochial considerations with respect to how national authority, if it should exist, might be brought to bear upon the churches of New England reinforced the logic of federalism to convince the Yankee that Congress should make no laws respecting an establishment of religion.

M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 26 (1965).

102 *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371 (1954).

the appropriate phrasing—of the establishment clause was a matter that received considerable attention in the First Congress, but primarily as an issue concerning the appropriate *means* for effecting a policy of federalism on questions of church and state.[103]

When the original Constitution was proposed and ratified, it was widely understood that, even without the first amendment, the newly created national government would have no power on the subject of religion. James Madison himself, for example, believed that there was "not a shadow of right in the general government to intermeddle with religion" and that the "least interference with it would be a most flagrant usurpation."[104] The national government was conceived as a government of limited and enumerated powers, and these powers did not extend to matters of religion.[105]

The Bill of Rights was designed, in the words of Madison, "to extinguish from the bosom of every member of the community" any fear that the national government would exceed its stated powers and thereby encroach upon the rights of individuals and of the states.[106] On many of the subjects addressed—freedom of expression and the rights of the criminally accused, for example—the framers and ratifiers may have formulated and agreed upon general principles concerning the role of government and the rights of individuals, principles as suitable for application to the states as to the federal government.[107] Because there was no fear of encroachment by state government, there was no need to make the Bill of Rights enforceable against the states.[108] But many of its principles would have been widely endorsed by the framers and ratifiers as principles to which each state should adhere.

The establishment clause, by contrast, could not have reflected such

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103 *See* L. LEVY, *supra* note 92, at 75-84; Snee, *supra* note 102, at 379-89. *See also* T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 213 (1986) (characterizing the debate in the First Congress as "a discussion about style, not substance"). *But see* Laycock, *supra* note 94, at 908 (arguing that "when the Framers debated the details of the religion clauses, their views on religious liberty were more salient than their views on federalism").

104 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330 (J. Elliot 2d Ed. 1836).

105 *See* L. LEVY, *supra* note 92, at 65-66. The early national government did exercise power over certain matters of religion when it was governing in the absence of competing state authority, as, for example, in the western territories. *See* G. BRADLEY, *supra* note 94, at 95-104.

106 *See* 1 ANNALS OF CONG. 431-32 (1789) (remarks of Rep. Madison).

107 *See generally* L. LEVY, *The Bill of Rights*, in CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 105 (1986); L. LEVY, EMERGENCE OF A FREE PRESS (1985). *But cf.* Van Alstyne, *Congressional Power and Free Speech: Levy's* Legacy *Revisited* (Book Review), 99 HARV. L. REV. 1089, 1095-99 (1986) (arguing that federalism was the principal issue for the framers of the first amendment even with respect to freedom of expression, and that the amendment was intended to remove from Congress and reserve to the states a broad range of power concerning the regulation of speech and press).

108 *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

a general principle, for the framers and ratifiers could not have agreed on its content. Instead, perhaps more than any other provision in the first eight amendments, it was designed to restrain the national government because it *was* the national government, not because the national government might violate principles that needed no further protection in the states. As a statement of general principle, the establishment clause would not have been enacted. As a statement of federalism, it was widely supported.[109]

The establishment clause, as originally understood, thus was animated by the policy of federalism. This conclusion does not resolve the *Everson*-Rehnquist debate, but it may help explain the historical arguments that have been advanced. The issue for the framers and ratifiers was, in essence, how to effectuate the basic policy of federalism on which they all agreed. If they intended the more narrow prohibition suggested by Justice Rehnquist in *Jaffree*, they did so because they were satisfied that such a prohibition would resolve their federalism concerns. If, on the other hand, they intended the broader prohibition identified by the Court in *Everson*, it was because they embraced an even stronger policy of federalism, one that would remove from Congress and preserve to the states an even broader segment of legislative power.

As applied to congressional legislation, the original understanding of the establishment clause depends on a resolution of the *Everson*-Rehnquist debate. Although Justice Rehnquist's arguments are not without merit, the *Everson* Court's position is at least equally forceful.[110] The resolution of this debate, however, is of limited importance, because the Court's establishment clause cases typically address state, not federal, government policies. Even assuming that *Everson* correctly identified the original understanding of the establishment clause as applied to federal action, the historical premise for applying this prohibition to the states remains to be examined.

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109 Professor William Van Alstyne has noted that federalism was only one of three basic principles that supported the adoption of the establishment clause (and the religion clauses generally), the other two being religious voluntarism and separatism. *See* Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 772-78. As to the motivations of a number of framers and ratifiers, Van Alstyne's point is well-taken. But the principles of voluntarism and separatism, as general principles concerning the proper relationship of religion and government, certainly were not supported by those from states maintaining established religions. As a result, those principles cannot properly be found in the original understanding of the establishment clause, for the clause would not have been enacted had it been understood to include them.

110 A study by Professor Leonard W. Levy strongly supports the *Everson* Court's reading of the historical record. *See* L. LEVY, *supra* note 92. This study expands upon earlier work in which Levy presented similar arguments. *See* L. LEVY, *No Establishment of Religion: The Original Understanding*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 169 (1972). For an argument that Levy's conclusion is sound but his reasoning faulty, see Laycock, *supra* note 94, at 906-13.

2. *The Fourteenth Amendment.*—In his dissenting opinion in *Jaffree*, Justice Rehnquist took the *Everson* Court to task for its reading of the history of the first amendment. At the same time, however, he accepted without challenge the *Everson* Court's " 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment."[111] But if the historical evidence is mixed concerning *Everson*'s first amendment conclusions, the evidence concerning "incorporation" points clearly against the Court's position. That evidence strongly suggests that the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to state government action.

Unlike Justice Rehnquist, the district court in *Jaffree* had been unwilling to acquiesce on the historical validity of incorporation. Reaching a conclusion that the Supreme Court would later describe as "remarkable,"[112] the district court had found that the fourteenth amendment did not render the establishment clause applicable to the states and that, therefore, the Constitution left the states free to maintain whatever church-state relations they might desire.[113] It is of course "remarkable" for a lower federal court to flout well-settled Supreme Court doctrine, but the district court's historical conclusion, in its own right, is not in the least remarkable. To the contrary, the district court supported its decision with a careful analysis of the historical evidence regarding the adoption of the fourteenth amendment.

Relying heavily on the work of Professor Charles Fairman,[114] the district court concluded that the fourteenth amendment was not intended to make any of the Bill of Rights applicable against the states:

> The debates in Congress at the time the fourteenth amendment was being drafted, the re-election speeches of the various members of Congress shortly after the passage by Congress of the fourteenth amendment, the contemporaneous newspaper stories reporting the effect and substance of the fourteenth amendment, and the legislative debates in the various state legislatures when they considered ratification of the fourteenth amendment indicate that the amendment . . . was not intended to incorporate the federal Bill of Rights (the first eight amendments) against the states.[115]

Fairman's historical analysis, of course, has not gone unchallenged,[116]

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111 Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

112 *See id.* at 48 (majority opinion).

113 Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1118-26 (S.D. Ala. 1983), *rev'd sub nom.* Jaffree v. Wallace, 705 F. 2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

114 Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

115 Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1119.

116 For an early attack on Fairman's work, see Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). *See also* Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954). For more recent commentary on the historical validity of incorporation, see, for example, R. BERGER, *supra* note 5, at 134-56

and the evidence suggesting a contrary historical conclusion can hardly be dismissed as a "few stones and pebbles."[117] Given the radical effect of incorporation in transferring power from the state to the national level, however, it is incumbent on those opposing Fairman to present clear and persuasive evidence in support of their position—evidence sufficiently powerful to establish that not only the congressional framers of the fourteenth amendment, but also its ratifiers in the various state legislatures, in fact intended to work a truly revolutionary change in the allocation of state and national power. This is not an easy case to make. Thus, it is perhaps not surprising that the Supreme Court in *Jaffree* made no real attempt to rebut the district court's acceptance of Fairman's historical argument; instead, the Supreme Court relied largely on the force of precedent as support for its fervent reaffirmation of the doctrine of incorporation.[118]

As the district court opinion in *Jaffree* suggests, it is not clear that the fourteenth amendment was originally intended to make *any* of the Bill of Rights applicable against the states.[119] In any event, there is more specific evidence that the framers and ratifiers of the fourteenth amendment, whatever their intentions with respect to the Bill of Rights generally, at least did not intend to incorporate *the establishment clause* for application to the states. In 1875 and 1876, *after* the adoption of the fourteenth amendment, Congress considered, but rejected, a resolution that was specifically designed to make the religion clauses of the first amendment applicable to the states. The proposed "Blaine Amendment" would have provided that "[n]o *State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."[120] The

(supporting Fairman's position); L. LEVY, *The Fourteenth Amendment and the Bill of Rights*, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64 (1972) (agreeing that there is little historical evidence in support of incorporation); M. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that the fourteenth amendment *was* intended to incorporate the Bill of Rights); Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235, 269-75 (1984) (suggesting that the fourteenth amendment probably was intended to incorporate the Bill of Rights); and Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933 (1984) (accord).

117 Fairman, *supra* note 114, at 134. Most notably, the historical record reveals that two of the leading congressional proponents of the fourteenth amendment, Congressman Bingham and Senator Howard, believed that the amendment would incorporate the Bill of Rights. *See* M. CURTIS, *supra* note 116, at 57-91. *See also* Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1256-59 (1987).

118 *See Jaffree*, 472 U.S. at 48-55.

119 There is one important exception to this proposition. The fifth amendment, applicable to the federal government, provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. In the same wording, the fourteenth amendment extends this prohibition to the states. *Id.* at amend. XIV, § 1. Needless to say, the fourteenth amendment's explicit "incorporation" of a single provision of the Bill of Rights does little to support a broader theory of incorporation, and it may even support a negative inference to the contrary.

120 H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875) (emphasis added). Thus, just

Blaine Amendment received considerable attention in Congress, and it passed in the House of Representatives before being defeated in the Senate.[121]

Post-ratification congressional action or inaction is ordinarily a hazardous basis for determining the original meaning of a constitutional amendment.[122] The Congress that considered the Blaine Amendment was not the Thirty-Ninth Congress, which had proposed the fourteenth amendment, and, in any event, Congress's rejection of the Blaine Amendment could have been grounded on a belief that the fourteenth amendment had already accomplished the object of the new amendment, making it superfluous. But the Congress that considered the Blaine Amendment acted only eight years after the fourteenth amendment had been ratified. It included some twenty-three members of the Thirty-Ninth Congress, two of whom had been members of the Joint Committee on Reconstruction, which had drafted the fourteenth amendment.[123] Thus, if the Blaine Amendment had been thought superfluous in light of the fourteenth amendment, at least some indication of this belief surely would appear in the legislative history of the Blaine Amendment. The historical record, however, contains no such evidence. To the contrary, the record suggests a congressional understanding that the proposed amendment would "prohibit[] the States, *for the first time*, from the establishment of religion [and] from prohibiting its free exercise."[124] The

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as the fourteenth amendment copied the language of the fifth amendment's due process clause, the Blaine Amendment copied the language of the first amendment's religion clauses. *See supra* note 119.

As introduced in the House of Representatives, the proposed amendment provided in full as follows:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id. The language of the proposed amendment was revised in the course of its consideration by the House and Senate, but its central meaning remained the same, and its initial clause, tracking the language of the first amendment, was not altered.

121 *See* 4 CONG. REC. 5189-92, 5245, 5453-57, 5561-62, 5580-95 (1876).

122 *Cf.* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 530 (1982) ("[J]ustifying an interpretation of a prior enactment by pointing to what a *subsequent* Congress did *not* enact seems incompatible with our constitutional structure.") (emphasis in original). *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 179-83 (1975).

123 *See* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 & n.14 (1951).

124 *See* 4 CONG. REC. 5561 (1876) (statement of Sen. Frelinghuysen). The record is replete with evidence that the Blaine Amendment's application of the religion clauses to the states was not thought superfluous by either the supporters or the opponents of the proposed enactment. *See, e.g.*, *id.* at 5191 (statement of Rep. Banks) ("[I]t prohibits the States from exercising the power they now exercise."); *id.* at 5245 (statement of Sen. Christiancy) ("[I]t is . . . imposing on the States what the Constitution already imposes on the United States . . . ."); *id.* at 5454 (statement of Sen. Randolph)

inference seems inescapable: the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to the states.[125]

There is substantial historical evidence, then, that whatever their intentions with respect to the Bill of Rights generally, the framers and ratifiers of the fourteenth amendment did not intend to incorporate the establishment clause for application against the states. Although this

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("It is simply an additional inhibition upon the States; no more, no less."); *id.* at 5561 (statement of Sen. Frelinghuysen) ("[It] extends the prohibition of the first amendment of the Constitution to the States."); *id.* at 5583 (statement of Sen. Whyte) ("[The first amendment] leaves the whole power for the propagation of [religion] with the States exclusively; and so far as I am concerned I propose to leave it there also."); *id.* at 5591 (statement of Sen. Bogy) ("For one hundred years the States have existed; and for all this time they have had the power of legislation on this subject . . . ."); *id.* at 5592 (statement of Sen. Eaton) ("We have got on for a hundred years without it, and I beg leave to say that we shall get along for another hundred years without it."). *See generally* O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L.J. 137 (1963).

125 Professor Leo Pfeffer has argued that my suggested inference is *not* inescapable. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 147 (rev. ed. 1967). He points to the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which were decided in the years between the adoption of the fourteenth amendment and consideration by Congress of the proposed Blaine Amendment. In the *Slaughter-House Cases*, the Supreme Court had given a narrow reading to the privileges or immunities clause of the fourteenth amendment, a reading that precluded any "incorporation" of the Bill of Rights on the basis of that clause. Pfeffer argues that the fourteenth amendment in fact *had* been intended to work such an incorporation, that the Supreme Court's decision was therefore erroneous, and that the Blaine Amendment might have been designed to "correct" this error by explicitly "overruling" the Court's decision.

It would have been curious indeed, however, for Congress to "correct" the Court's refusal to sanction an incorporation of the Bill of Rights by adopting a constitutional amendment dealing only with the establishment and free exercise of religion. It is not surprising, therefore, that the legislative history of the Blaine Amendment belies Pfeffer's thesis. The congressional debates on the Blaine Amendment do include a single, oblique statement that might have been directed toward the Supreme Court's ruling in the *Slaughter-House Cases*. Defending the detailed language that the Senate had added to the House version of the proposed amendment, Senator Morton commented as follows:

> It is very important to have this resolution specific. In framing constitutional amendments the objection is that they are too general in their character. The fourteenth and fifteenth amendments which we supposed broad, amble, and specific, have, I fear, been very much impaired by construction, and one of them in some respects almost destroyed by construction. Therefore I would leave as little as possible to construction. I would make them so specific and strong that they cannot be construed away and destroyed by courts.

4 CONG. REC. 5585 (1876) (statement of Sen. Morton). But other comments by Senator Morton undercut any claim that he believed the Blaine Amendment would simply re-enact what the Supreme Court erroneously had failed to find in the fourteenth amendment:

> [The Blaine Amendment] cannot become a part of the fundamental law unless three-fourths of the States agree to it. We cannot take the power from the States by passing it here. . . . If the States agree to it and give up this power it is all right. They have nobody to blame but themselves. If three-fourths of them agree to it, then it becomes the law of the land, just like any other constitutional amendment.

Id. at 5594 (statement of Sen. Morton). The remainder of the legislative record, moreover, offers not a trace of support for Pfeffer's argument. *See supra* note 124.

In his recent book, Michael Kent Curtis has advanced an argument similar to Pfeffer's in an attempt to explain the Blaine Amendment. *See* M. CURTIS, *supra* note 116, at 169-70. Curtis's argument is no more convincing than Pfeffer's, because it suffers from the same weaknesses.

conclusion is firmly supported by the evidence, some might choose to read the historical record differently.[126] I turn next, therefore, to two additional—and even more basic—reasons for rejecting the historical validity of incorporation with respect to the establishment clause. These reasons depend more on an analysis of language and logic than on historical evidence that some may regard as controversial, and they independently compel a rejection of the incorporation argument.

First, there is the problem of language. By prohibiting laws "respecting an establishment of religion,"[127] the establishment clause states a limitation on the power of government. But unlike the other provisions of the Bill of Rights, this clause does not designate any obvious individual beneficiaries. Indeed, a prohibition on establishment might serve a variety of purposes beyond protecting the rights of particular individuals.[128] Thus, it is not easy to see how the language of the fourteenth amendment, even if read broadly, can be said to incorporate this provision for application to the states.

The "incorporating" language of the fourteenth amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[129] Putting aside the question of whether these words fairly can be read to incorporate *any* of the Bill of Rights, note that the words at least would limit any such incorporation to the protection of "privileges" and "immunities" of "citizens," as well as the rights of "persons" to be free from unlawful "deprivations" of life, liberty, or property. These limitations would seem to exclude the establishment clause.[130] Concededly, this problem could be resolved through a skillful manipulation of the pertinent constitutional language.[131] But the very need for

126 *See generally* R. SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION 133-70 (1987) (suggesting that the historical record is insufficient either to establish or to refute the claim that the fourteenth amendment incorporated the religion clauses for application against the states).

127 U.S. CONST. amend. I.

128 *See infra* notes 205-69 and accompanying text.

129 U.S. CONST. amend. XIV, § 1.

130 *Cf.* E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 113-14 (1951) (arguing that the establishment clause does not protect any individual "liberty" that can properly be absorbed within the fourteenth amendment); M. HOWE, *supra* note 101, at 73 ("[I]t is not easy to see how . . . laws . . . which, although they may respect an establishment, do not deny liberty can be made into unconstitutional deprivations of liberty."). On the other hand, these same limitations might not impose a purely textual barrier to an incorporation of the free exercise clause.

131 In School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), Justice Brennan made such an effort, arguing essentially that the establishment clause prohibition can be read as a guarantee of religious liberty. *See id.* at 256-58 (Brennan, J., concurring). *See also* Wallace v. Jaffree, 472 U.S. 38, 48-55 (1985). For a rebuttal of Brennan's argument, see P. KAUPER, RELIGION AND THE CONSTITUTION 56-57 (1964).

such manipulation undercuts a claim that the words were originally intended to have the ascribed meaning.

Second, an originalist incorporation of the establishment clause for application to the states creates logical difficulties. The originalist contention is that the framers and ratifiers of the fourteenth amendment intended to incorporate by reference the Bill of Rights, making its norms—as originally understood for application to the federal government—apply to the states in the same way. But recall the original understanding of the Bill of Rights, and especially the narrow, federalistic purpose that underlay the establishment clause.[132] To the extent that a provision in the Bill of Rights, as originally understood, reflected a general principle concerning the proper role of government and the rights of individuals, the framers and ratifiers of the fourteenth amendment might logically have concluded that the federal constitution should be extended to protect that principle against state as well as federal infringement. But the establishment clause, as originally understood, did not embrace any such general principle; it embraced only a policy of *federalism* on the subject of church and state. To "incorporate" this policy of states' rights for application *against* the states would be utter nonsense, for there would be no norms to incorporate. It would be the incorporation of an empty set of values, akin to an incorporation of the tenth amendment for application against the states.[133]

To be sure, the framers and ratifiers of the establishment clause intended to preclude the federal government from taking certain action. If we accept the *Everson* side of the *Everson*-Rehnquist historical debate, for example, the establishment clause denied to the federal government a broad range of power with respect to religious matters. Theoretically, the framers and ratifiers of the fourteenth amendment could have intended to "incorporate" this prohibition for application to the states, thereby precluding the states from exercising any power with respect to religion that was previously denied to the federal government. Even though the establishment clause was designed to further the end of federalism, its prohibitions against the federal government could be extended to the states for other reasons. This argument would provide a set of norms to be incorporated, thereby avoiding the problem of an empty set. The argument would require us to assume, however, that the framers and ratifiers of the fourteenth amendment meant to impose on the states, as a general principle concerning the proper role of government, a rule that had been formulated only as a means for allocating authority between the federal and state governments. This would have been a truly radical, if not mindless, act of incorporation, an act we should not readily impute

132 *See supra* notes 95-109 and accompanying text.

133 *Cf.* Snee, *supra* note 102 (arguing that the establishment clause did not create constitutional rights, and that the "liberty" of the fourteenth amendment therefore cannot be read to incorporate its prohibitions).

to the officials who adopted the fourteenth amendment.[134]

The language of the fourteenth amendment, coupled with the federalistic motivation for the establishment clause, make it exceedingly difficult to argue that the framers and ratifiers of the fourteenth amendment intended to incorporate the establishment clause for application against the states. At the very least, the problems of language and logic discussed above impose a heavy burden of persuasion on those who wish to advance such an historical argument. Given that the historical argument for incorporating *any* of the Bill of Rights is difficult, and given the circumstances surrounding the Blaine Amendment, I cannot imagine how that burden could be met.[135]

3. *Inaccurate History and Judicial Activism.*—As applied to federal action, the Supreme Court's establishment clause doctrine can be defended in originalist terms. To this extent, although *Everson*'s reading of the historical record is controversial, it is at least as plausible as the contrary reading advanced by Justice Rehnquist in *Jaffree*. Giving the Court the benefit of the doubt, let us assume that the *Everson* view on this matter is not merely plausible, but is historically correct.

The Court's establishment clause cases, however, almost invariably address state, not federal, government policies, and therefore depend on a theory of fourteenth amendment incorporation. More precisely, these cases depend on a premise that the establishment clause prohibition on federal action—although actually adopted to resolve federalistic con-

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134 Such an act of incorporation would not have been so radical, or at least not so mindless, if the framers and ratifiers of the fourteenth amendment had consciously determined that the provisions of the establishment clause henceforth should be *read* to embody a general principle concerning the proper role of government and, on that understanding, should be applied against the states as well as the federal government. Indeed, the supporters of the proposed Blaine Amendment apparently were prepared to make such a determination. *See supra* notes 119-25 and accompanying text. The fact remains, however, that this type of incorporation decision is sufficiently unusual that we should not readily impute it to government officials, at least not in the absence of conscious deliberation of the sort that accompanied Congress's consideration of the Blaine Amendment.

135 Professor Ira C. Lupu has argued that nonestablishment principles can be derived directly from the equal protection clause of the fourteenth amendment, rendering an incorporation of the establishment clause unnecessary. *See* Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 743 (1986). *Cf.* Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 324 (1986) (suggesting that an equal protection approach may render less problematic an incorporation of the religion clauses "as a unified package of personal religious freedoms"). Lupu relies not on the "original and particularized concern" of the equal protection clause, however, but rather on an "evolving" modern conception of that clause, one that permits recognition of a principle of "equal religious liberty." *See* Lupu, *supra*, at 743. Lupu's equal protection arguments have considerable power, and to some extent complement the arguments that I offer later in defense of the Supreme Court's establishment clause doctrine. *See infra* notes 230-57 and accompanying text. But Lupu's arguments, no less than my own, are decidedly nonoriginalist in character. They provide no *originalist* reason for applying nonestablishment principles to the states in the absence of incorporation.

cerns—should be applied to the states as though it reflected a general principle concerning the proper relationship of religion and government. But as I have shown, such a premise cannot be justified by reference to the original understanding of the first and fourteenth amendments, and therefore cannot be defended as a product of originalist judicial review. Instead, the Court is enforcing values that no set of framers and ratifiers intended to be enforced against the states.

Assuming that the Court takes its history seriously, however, the Court's historical premise—though inaccurate—does limit the Court to a closed set of norms, those placed in the Constitution by the framers and ratifiers of the first amendment. This set of norms was designed to serve the purpose of allocating power between the federal and state governments, a purpose bearing no meaningful relationship to the purposes served by the Court's application of these norms to the states. The norms do fall within a closed set, however, and this provides a quantitative limit[136] on the Court's use of the establishment clause as a vehicle for imposing constitutional restraints on the majoritarian actions of state governments. Thus, the Court can find that a state has violated the Constitution only if the state's exercise of power would have been denied to the federal government by the framers and ratifiers of the establishment clause. This quantitative limitation confines the Court's exercise of judicial review, precluding the recognition of constitutional restraints beyond those provided by the Court's (mistaken) incorporation of the original establishment clause restraints on federal action. On this quantitative criterion of judicial activism, the Court's review, although it cannot properly be regarded as originalist, is characterized by similar limitations and is equally nonactivist.

A proper measure of the Court's judicial activism, however, must also include a qualitative evaluation—that is, an evaluation of the extent to which the Court's method of decision dishonors majoritarian values. On this score, the Court's establishment clause doctrine, understood as a product of mistaken historical analysis, stands as an extremely activist doctrine, for it bears no meaningful relationship to majoritarian values. Originalist judicial review can claim at least an historical majoritarian foundation; it recognizes constitutional restraints on government, and thus on majoritarian action, but these restraints are ones that were originally placed in the Constitution through the majoritarian process of constitutional enactment. Because no group of framers and ratifiers ever chose to impose establishment clause limitations on the states, the Court's own imposition of those limitations has no majoritarian sanction of this type.

Consider, moreover, the source of the Court's decisional norms if it

136 On the distinction between quantitative and qualitative measures of judicial activism, see *supra* notes 28-36 and accompanying text.

is engaged in the process of mistaken historical analysis that I have posited: in applying establishment clause principles to the states, the Court is using a set of norms that was adopted nearly 200 years ago to serve a entirely unrelated purpose. On this view, any relationship between the Court's modern constitutional doctrine and majoritarian values, past or present, would be purely coincidental. To be sure, certain supporters of the first amendment—those from Virginia, for example—might happily have endorsed the modern Court's establishment clause doctrine,[137] and certain supporters of the fourteenth amendment might conceivably have held similar individual views. But the individual views of particular framers or ratifiers—not embodied in constitutional enactments—cannot form the predicate for originalist judicial review. Such a selective history, again, yields no logical connection to majoritarian values.

The Court's establishment clause doctrine, then, can be viewed as a product of mistaken history. As such, it would properly be regarded as relatively nonactivist on a quantitative scale, but strikingly activist in its qualitative character. This activism, moreover, would be patently indefensible. It may be appropriate for the Court to frustrate modern majorities in order to honor the original understanding of the Constitution.[138] And it may also be appropriate, as I will argue later, for the Court to go beyond the original understanding and determine the proper relationship of religion and government through a thoughtful exercise of nonoriginalist judicial review.[139] But to use inaccurate history as the basis for imposing constitutional restraints on government is absurd. If the Court's establishment clause doctrine can be justified, it must be for other reasons, reasons that transcend the mistaken history on which the Court claims to rely.

4. *Originalism and the Supreme Court's Subtheme.*—Although the Supreme Court's basic *Everson* doctrine, as implemented through the *Lemon* test, requires a careful separation of religion and government, the Court's subtheme permits the government to favor religion in certain circumstances.[140] One might argue, moreover, that while the Court's *Everson* doctrine cannot be defended in originalist terms, its subtheme can be. In *Marsh v. Chambers*,[141] for example, the Court conspicuously relied on the original understanding of the Constitution as support for a "subtheme" ruling that upheld the constitutionality of legislative prayer. The

137 *See supra* notes 80-82 and accompanying text. *But cf.* G. BRADLEY, *supra* note 94, at 35-41, 130-31 (arguing that Virginia's experience in the founding era in fact was less separationist than we have come to believe).

138 Professor Larry Simon has suggested that this assumption is not necessarily valid. *See supra* note 77.

139 *See infra* notes 197-311 and accompanying text.

140 *See supra* notes 68-72 and accompanying text.

141 463 U.S. 783 (1983).

Court noted that the practice of legislative prayer had been specifically approved by the First Congress, the same Congress that had framed the first amendment, and that therefore the Court could not properly find that this practice violates the establishment clause.[142] The Court made no pretense of applying *Everson* or the *Lemon* test. Rather, the Court in effect recognized an exception to its usual establishment clause doctrine: any government practice that would otherwise violate the Court's doctrine is immune from invalidation if the practice was specifically present in the minds of the framers and ratifiers of the first amendment and if they did not disapprove it.[143]

If the Court's *Everson* doctrine were itself derived from originalist judicial review, then the *Marsh* exception would seem entirely appropriate, for the specific intentions of the framers and ratifiers properly could be read to limit whatever general principles they otherwise appeared to endorse. But the Court's *Everson* doctrine, as applied to the states, cannot be defended as a product of originalist review. As a result, the *Everson* doctrine and the *Marsh* exception reflect a selective—and arbitrary—use of originalist review. When a case falls within the *Marsh* exception, the Court upholds the practice under attack on the ground that the framers and ratifiers did not intend to ban it. But the framers and ratifiers did not intend to ban *any* of the practices that the Court has invalidated in applying the establishment clause to the states. As an attempted exercise of originalist judicial review, the Court's *Everson* doctrine is indefensible, resting as it does on the historically inaccurate and anomalous "incorporation" of federalism-based principles. The *Marsh* exception, which heralds deference to the original understanding of the Constitution, does nothing more than exacerbate the Court's cut-and-paste use of the historical record.

B. Process-Oriented Theories of Nonoriginalist Review

Because the Supreme Court's establishment clause doctrine cannot be justified under a theory of originalist judicial review, any defense of the doctrine must move beyond the Court's stated reliance on the original understanding. An alternative *non*originalist theory must be advanced to substitute for the Court's failed attempt to defend its doctrine in originalist terms.

Although nonoriginalist judicial review is more activist than originalist review, some types of nonoriginalist review are less activist than others. In particular, the process-oriented, *Carolene Products*-type

142 *See id.* at 787-92.

143 *Cf.* Tennessee v. Garner, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting) ("[F]idelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the [constitutional provision] was adopted are now constitutionally impermissible.") (emphasis in original).

models are among the least activist, because they are designed not so much to check the majoritarian process as to perfect its procedural operation. They are comparatively less activist than other nonoriginalist models because they are comparatively less offensive to the basic value of majoritarian rule.[144]

To be taken seriously, any theory of judicial review, process-oriented or otherwise, must consider the proper institutional role of the judiciary in relation to the majoritarian branches of government.[145] What distinguishes process theory, and makes it comparatively nonactivist, is that process theory would restrict the judiciary to a very limited institutional role—that of policing the majoritarian process for participational imperfections. In the words of Professor John Hart Ely, process-oriented judicial review "can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."[146]

These "questions of participation" can support the judicial invalidation of majoritarian decisions in two distinct settings. First, the Supreme Court properly may invalidate majoritarian policies that directly or indirectly restrict political participation. Second, the Court properly may invalidate majoritarian policies that are not themselves addressed to political participation if such policies would not have been adopted in the absence of participational defects in the majoritarian process. Process-oriented nonoriginalist review thus permits the Court to invalidate procedural restrictions on political participation as well as substantive policies that result from participational defects.[147] Each type of process-oriented

144 *See supra* notes 28-36 and accompanying text.

145 As Professor Neil K. Komesar has noted, the Supreme Court's recognition of constitutional restraints on government reflects an allocation to the judiciary of decisionmaking responsibility. As a result, Komesar urges "a comparative institutional approach to constitutional law." Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 366 (1984) [hereinafter Komesar, *Taking Institutions Seriously*]. Under this approach, the Court would assess its own capabilities, as well as those of the government institution whose decision is under attack, in determining which institution is better capable of addressing the social issue involved. Only when the Court has a superior institutional ability to confront a particular issue, writes Komesar, should it take it upon itself to overturn the challenged government decision as a violation of constitutional law. *See id.* at 367-68. *See also* Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U.L. REV. 191 (1987); Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988).

146 J. ELY, *supra* note 22, at 181. For arguments that question the feasibility of separating issues of process from issues of substance, see, for example, Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981), and Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

147 These two basic themes can be derived from the Supreme Court's *Carolene Products* footnote. *See supra* note 20 and accompanying text. *See also* J. ELY, *supra* note 22, at 75-77. My discussion of process theory, however, is not tied to the particular language of that footnote. *See supra* notes 21-22 and accompanying text.

review is at least arguably implicated by the Court's establishment clause doctrine.

1. *Restrictions on Political Participation.*—Although she has not rejected the originalist pedigree that the Supreme Court claims for its establishment clause doctrine, Justice O'Connor recently has offered a "clarification" of that doctrine that directly considers the political process functions that it serves.[148] Justice O'Connor argues that the establishment clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community,"[149] a prohibition that she sees amplified in *Lemon*'s three-pronged test.[150] According to Justice O'Connor, the "secular purpose" and "primary effect" requirements of *Lemon* implement a prohibition on "government endorsement or disapproval of religion":[151] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[152] As Justice O'Connor views it, the final prong of *Lemon*, in prohibiting an excessive government entanglement with religious institutions, also serves a largely political function: such an entanglement may "give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines."[153]

On one reading,[154] Justice O'Connor's "clarification" can be viewed as a process-based defense of the separationist doctrine of *Everson*, as implemented through the *Lemon* test. So understood, Justice O'Connor's approach may suggest a justification for the Court's doctrine that transcends the original understanding of the first and fourteenth amendments, and that rests instead on the functional desirability of judicial enforcement of participational values. More specifically, O'Connor may be suggesting that the Court properly may utilize the establishment

148 *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

149 *Id.*

150 For a discussion of the *Lemon* test and its application by the Supreme Court, see *supra* notes 46-67 and accompanying text.

151 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). *See id.* at 690-94 (elaborating this view and applying it to the case at hand).

152 *Id.* at 688. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community." *Id.* at 692.

153 *Id.* at 688. *But cf.* Aguilar v. Felton, 473 U.S. 402, 429-30 (1985) (O'Connor, J., dissenting) (questioning whether entanglement should be retained as independent prong of *Lemon* test).

154 Later I will argue that Justice O'Connor's observations can also be read to support the Supreme Court's establishment clause doctrine under a theory of political-moral reasoning. *See infra* notes 233-38 & 249-52 and accompanying text.

clause to ensure that persons are not denied fair access to the political process on the basis of their religious affiliation or beliefs.

Viewed as a process-based argument, Justice O'Connor's position may be persuasive to the extent that the Court's establishment clause doctrine addresses direct or indirect barriers to political participation. The Court's establishment clause doctrine does preclude direct barriers to political participation, such as religion-based prohibitions on the holding of elected office,[155] and it precludes certain indirect barriers as well, such as the exclusion from power that results from religion-based allocations of quasi-government authority.[156] These components of the Court's doctrine can be seen to reflect a process-oriented requirement that participational rights not be restricted on the basis of religion.[157]

These are very minor aspects of the Court's establishment clause doctrine, however, as the doctrine has been used to invalidate countless government policies that bear no meaningful connection, direct or indirect, to restrictions on political participation. To defend the bulk of the Court's establishment clause doctrine, Justice O'Connor must move beyond restrictions on political participation and focus instead on other evils that she perceives in laws that violate *Everson* and the *Lemon* test. Thus, she speaks of the evil of creating "political constituencies defined along religious lines"[158] and the evil of government "endorsement" or "disapproval" of religion, which sends "messages" of "insider" or "outsider" political status.[159] Political constituencies form along numerous lines, however, and all government actions send "messages" of "endorsement" and "disapproval." Justice O'Connor's position therefore depends on a belief that religion is special—that religion is qualitatively different from nonreligious matters, thereby requiring different treatment in the political process.

As I will argue later, religion *is* qualitatively different from nonreligious matters, thereby requiring different treatment in the political process.[160] Thus, perhaps the Court *ought* to take a nonoriginalist view of

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155 *See, e.g.*, McDaniel v. Paty, 435 U.S. 618 (1978). Although the plurality opinion in *McDaniel* relied on the free exercise clause, the *Lemon* test would have required a similar conclusion under the establishment clause as well. *See id.* at 636-42 (Brennan, J., concurring in the judgment). *Cf.* Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (finding that religious test for public office unconstitutionally invades "freedom of belief and religion").

156 *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (invalidating Massachusetts statute that granted churches power to veto applications for liquor licenses to be used in their neighborhoods).

157 *Cf.* McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("[G]overnment may not . . . fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.")

158 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

159 *Id.*

160 *See infra* notes 205-89 and accompanying text.

the establishment clause that works to retard the creation of religion-based political constituencies and that works to discourage government from sending messages that endorse or disapprove religion. But such conclusions, however sound, cannot be defended as the product of process theory.

Process theory is relatively nonactivist precisely because it deals "only with questions of participation, and not with the substantive merits" of majoritarian policymaking. Process theory may serve to justify the elimination of barriers to political participation, for this task plausibly can be carried out with reference only to nonsubstantive, participational values. Such values may call for a general opening of the political process so that "the people," through their elected representatives, can make informed substantive decisions in the crucible of a full and open political debate that includes fair representation of all competing views. Process theory therefore may support an open system of government that includes a strongly enforced freedom of expression and a broad extension of the voting franchise and access to the ballot.[161] By contrast, the essence of Justice O'Connor's establishment clause argument actually calls for the Court not to open, but to *restrict*, the operation of the political process by *foreclosing* certain types of political activity—the formation of certain types of political coalitions and the formulation of certain types of substantive government policies.

Justice O'Connor's approach would have the Court enforce a particular vision of politics, but a vision that cannot be derived from participational values. Instead, her approach depends on an evaluation of the appropriate limits on substantive policymaking by majoritarian institutions. Process theory may permit the Supreme Court to eliminate barriers to political participation, but it does not permit the Court to restrict the types of substantive values that such participation may be used to advance.[162]

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161 As Professor Ely has noted, process theory "suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open." J. ELY, *supra* note 22, at 76. For Ely's defense of a vigorous judicial role in policing restrictions on expression and on the right to vote, see *id.* at 105-25.

162 As Professor Mark V. Tushnet has suggested in commenting on an earlier version of this Article, there is a risk that government messages of "outsider" status, at least if repeated with regularity, might have the practical effect of driving the "outsiders" out of politics, thereby creating a de facto restriction on political participation. *Cf.* M. TUSHNET, *supra* note 14, at 257 n.31 (noting this risk, but describing it as "remote"). Under this view, Justice O'Connor's approach might be defended as a process-based protection of participational values, working as a prophylactic against this possibility. But such a view would seem to push process theory to the breaking point. The Court would be seeking to vindicate participational values based on a determination that certain citizens would be so offended by particular government actions that they would decide to withdraw from political participation. The offensiveness question, however, could not be answered on the basis of participational values; instead, it would depend on the *substance* of challenged government actions that, in themselves, might have no relation to political participation at all. As I will argue later, the

2. *Substantive Policies Resulting from Participational Defects.*—In addition to judicial elimination of barriers to political participation, process theory does permit a limited judicial scrutiny of the substantive policy decisions of majoritarian officials, but it is a scrutiny informed entirely by participational considerations. In particular, the Court may invalidate substantive policies that would not have been adopted but for participational defects in the political process. Professor Bruce A. Ackerman has explained this second type of process-based constitutional decision:

> [T]he court does not purport to challenge the substantive value judgments underlying the legislative decision; instead, it simply denies that the . . . statute would have emerged from a fair and open political process . . . . In essence, the court is trumping the statutory conclusions of the . . . real-world legislature by appealing to the hypothetical judgment of an ideally democratic legislature.[163]

An "ideally democratic legislature" would be premised on full and fair political participation, including equally *effective* participation from all quarters of society. As a result, it would include proportionate representation and political influence for all members of the political community.[164] Moreover, such a legislature would be genuinely open to the arguments of all interested persons, and it would give fair consideration to the merits of those arguments.[165]

Majoritarian institutions in the United States, however, are not "ideally democratic." Even in the absence of government-imposed barriers to participation, not all segments of society have proportionate representation in these institutions, much less a proportionate share of political influence. Moreover, existing societal prejudices mean that the arguments of certain groups may be dismissed by majoritarian officials with-

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Court's establishment clause doctrine does work to further the maintenance of a religiously inclusive political community, and one of the likely benefits of such a community is enhanced political participation. *See infra* notes 210-21 & 247-57 and accompanying text. But my argument, like Justice O'Connor's, is inexorably tied to nonparticipational, substantive considerations.

163 Ackerman, *supra* note 21, at 715.

164 There might be difficulties in deciding who should count, for this purpose, as a member of the political community. *See generally* Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291, 1315-30 (1986) (discussing the problem of "inside-outsiders," *i.e.*, those who are excluded from participation in a political process, but who are nonetheless subject to its results).

165 The focus here is on fair participatory access and influence in a representative democracy. There are, of course, different conceptions of representative democracy, which provide different models of the role of representative officials. Some models, for example, emphasize a role of political bargaining in light of interest group pressures; others see representative officials engaged in a more deliberative search for the public interest. *See generally* Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Whatever the model may be, however, the representative system can be regarded as *participationally* ideal if all members of the political community have proportionately effective access to the system, whether that access means an opportunity to benefit from political bargains or an opportunity to persuade through arguments concerning the public interest.

out the full and fair consideration that they deserve.[166] Based on these criteria, racial minorities traditionally have been the paradigm "politically disadvantaged" group in the United States. In fact, however, other groups—such as women, the poor, and homosexuals—may actually face greater participational disadvantages.[167]

On issues affecting religion, religious minorities and nonbelievers properly may be regarded as politically disadvantaged. While they may attempt to participate at a level proportionate to their numbers in society, these groups face a readily identifiable and potentially severe problem of prejudice—prejudgment—on the part of majoritarian officials holding contrary religious views. Religious beliefs frequently are formed early in life, and they are not readily subject to fundamental changes of mind.[168] Moreover, such beliefs depend substantially on commitments of faith, which are supra-rational in character. As a result, it is hard to imagine how a real-world majoritarian institution could give full and fair consideration to minority arguments concerning issues that touch religion, arguments no doubt implicating matters of faith. Such arguments likely would be viewed with a suspicion and distrust that simply could not be overcome.

Process theory suggests that when a majoritarian decision adversely affects a politically disadvantaged group, the judiciary may find the decision unconstitutional if it resulted from participational defects working to the detriment of the disadvantaged group. The Supreme Court's establishment clause doctrine, moreover, works largely to the benefit of religious minorities and nonbelievers, because the establishment clause generally operates to invalidate government attempts to prefer dominant religions. As a student commentator has noted, "groups in political power are most likely to violate the establishment clause when such a violation is somehow to their own benefit; the majority group may attempt to establish its own religion or all religions but will likely not take actions that have the purpose and effect of establishing minority religions."[169] Thus, one could attempt to defend many of the Court's establishment clause decisions as decisions based on process theory, decisions

166 *Cf.* J. ELY, *supra* note 22, at 103 (arguing that a political malfunction occurs when "though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system").

167 *See* Ackerman, *supra* note 21.

168 *See generally* K. ROBERTS, RELIGION IN SOCIOLOGICAL PERSPECTIVE 133-81 (1984) (discussing the social psychology of religious conversion and commitment).

169 Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175, 1178 n.13 (1983) (emphasis omitted). "Legislatures are, for the most part, comprised of representatives of the mainstream religions. It is unlikely that they would pass laws burdening mainstream religions; it is much more likely that laws will be passed that, intentionally or not, benefit the majority and burden minority or nonmainstream religions." *Id.* at 1197.

designed to protect the interests of minority groups unable to compete in the political process.[170]

This line of reasoning does reveal defects in the majoritarian process when that process attempts to address matters concerning religion, and it therefore provides support for more careful than usual judicial scrutiny of majoritarian action. But, as with the first branch of process theory, this branch is insufficient to justify the Court's establishment clause doctrine. Process theory, standing along, cannot defend the invalidation of substantive government policies merely because those policies were formed through a less than ideal majoritarian process. Instead, the Court can invalidate substantive policies only if it can say, with a fair degree of confidence, that those policies would not have been adopted if the process *had* been ideal—that is, if the participational defects in the political process had not been present. In positive terms, the Court can invalidate majoritarian government action only to bring about substantive results that *would have been adopted* in a participationally ideal political process; for the Court to go beyond this limit would be for it to leave the world of process theory and enter the realm of substantive policymaking.

Comparing actual majoritarian policies with policies that would be reached in a participationally ideal majoritarian process is necessarily speculative, but process theorists can at least plausibly argue that certain substantive policies would not have been adopted in the absence of participational defects, and that those policies therefore should be invalidated to bring about contrary substantive results.[171] There is absolutely no reason to believe, however, that a participationally ideal majoritarian institution would refrain—due to the removal of participational defects—from adopting substantive policies furthering the interests of dominant religions at the expense of religious and irreligious minorities.

It is not clear how, even hypothetically, one could "remove" participational defects of the sort that arise from the consideration of issues that implicate matters of faith. But even if such defects could be hypothetically removed, this at most would ensure that the arguments of the minority groups would be fully and fairly considered, rather than simply

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170 *Cf. id.* at 1197-1200 (advancing a "political process argument" to defend the Supreme Court's basic approach to the establishment and free exercise clauses).

171 In the absence of participational difficulties faced by homosexuals, for example, legislatures might not maintain criminal prohibitions on consensual homosexual sodomy. *See* Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 225-26 (1987).

Professor Ely presents a general argument that "we-they" legislative stereotyping reflects a participational defect that can deprive disadvantaged "they" groups of fair representation in the political process. He suggests that this sort of stereotyping produces a distorted view of reality and therefore may result in the adoption of substantive policies that would not have been adopted otherwise. *See* J. ELY, *supra* note 22, at 152-70. For a summary of the major types of participational defects that might affect majoritarian policymaking, see Komesar, *Taking Institutions Seriously*, *supra* note 145, at 373-76.

ignored or disregarded on the basis of conflicting religious commitments. There would be no reason to conclude that the ideal majoritarian institution would find the minority arguments persuasive. To the contrary, like most interests that command the prima facie support of a majority of the people and their elected representatives, the legislative interests of the dominant religion probably would maintain support in the majoritarian process despite a full and fair consideration of alternative arguments. In a majoritarian democracy, even one that is participationally ideal, one must expect that minority political interests generally will lose.[172] Given the nature and strength of religious beliefs, this is at least as true for matters affecting religion as it is for matters purely secular.

Perhaps an ideal majoritarian institution *would* refrain from adopting laws that violate the Supreme Court's *Everson* doctrine, or perhaps it would so refrain except when the laws fell within the Court's subtheme, which permits the adoption of certain laws favoring religion. If so, the Court's establishment clause doctrine could be seen as working to further the operation of an ideal majoritarian process. But this "ideal" majoritarian process would be ideal not on the basis of *participational* considerations; rather, it would be ideal in its adherence to certain nonparticipational values, certain *substantive* values concerning the proper relationship between religion and government. Whatever the terminology, such a defense of the Supreme Court's establishment clause doctrine would have moved beyond the world of process theory, and accordingly would require a substantive justification.[173]

3. *Process Theory, Judicial Activism, and the Establishment Clause.*—Nonoriginalist judicial review in the service of either of the two branches of process theory is relatively nonactivist. In quantitative terms, this type of nonoriginalist review provides only a limited occasion

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172 As Professor Ackerman has noted:

> To put the point simply, minorities are *supposed* to lose in a democratic system—even when they want very much to win and even when they think (as they often will) that the majority is deeply wrong in ignoring their just complaints. This principle—call it the principle of minority acquiescence—is absolutely central to democratic theory.

Ackerman, *supra* note 21, at 719 (emphasis in original).

173 As Professor Lea Brilmayer has written:

> Certain values are not likely to be adequately protected by majority rule, because they are values to which the majority is likely to be hostile. When a value popular to only a few is impinged upon by a legislature, one might then argue that there has been a defect in the democratic processes—a value that went unprotected solely because of its unpopularity. . . .
>
> When "process analysis" is construed so broadly, however, any invalidation of a statute could be seen as process-oriented because some minority's interest always goes unprotected. . . . For instance, if Congress establishes a state religion, the democratic process can be viewed as having failed to respect the value of disestablishment.
>
> Such a legislative result, however, does not mean that the democratic process has failed in its own terms, but rather that it has failed in terms of the extrinsic values protected by the first amendment. . . . The only reason that one thinks the process has failed is that there is some substantive value that should have been protected but was not.

Brilmayer, *supra* note 164, at 1306-07.

for judicial intervention, permitting the judiciary to act only when the majoritarian process restricts political participation or reaches substantive results that would not have been reached but for participational defects. Moreover, the Court's method of decision is qualitatively nonactivist, in that its identification and enforcement of participational values can be seen to perfect the majoritarian process and therefore to support, rather than undercut, the basic value of majoritarian rule.[174]

We have seen that each of the two branches of process theory provides useful insights that can help inform the role of the Supreme Court under the establishment clause. It is important to identify participational values and the participational defects that may infect the majoritarian consideration of matters affecting religion. But these insights cannot in themselves justify the Supreme Court's establishment clause doctrine, for the Court's doctrine goes well beyond the correction of participational defects. Process theory is relatively nonactivist, both quantitatively and qualitatively, precisely because it engages the Court in a very limited function, one that precludes the consideration of substantive values. In defending the Supreme Court's establishment clause doctrine, however, a consideration of substantive values cannot be avoided, and process theory is not up to the task.

C. Common Values Theories of Nonoriginalist Review

Common values theories of nonoriginalist judicial review move the Supreme Court beyond considerations of process and permit direct consideration of substantive values. At the same time, however, these theories attempt to constrain the Court's role by limiting the Court to an identification and enforcement of common societal values. Thus, common values theories do not authorize the Court to enforce substantive values of its own choosing. Rather, the Court is permitted only to identify and enforce values widely supported by the national society and therefore, in some sense at least, by the American people themselves. To locate these values, the Court can examine factors such as statutory enactments, societal customs and practices, and public opinion.[175] Like process theories, common values theories are relatively nonactivist because they are relatively inoffensive to the principle of majoritarian rule.[176]

Some common values theories are historical in orientation. They

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[174] On the distinction between quantitative and qualitative measures of judicial activism, see *supra* notes 28-36 and accompanying text.

[175] The best evidence of our societal values may lie in formally adopted majoritarian policies, agreed to by elected societal leaders in the crucible of public debate. On the other hand, the views of the general population, if otherwise ascertainable, are entitled to some consideration as well. *See generally* Smith, Book Review, 72 CALIF. L. REV. 908, 913 (1984) (suggesting that the views of both elites and the general public must be considered in determining the content of our nation's norms).

[176] *See supra* notes 28-36 and accompanying text.

call for the judicial protection of traditional national values that have strong support not only in the present, but also in the past. Being nonoriginalist in derivation, these values do not fall within the original meaning of any constitutional provision. Nonetheless, they command an enduring support in our society, reflecting societal commitments that in turn have created individual expectations. To ensure respect for these commitments and protection for the expectations that they have created, traditional values theories would permit the Supreme Court to enforce traditional societal values by invalidating nonconforming majoritarian policies.[177]

Other common values theories are forward-looking. They see the pattern of evolving societal thought in the United States as one that tends to reflect positive societal development and growth. Thus, the societal values that should be protected by the judiciary are those that fall on the forward edge of the evolutionary progression. These include values that have grown to command strong support in the contemporary society, and they also include values that are not yet widely supported, but that—in light of developing trends—are likely to prevail in the future. Forward-looking common values theories thus call for the Supreme Court to further American societal progress by invalidating majoritarian policies that conflict with contemporary or emerging national values.[178]

Assuming that judicial enforcement of common values is legitimate,[179] the question remains whether either type of common values the-

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177 Although he focuses on substantive due process in particular, Professor Ira C. Lupu has advanced a traditional values theory that could be applied with equal force to other types of nonoriginalist constitutional doctrine. *See* Lupu, *supra* note 24, at 1032-54. For a similar argument, see *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1177-87 (1980). *Cf.* G. LEEDES, THE MEANING OF THE CONSTITUTION: AN INTERDISCIPLINARY STUDY OF LEGAL THEORY 92-108 (1986) (defending substantive due process protection for society's "reasonable expectations"); Kaufman, *Judges or Scholars: To Whom Shall We Look for Our Constitutional Law?*, 37 J. LEGAL EDUC. 184, 196-97 (1987) (arguing that "dominant long-term values" should be consulted in constitutional adjudication); Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1262-86 (1986) (discussing "neutral principles" constitutional adjudication based on "consensus history"). *See generally* Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753 (1987) (arguing that constitutional meaning should be based on the constitutional values of "the people" today, as determined through an investigation of the historical and contemporary relationship between constitutional ideals and ordinary politics).

178 Elsewhere I have defended a forward-looking common values approach to nonoriginalist judicial review. *See* Conkle, *supra* note 6, at 626-37. *See also* Conkle, *supra* note 31, at 23-30. *Cf.* Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 How. L.J. 809, 843-51 (1985) (presenting a forward-looking common values theory focused on shared societal *ideals*).

179 This method of judicial review, like other methods, should be regarded as legitimate if it serves a purpose sufficient to justify its intrusion on majoritarian decisionmaking. Common values nonoriginalist review does not engage the Supreme Court directly in a search for the right answers to political-moral problems; instead, it calls merely for the Court to enforce widely-held societal values. This limitation is a theoretical strength to the extent that one values the principle of majoritarian rule, for it makes this type of judicial review relatively nonactivist. This same limitation, however,

ory is sufficient to justify the Supreme Court's establishment clause doctrine.

1. *Preserving Traditional Values.*—The Supreme Court's establishment clause doctrine, at least as applied to the states, cannot be traced to the constitutional enactment of any set of framers and ratifiers, and therefore cannot be defended as a product of originalist review.[180] This conclusion, however, does not mean that history is irrelevant. In particular, it does not preclude a *non*originalist, traditional values argument in support of the Court's doctrine. Under this type of theory, the Court's establishment clause doctrine can be defended to the extent that its content can be derived from traditional American values, even if those values have never been embodied within a formal constitutional enactment. Traditional values, for this purpose, are values that have commanded strong societal support historically and that continue to enjoy that support today.[181]

At the time of our nation's founding, the newly created American states espoused different views on the proper relationship between religion and government. Some states, led by Virginia, embraced anti-establishment policies, but others continued to maintain or authorize established religions. As discussed earlier, this fundamental disagreement ensured that the framers and ratifiers of the first amendment would be unable to agree on any general principle concerning establishment.[182] In the decades following the first amendment's adoption, however, formal establishments became less common, and by the middle of the nineteenth century they had been discarded as a thing of the past.[183] A basic policy of disestablishment thus had grown to command wide acceptance throughout the United States. This policy, moreover, continues to be widely respected. Indeed, in today's political culture, arguments favoring the formal establishment of religion are rarely if ever advanced; they lie beyond the realm of acceptable political discourse. Based on our soci-

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operates as a theoretical weakness as well, for it limits the importance of the function that nonoriginalist judicial review can serve. Such review cannot directly further the pursuit of right answers, but rather can do no more than keep America "on track"—either in its adherence to traditional values or on its path of evolutionary societal growth. The question of legitimacy thus turns on whether this limited function is sufficiently important to justify the relatively modest intrusion on majoritarian policymaking that it entails.

Elsewhere I have argued that a forward-looking common values approach *is* legitimate, in part on the ground that this type of nonoriginalist review can *in*directly further the pursuit of right answers. *See* Conkle, *supra* note 6, at 628-29.

180 *See supra* notes 77-143 and accompanying text.

181 *Cf.* Lupu, *supra* note 24, at 1040 (the search must be "for values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weight") (emphasis omitted).

182 *See supra* notes 95-103 and accompanying text.

183 The last formal establishment in the United States was dissolved by Massachusetts in 1833. *See* L. LEVY, *supra* note 92, at 38.

ety's long-term and enduring commitment to the policy of disestablishment, one can argue persuasively that disestablishment at this point has become a traditional societal value in the United States.

Our society's basic policy of disestablishment, however, is just that—a *basic* policy of disestablishment. There is an historically supported and continuing societal consensus that government should not formally establish any "official" religion. As a result, *Everson*'s interpretation of the establishment clause to mean that "[n]either a state nor the Federal Government can set up a church"[184] could be defended under a traditional values theory of nonoriginalist judicial review. This conclusion is not unimportant as a theoretical matter, but it cannot justify the more far-reaching establishment clause doctrine employed by the Supreme Court. To justify that doctrine under this type of theoretical approach would require a demonstration that the traditional value of disestablishment extends beyond a limited commitment to *formal* disestablishment.

There is room for disagreement about the meaning of "formal disestablishment" and therefore about the scope of our societal commitment in this area. Nonetheless, the major components of the Supreme Court's establishment clause doctrine cannot plausibly be defended by appeals to an historical and contemporary societal consensus. It is not clear that such a consensus could be found for the proposition that government should be precluded from favoring some religions (such as mainstream Judeo-Christian religions) over others (such as Eastern or other minority religions).[185] In any event, there is nothing approaching a consensus, historical or contemporary, for the proposition that government should be precluded from favoring religion generally, as against irreligion.[186]

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184 Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

185 There plainly was no such consensus in the early history of the United States:

> Probably at the time of the adoption of the Constitution, and of [the first amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 630-31 (5th ed. 1891). *See id.*, § 1871, at 628 ("[I]t is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects.").

186 In our early history, most of the American people and their leaders favored government encouragement of religion, short of formal establishment. *See generally* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 94. It appears that the same is true today. More than two-thirds of the American people, for example, support state-sanctioned prayer in the public schools. *See* Martin, *Views on Constitution: Promises Kept, Miles to Go*, N.Y. Times, May 26, 1987, at 10, col. 1. Faced with Supreme Court decisions that clearly preclude state-sanctioned spoken prayer, legislatures have been forced to advance this public sentiment with a next-best alternative, state-sanctioned moments of silence for meditation or prayer. As of 1985, at least 25 states had adopted "moment of silence" statutes. *See* Wallace v. Jaffree, 472 U.S. 38, 70 & n.1 (1985) (O'Connor, J., concurring in the

These propositions, however, are fundamental components of the Supreme Court's *Everson* doctrine, as implemented by the *Lemon* test. The traditional value of disestablishment is inadequate to explain these propositions, and is therefore inadequate to justify the Supreme Court's establishment clause doctrine.

Traditional values theories are nonactivist because they limit the Supreme Court to the enforcement of widely shared societal values. As a result, however, these theories can work only to explain the constitutional invalidation of aberrant majoritarian policies, policies that conflict with values that have been and continue to be broadly respected in the national society. The existence of some nonconforming policies should not be surprising; the majoritarian support for a nonconforming policy may be a temporary deviation from long-held values, or it may reflect the unusual views of a particular state. When the "aberrant" policies appear widely throughout the society, however, they appear not to be aberrant at all, but suggest instead that the values the Court is enforcing actually are not traditional. The Supreme Court's establishment clause doctrine obviously is not limited to the invalidation of aberrant government policies. Instead, the Court has invalidated countless government programs, including officially sanctioned school prayer and public support for sectarian schools, that have widespread support in the society. If anything, an appeal to "traditional values" in this area would provide support for upholding these practices, not for invalidating them.

2. *Furthering Societal Progress.*—Forward-looking common values theories look to historical and contemporary societal thought in the United States, but with an eye to the future. These theories look not for an unchanging historical commitment to a value, but rather for a progression of changing views that suggests an unfolding path of American societal development. Under this type of model, the nonoriginalist role of the Supreme Court is to further societal progress by enforcing the contemporary and emerging societal values that fall on the forward end of this developing pattern.[187]

To the extent that a forward-looking common values theory focuses on contemporary societal values, it calls for the Court to enforce values that, because of a developing historical pattern of change, have grown to command strong support in modern society. One could use this type of reasoning to defend the same establishment clause principle that can be defended under a traditional values approach, namely, the Supreme

judgment). *See generally* Smith, *supra* note 175, at 914 (suggesting that our contemporary national norms "exclude extreme practices such as establishing specified churches, but they permit a range of more moderate responses to issues such as religion in the public schools and the financing of religious schools").

187 For an argument that this type of model can explain many of the modern Supreme Court's nonoriginalist decisions, see Conkle, *supra* note 6, at 631-36.

Court's enforcement of a policy of formal disestablishment. Citing our society's early movement away from formal establishment,[188] the analysis here would emphasize that the modern consensus on this question is not merely a product of enduring historical commitment, but one that initially arose from a pattern of *changing* societal thought. The fact of change, on this view, suggests societal progress, albeit progress made well over a century in the past. Having thus reached this point of societal development, America ought not be permitted to regress through the adoption of majoritarian policies that would return us to the now rejected era of formal establishment.

This type of forward-looking common values theory provides the same support for a policy of formal disestablishment as does a traditional values approach. Also like a traditional values approach, however, it cannot support the major thrust of the Supreme Court's establishment clause doctrine. Although its chronological perspective differs, this theory still requires a contemporary societal commitment before a value properly can be protected by the Supreme Court. And as I have shown, there is no persuasive evidence of a contemporary societal consensus that would go beyond the bare policy of formal disestablishment.[189]

Forward-looking common values theories sometimes urge a more expansive role for the Supreme Court, one that would permit the Court to reach beyond the present in a search for emerging societal values. Under such an approach, the Court could attempt to hasten the advance of developing societal thought by enforcing values not yet accepted by the society, but values that nonetheless are likely to be accepted in the future. In the establishment clause context, this approach would not limit the Court to an enforcement of the contemporary value of formal disestablishment, but instead would permit the Court to enforce a broader vision of church-state separation if that vision found support in the emerging values of the American society.

To count as a common values method of nonoriginalist judicial review, the Court's function must be limited to the enforcement of values that are at least in some sense drawn from the society itself. A search for emerging American values, therefore, cannot be based merely on uncabined speculation concerning the future. Instead, it must be based on an analysis of the societal thought of the present, as well as the historical pattern from which that existing thought has developed. The search is for a demonstrable trend in societal thinking that makes it possible to draw reasonable inferences concerning where that trend might lead.

There are occasions on which such trends exist, trends that may support some aspects of the modern Court's nonoriginalist decisionmak-

188 *See supra* notes 182-83 and accompanying text.

189 *See supra* notes 185-86 and accompanying text.

ing.[190] In an era of the "Reagan revolution" and the "Moral Majority," however, it would be fanciful to suggest that there is an identifiable trend of societal thinking concerning the proper relationship between religion and government, much less a trend that would support the separationist philosophy that the Court has enunciated in its decisions.[191] That separationist philosophy has been and remains a matter of vigorous public debate and controversy. Indeed, it would appear that we are moving less toward any type of consensus on this matter than toward a state of increased polarization and divisiveness. In any event, there is no identifiable trend of societal thinking that points toward a future consensus favoring either the Supreme Court's philosophy of separation or the more specific embodiment of that philosophy reflected in the *Lemon* test. As a result, the Court's establishment clause doctrine cannot be defended by reference to a forward-looking theory of emerging societal values.

3. *Common Values and the Supreme Court's Subtheme.*—As discussed earlier, the Supreme Court's separationist doctrine is complicated by a prominent subtheme, one that permits the government to favor religion in selected circumstances.[192] In upholding government practices that cannot fairly be read to comply with *Everson* or the *Lemon* test, the Court has relied not only on the original understanding of the first amendment,[193] but also on the presence of traditional societal support for the particular government practices in question.[194] This line of reasoning might suggest a common values approach to nonoriginalist judicial review, one grounded on the protection of traditional societal values. Such an approach cannot support the Court's basic *Everson* doctrine, but perhaps it could nonetheless support the Court's subtheme.

Although superficially appealing, a traditional values defense of the Supreme Court's subtheme is unavailing. In the first place, the Court has invalidated certain government practices that appear to be as strongly supported by traditional values as other practices that the Court has up-

190 *See* Conkle, *supra* note 6, at 634-36.

191 *Cf.* Van Alstyne, *supra* note 109, at 785-87 (arguing that American history reveals a gradual but ever-increasing affiliation between Christianity and government).

192 *See supra* notes 68-72 and accompanying text.

193 *See supra* notes 140-43 and accompanying text.

194 In Marsh v. Chambers, 463 U.S. 783 (1983), for example, the Supreme Court upheld the practice of legislative prayer based not only on the original understanding of the first amendment, but also on the existence of an enduring American tradition that had rendered this practice "part of the fabric of our society." *Id.* at 792. *See also id.* at 786-92. Likewise, in Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Court's approval of property tax exemptions for churches was grounded in part on their traditional support in our society, support that the Court found "deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times." *Id.* at 676. *See also id.* at 676-78. "[A]n unbroken practice of according the exemption to churches . . . is not something to be lightly cast aside." *Id.* at 678. *Cf.* Lynch v. Donnelly, 465 U.S. 668, 725 (1984) (Brennan, J., dissenting) (contending that this type of historical argument "must always be focused on the particular practice at issue in a given case").

held.[195] A theory of traditional values cannot explain this inconsistency. But there is a more fundamental theoretical problem: if a traditional values theory cannot explain the Supreme Court's basic *Everson* doctrine, how can we expect it to explain the subtheme? The Court's subtheme identifies what amounts to an exception to the general rule of separation reflected in *Everson* and the *Lemon* test. That general rule, however, can be defended only on the basis of something other than a theory of traditional values. If a contradictory subtheme is to be justified, it must be on terms consistent with whatever theory informs the basic doctrine itself. The subtheme does not stand alone, and therefore cannot be defended in isolation.

4. *Common Values, Judicial Activism, and the Establishment Clause.*—Whether under a traditional or a forward-looking approach, nonoriginalist judicial review based on the enforcement of common values is relatively nonactivist. Quantitatively, the level of judicial invalidation is low, for majoritarian institutions are not inclined to depart from traditional or contemporary societal values, and only rarely will an identifiable trend support judicial invalidation on the basis of emerging values. Qualitatively, this type of judicial review calls for the Supreme Court to draw its decisional norms from society itself; even as it invalidates particular majoritarian actions, the Court is enforcing values that have "majoritarian" support of their own, support reflected in the long-term pattern of national societal thought.[196]

Either a traditional values approach or a more forward-looking common values theory can justify nonoriginalist constitutional protection for a societal value favoring formal disestablishment. This conclusion is not insignificant, but it cannot support the major components of the Supreme Court's separationist doctrine, nor can it support the Court's contradictory subtheme.

IV. The Establishment Clause and Political-Moral Reasoning: An Activist Theory of Church-State Judicial Review

Neither originalism nor the relatively nonactivist varieties of non-

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[195] At the time of the Court's school prayer decision in Engel v. Vitale, 370 U.S. 421 (1962), for example, "the habit of putting one sect's prayer in public schools had long been practiced." Walz v. Tax Comm'n, 397 U.S. 664, 702 (1970) (Douglas, J., dissenting). As a result, the Court's decision was broadly "disruptive of traditional state practices." *Id.* at 703. *But cf.* Stone, *In Opposition to the School Prayer Amendment*, 50 U. Chi. L. Rev. 823, 834 (1983) (suggesting that the strength of this tradition has been exaggerated). *See generally* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 266-78 (1963) (Brennan, J., concurring) (discussing history of prayer and religious exercises in American public schools).

[196] On the distinction between quantitative and qualitative measures of judicial activism, see *supra* notes 28-36 and accompanying text.

originalist theory can explain the Supreme Court's establishment clause doctrine. Originalism fails because it cannot support the Court's critically important "incorporation" of the establishment clause for application to the states.[197] Process theory can explain only that tiny portion of the Court's doctrine that deals with religion-based limitations on political participation.[198] Common values theory likewise has only a limited role to play; it can justify the Court's enforcement of a policy of formal disestablishment, but that policy is so widely respected in the United States that it hardly requires judicial protection.[199] In sum, these various theories might support selected applications of the Supreme Court's establishment clause jurisprudence, but they cannot begin to provide a coherent and comprehensive justification either for the Court's basic *Everson* doctrine or for its contradictory subtheme.

To be defended comprehensively, the Court's establishment clause doctrine must be justified on the basis of a theory of political-moral reasoning. Under such an approach, the Supreme Court is not limited to the original understanding of the Constitution, nor is it limited to an enforcement of participational values or substantive values widely accepted in society. Instead, the Court is broadly entrusted with a search for the right answers to political-moral problems, answers to be formulated on the basis of reasoned arguments of principle and policy.[200] Needless to say, this type of decisionmaking role is fundamentally antagonistic to the concept of majoritarian rule and therefore, on this criterion, must be regarded as exceedingly activist.[201] As a result, anyone seeking to defend such a role must carry a heavy burden of justification, much heavier than the burden faced by advocates of originalism or the less activist versions of nonoriginalist review.

In the remainder of this Article, I will attempt to shoulder this burden by advancing a political-moral reasoning theory of the establishment clause. I will defend the basic contours of the Supreme Court's establishment clause doctrine, including its dominant separationist component and its contradictory subtheme, on two related grounds: first, that the Court's doctrine is sound as a matter of political-moral theory; and second, that the Court is the proper institution to formulate and apply a doctrine of this sort. My analysis is limited to the Supreme Court's doctrine as it concerns traditional—typically theistic—religion.[202] My goal,

197 *See supra* notes 111-35 and accompanying text.

198 *See supra* notes 144-74 and accompanying text.

199 *See supra* notes 175-96 and accompanying text.

200 Professor Ronald Dworkin has suggested that it may be appropriate for certain purposes to distinguish "principles" from "policies." *See, e.g.*, R. DWORKIN, *supra* note 27, at 22-28. For present purposes, however, such a distinction is not important, and I mean to embrace reasoned arguments of all types, whether relating to "principles" or "policies."

201 *See supra* notes 28-36 and accompanying text.

202 I make no attempt to evaluate whether the Court's doctrine should be extended to government action based upon or relating to other forms of philosophical thought that some might regard

moreover, is not so much to evaluate the validity of particular decisions as it is to suggest a theoretical basis for the broad features of the Court's decisionmaking in this area.

When I say that the Court's doctrine is "sound as a matter of political-moral theory," I do not mean to suggest that the Court has reached a resolution of church-state questions consistent with some type of overarching philosophical system of political-moral truth. Instead, I mean only that the major features of the Court's doctrinal approach are strongly supported by arguments of principle and policy and that, as a result, the Court's doctrine makes America a fundamentally stronger society, both politically and morally. America is politically stronger to the extent that it embraces principles and policies that work to protect the viability of our political institutions and to ensure their efficient and effective operation. It is morally stronger to the extent that it embraces principles and policies that are just and right. These considerations overlap, because a morally stronger society is likely to be politically stronger as well.[203]

Arguments of principle and policy in defense of the Court's establishment clause doctrine are not new. Indeed, a number of the arguments presented here are supported in part by opinions from the Supreme Court itself.[204] In the Court's opinions, however, arguments of this type generally are tied to the Court's mistaken assumptions concerning the original understanding of the first and fourteenth amendments. I seek here to isolate my discussion from any originalist constitutional predicate and to evaluate whether arguments of principle and policy, in their own right, can justify what is in fact a starkly activist form of nonoriginalist judicial review.

Under a theory of political-moral reasoning, the Court can consider reasoned arguments drawn from any source. As a result, it can embrace arguments that are unpersuasive when offered in connection with less

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as "religious." For discussions of the complex problem of defining religion for purposes of the first amendment's establishment and free exercise clauses, see, for example, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (2d ed. 1988); Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Freeman, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); and Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

203 Needless to say, I believe that reasoning about principles and policies is a productive enterprise and that certain answers to political-moral problems may be demonstrably better than others. Professor Michael J. Perry recently has offered powerful support for this position. *See* M. PERRY, *supra* note 73, at 7-54. *See also* R. DWORKIN, LAW'S EMPIRE 76-86 (1986).

204 Professor Michael E. Smith has carefully catalogued and analyzed the policy justifications presented by Supreme Court justices in support of their interpretations of both the establishment and the free exercise clauses. *See* Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83.

activist constitutional theories. Thus, arguments made by individual framers of the first amendment may be relevant here—not on the basis of originalist theory, but rather for whatever intrinsic merit the arguments may hold. Likewise, a political-moral reasoning model can evaluate "defects" in the political process regardless of whether those defects are strictly participational, and it might consider the presence of a societal consensus favoring formal disestablishment to be a pertinent factor in developing a more far-reaching doctrine concerning the relationship between religion and government. More generally, however, the Court can look to reasoned arguments not tied in any way to a less activist theory of judicial decisionmaking, for the Court's overriding goal is to formulate political-moral principles and policies that are sound—principles and policies that make America stronger and better than it would be in their absence.

A. Factors Informing the Proper Relationship Between Religion and Government in the United States

At least three broad considerations are relevant in addressing the proper relationship between religion and government in the United States. The first focuses on the need to respect the religious and irreligious beliefs of individuals. The second concerns the importance of maintaining a political community that embraces its members without regard to their religion. The third concerns the value of religion itself in American society.

1. *Respecting Religious and Irreligious Beliefs.*—Religious beliefs are special, and especially important, to the individuals who hold them. Although the nature of these beliefs is not the same for all believers, certain characteristics are common. First, a person's religious beliefs typically provide a general structure of thought through which the person views the world, and a system of ethics through which he guides and evaluates his own conduct. Second, these beliefs are likely to be based on faith and emotion as well as reason. Third, they frequently rest in substantial part on concerns about the spiritual consequences of one's beliefs and conduct—most notably, concerns relating to spiritual life after physical death.[205]

Religious beliefs, by their very nature, form a central part of a person's belief structure, his inner self. They define a person's very being—his sense of who he is, why he exists, and how he should relate to the world around him. A person's religious beliefs cannot meaningfully be

[205] Dean Jesse H. Choper has argued that an "extratemporal consequences" definition of religion might be appropriate for both the establishment and the free exercise clauses. *See* Choper, *supra* note 202.

separated from the person himself; they are who he is.[206] The essential identity of a person and his religious beliefs means that these beliefs often will be grounded on intense convictions. Although religious beliefs are subject to reevaluation and possible change, they tend to endure. For a person to challenge his own religious beliefs in any fundamental way is for him to challenge his sense of self, a sense of self that may depend on faith and that may give rise to eternal consequences. Challenges of this sort are difficult at best and traumatic at worst.

Challenges to a person's religious beliefs may come not from within, but from without. In a religiously pluralistic society such as ours, these challenges are not uncommon; religious believers frequently attempt to persuade and convert those with differing views. These efforts at persuasion and conversion are inoffensive if they are premised on a basic respect for the existing belief structure of the person whose beliefs are being challenged. Otherwise, however, the efforts may be deeply offensive to that person. Attacks on a person's religious beliefs are attacks on his conception of himself as a human being; if the challengers suggest that the person's existing beliefs are deeply flawed and not entitled to respect, they therefore are suggesting that the person himself is deeply flawed and not entitled to respect. Is it any wonder that attempts at religious persuasion and conversion are widely regarded as "sensitive" undertakings? They are sensitive because they carry the risk of deeply affronting the person whose religious beliefs are being questioned.

As this discussion suggests, religious beliefs are strong, but at the same time fragile. They are strong because they are deeply embedded in the person's self. They are fragile for essentially the same reason. Although a person can ignore—brush off—certain types of insults, he cannot easily ignore a challenge to his self-identity. In most cases, challenges of this sort will not change a person's religious beliefs, given the strength and resilience of such beliefs. But the challenges are likely to cause harm; they may amount to an assault on the person's most fundamental sense of being, inflicting a type of psychological injury, a form of mental anguish.[207] This mental anguish, moreover, may lead in turn to feelings of resentment and ill will toward those who have issued the challenge and thereby caused the pain.

The person's mental anguish, and his feelings of alienation and resentment, may be only temporary if he has no continuing relationship with those who have affronted him. If, on the other hand, there is a continuing relationship, his injury is compounded. The feelings of anguish, alienation, and resentment will linger, and the relationship itself

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206 I am using "he" and "him" in their generic—not their gender-specific—senses.

207 *Cf.* Smith, *supra* note 204, at 93 ("Intrusion into parts of our psyche, especially the realm of religious belief, may be too painful and destructive of our psychological well-being.").

will suffer. The more important that relationship to the person affronted, the greater his injury.

Paradoxically, irreligious beliefs—beliefs grounded on a self-conscious *rejection* of religion—bear important similarities to religious beliefs. In rejecting religion, an irreligious individual necessarily confronts the fundamental questions of who he is, why he exists, and how he should relate to the world around him. His resolution of these questions may well depend in part on emotion, and in part on a consideration of whether spiritual consequences may flow from the decision. Although perhaps not to the same extent as religious beliefs, irreligious beliefs also form a central part of a person's belief structure and constitute a type of self-definition. Like religious beliefs, they tend to be intensely felt, and they are both strong and fragile in the same way. As a result, attacks on irreligious beliefs also may affront the individual who holds them, causing anguish, alienation, and resentment, and damaging his relationship with those who have affronted him.

A proper respect for the individual members of our society requires that they be spared unnecessary injury, including psychological injury. Because religious and irreligious beliefs are fragile as well as strong, they are unusually susceptible to damaging assaults, assaults arising from the communication of messages that challenge the validity of a person's beliefs.[208] As a result, religious and irreligious beliefs are entitled to special respect and special protection.[209]

2. *Maintaining a Religiously Inclusive Political Community.*—We all are members of various, overlapping communities. These communities are based on family relationships, for example, or relationships between coworkers, neighbors, or friends. Many of us are members of religious communities. Whatever the context, a community—at least as I use the term—cannot exist without a feel of connectedness and mutual obligation, and the community's membership is defined accordingly. Each member of a community, in order to be a member of that community, must feel a sense of attachment, which in turn gives rise to a sense of loyalty. This loyalty makes individual members of a community will-

208 It may be that certain nonreligious beliefs stand in a similar posture. If so, perhaps they should be regarded as "religious" or "irreligious" for this purpose. *See generally supra* note 202 and accompanying text.

209 Nothing I have said in this section depends on a claim that religious and irreligious beliefs should be protected based on the value of "personal autonomy," defined as individual freedom to control one's own decisionmaking. Such beliefs may or may not be the product of "personal autonomy" in this sense. Many religious believers, for example, expressly disclaim personal credit or responsibility in the selection of their religious beliefs, claiming instead to have been called by God to hold the beliefs that they do. *See generally* Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 788-92 (1986) (suggesting that autonomy is not a helpful concept in this area). For an autonomy-based defense of a principle of "equal respect for conscience" under the religion clauses, see D. RICHARDS, TOLERATION AND THE CONSTITUTION 67-162 (1986).

ing, and perhaps anxious, to take actions that further the interests of the community, sometimes at the expense of their own individual interests.[210] Communities differ in the degree of loyalty that they command, of course, because some communities are stronger and more vibrant than others.

With respect to government affairs, there exists in the United States a community that consists of those who regard themselves politically as Americans—a political community composed of those United States citizens[211] who feel at least some loyalty to the community.[212] The strength of this political community is a function of two factors: first, the percentage of citizens who regard themselves as members; and second, the degree of their loyalty.[213] We can nourish the American political community through actions of embracement—actions that maintain or expand the membership of the community or that maintain or strengthen the loyalty of its members. Conversely, we can weaken the community through actions of exclusion—actions that restrict the community's membership or that reduce the loyalty of its members.

A community relationship is reciprocal, a relationship between an individual and the community. A citizen's relationship to the American political community therefore depends on the relationship of that community to him. His regard for the community depends on the community's regard for him. His sense of belonging depends on the community's treatment of him as a respected member.

The American political community expresses itself most clearly through the adoption of government policies. These policies may formally embrace or exclude an individual as a member, as, for example, in connection with eligibility requirements for voting or other political par-

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210 As Professor Frederick Schauer has noted, "a meaningful sense of community exists only insofar as the individuals who comprise that community are willing to take actions on behalf of the community not only that they would not take on their own behalf, but that are quite possibly detrimental to their own interests." Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1504 (1986).

211 It may be that certain noncitizens also should be regarded as potential members of the American political community. *See* Walzer, *The Distribution of Membership*, in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1 (1981). For convenience, however, I will refer to all potential members of the American political community as "citizens." *See generally* Schauer, *supra* note 210, at 1512-17 (suggesting that citizenship could serve as a bond of community in the United States).

212 For convenience, I speak of one political community. Of course, there actually are a number of political communities in the United States, existing at the state and local as well as the national levels.

213 Professor Kenneth L. Karst has argued that the American political community is tied together by "the American civic culture—a mixture of behavior and belief that infuses our law and our institutions, transcending race, religion, and ethnicity, allowing individual citizens to preserve their separate cultural identities and still identify themselves as Americans." Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 363 (1986). *See also id.* at 361-77. *See generally* R. DWORKIN, *supra* note 203, at 195-216 (arguing that to be a "true" associative community, a political community must be "a community of principle").

ticipation. They also may embrace or exclude informally; this occurs when the policies send messages to the individual concerning his status in the eyes of the community.

Government policies endorsing religious or irreligious beliefs send messages that informally embrace those whose beliefs are endorsed and that informally exclude those whose beliefs are rejected. The embrace may strengthen the community bond of those to whom it is directed, but if that bond is already solid, the gain is likely to be modest. Far more important is the potential for exclusion, for existing bonds of community can be severely weakened, if not severed altogether. The potential damage from exclusion generally will exceed the potential gain in loyalty that may come from the embracing effect of the government's messages. As a result, the safer course is for the community to avoid the excluding effects of religious or irreligious messages.

Government policies that endorse nonreligious beliefs also send messages, messages that might have the damaging effect of exclusion. Religious and irreligious messages, however, carry an especially potent exclusionary force. As we have seen, religious and irreligious beliefs lie at the core of individual self-identity. An attack on these beliefs therefore tends to engender mental anguish and a resulting resentment toward those who have made the attack; the individual's relationship with them can be severely damaged.[214] In adopting government policies that endorse religious or irreligious beliefs, the political community becomes the attacking party, and the relationship harmed is the individual's relationship to that community. The community has shown a lack of regard for the individual by adopting policies that conflict with his most fundamental beliefs. Indeed, because these beliefs define the person's very sense of being, the community's action may be viewed as an assault not merely on the person's beliefs, but on the person himself. The community has shown a lack of respect, a sense that it does not regard the individual as one of its own.[215] The individual's reciprocal sense of belonging will be shaken. His loyalty to the community will be weakened, perhaps dramatically, and he may even withdraw from the community altogether.[216]

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214 *See supra* notes 205-09 and accompanying text.

215 *Cf.* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 236 (J. Mayer & M. Lerner ed. 1966) ("from this day you are a stranger among us").

216 Although its discussion was framed in originalist terms, the Supreme Court suggested this point in Engel v. Vitale, 370 U.S. 421 (1962):

> [The establishment clause] rested on the belief that a union of government and religion tends to destroy government. . . . The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect, and even contempt of those who held contrary beliefs.

Id. at 431. *See* Marsh v. Chambers, 463 U.S. 783, 805-06 (1983) (Brennan, J., dissenting) ("[N]o American should at any point feel alienated from his government because that government has declared or acted upon some 'official' or 'authorized' point of view on a matter of religion."). *But see* M. TUSHNET, *supra* note 14, at 257 n.31 (suggesting that "symbolic exclusion" reflects nothing more

Maintaining a strong political community is exceedingly important, and in a society as religiously pluralistic as ours,[217] we must attempt to avoid the weakening effects of religious and irreligious exclusions. By maintaining a religiously inclusive political community, we lessen the risk of religiously-motivated civil unrest and violence, a problem that cannot be discounted in light of historical and contemporary events in America and elsewhere.[218] Beyond this, we encourage all of our citizens, regardless of religion, to respect our political system and to voluntarily obey the laws it produces.[219] Moreover, if citizens respect the political system, they are more likely to participate politically, making the system more broadly representative and therefore more responsive to the interests of those within its governing reach. Finally, if their sense of loyalty is strong, citizens may even make individual sacrifices for the good of the community, sacrifices that may be especially important during times of war or other national emergency.[220] For all these reasons, we should strive to maintain a religiously inclusive political community and avoid the "political divisiveness" that would otherwise result.[221]

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than "the disappointment felt by everyone who has lost a fair fight in the arena of politics" and poses only a "remote" risk that the disadvantaged individuals will actually withdraw from politics).

217 Literally hundreds of Christian and non-Christian religions are practiced in the United States today. Approximately 80% of the American people follow some type of Christian religion; 2-3% are Jewish. The remainder—numbering in the tens of millions—belong to other religions, such as Islam, Hinduism, Buddhism, or various Native American religions, or do not adhere to any religion at all. For a summary of the evidence supporting these conclusions, see Karst, *supra* note 213, at 360 & n.364. *See generally* Smith, *Relations Between Church and State in the United States, With Special Attention to the Schooling of Children*, 35 AM. J. COMP. L. 1, 4-10 (1987) (discussing the historical and contemporary character of religious diversity in the United States).

218 In Everson v. Board of Educ., 330 U.S. 1 (1947), the Court emphasized the history of religious violence and persecution in Europe and the American colonies. *See id.* at 8-11. Religious violence and persecution, moreover, obviously continue to be serious problems in various parts of the world today, including Northern Ireland, India, and various parts of the Middle East.

219 Compare James Madison's statement in his famous "Memorial and Remonstrance against Religious Assessments": "[A]ttempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society." J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 70 (1947) (appendix to dissenting opinion of Justice Rutledge).

220 By virtue of the example that it sets, a religiously inclusive political community also may support the maintenance of religiously inclusive private communities and the avoidance of private ostracism and discrimination along religious lines.

221 In its establishment clause cases, the Supreme Court frequently has expressed concern about "political divisiveness" along religious lines. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 252-53 (1982); Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971). This concern can be understood in part to reflect the risks to the political community that result from religious or irreligious exclusions. At least to that extent, the Court's concern is well-grounded. *But cf.* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205, 233 (1980) (arguing that the Court has "misconstrue[d] the purpose of the first amendment as a mandate for consensus politics").

Professor Michael E. Smith has suggested that a fear of political divisiveness along religious lines has little relevance in the United States today. *See* Smith, *supra* note 204, at 96-97, 107. To the

3. *Protecting the Role of Religion in American Society.*—Although some Americans are irreligious, America is a broadly religious society. This was true at the time of the nation's founding, it has been true throughout our history, and it is true today. All but a small fraction of Americans believe in a Supreme Being, and a large majority consider religion an important part of their lives.[222] In the words of Justice Douglas, "[w]e are a religious people whose institutions presuppose a Supreme Being."[223]

For at least three reasons, religion in America is valuable and should be protected. First, we should protect religion for its own sake, on the premise that religion has intrinsic value and that at least some religious beliefs are true and valid. I make no defense of this premise here; I am not a theologian, and this is not a theological treatise. The vast majority of Americans operate on this premise, however, and it therefore seems appropriate to accept it as a given.[224]

Second, religion has instrumental value. On an individual level, religion frequently enhances feelings of self-worth and personal satisfaction, thereby contributing to the psychological well-being of religious believers.[225] In the United States, moreover, religious norms and societal norms tend to overlap. Although there are important examples to the

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extent that he is talking about widespread religious violence and persecution, Smith may be right. Our society may not be capable of a Nazi Holocaust. On the other hand, the winds of social change can be unpredictable, and this is hardly the type of risk that we can afford to take lightly. In any event, as I have suggested, religious and irreligious exclusions from the political community can weaken our political system in less serious ways, and there is no reason to believe that these lesser but still important types of damage cannot occur in our present society.

It may be, as Professor Smith suggests, that nonreligious political divisiveness sometimes may cause serious damage to the political community. *See id.* at 97. If so, that might support the development of a constitutional doctrine to protect the political community in those nonreligious contexts. But it would in no way reduce the importance of protecting the community in the religious context discussed here.

222 According to one recent survey, 96% of all Americans believe in God or a Supreme Being. Los Angeles Times Survey, "Religion and Politics," Question No. 61 (July 1986) (available on microfiche). According to another survey, religion is "very important" to 57% of the American population, and "fairly important" to another 29%. CBS/New York Times Poll, "Catholics in America," Question No. 53 (August 1987) (available on microfiche). 61% belong to a church, congregation, or synagogue, and 57% attend religious services at least once or twice a month. *Id.*, Question Nos. 50 & 51. *See also Report Shows Church Membership in U.S. is Growing Slowly*, N.Y. Times, June 15, 1987, at 12, col. 3. *See generally* Smith, *supra* note 217, at 24 ("Compared to other western countries, religious belief is unusually widespread in the United States.").

223 *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

224 Any theory that would reject this premise would itself be destined for rejection in the American society as it stands. *Cf.* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 306 (1962) (Goldberg, J., concurring) ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God . . . .").

225 *See* Gallup, *Religion in America*, 480 ANNALS 167, 169-70 (1985). These individual benefits may flow in part from communal relationships with other believers. *See* M. TUSHNET, *supra* note 14, at 272-74; Gedicks & Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579, 1600-02 (1987).

contrary,[226] religion in the United States tends to promote voluntary compliance with secular laws as well as nonlegal societal norms. Moreover, most religions encourage private altruism to one degree or another,[227] further benefiting society and reducing the need for government involvement in the protection of disadvantaged citizens.[228]

Finally, religion can play a symbolic role in nourishing the American political community. As I have discussed, the political community may suffer serious damage when it excludes on the basis of religious or irreligious beliefs. On the other hand, the community is strengthened by feelings of connectedness. Feelings of connectedness are enhanced when the community recognizes the common characteristics and common interests of its members. If these similarities have a history, the members of the community can recognize the existence of a common heritage, adding to the unifying effect. In American society, religion can serve as the source of both present-day similarity and historical heritage, thereby performing a symbolic, unifying function.[229] It is important to note, however, that when the political community uses religion in this fashion, it not only will gain from the unifying effect, but also suffer from the religious and irreligious exclusions that will inevitably result.

* * *

There is an obvious tension within the three broad factors that I have discussed. The first two factors require a respect for irreligious as well as religious beliefs, both for the sake of the individuals holding those beliefs and for the sake of the political community. Yet the third factor suggests that religion has special value, or, to put the tension more clearly in focus, it suggests that religion is more valuable than irreligion. There is no direct conflict here, for my arguments concerning the need to protect irreligious beliefs do not depend on an assumption that *ir*religion

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226 Some of the more prominent of these examples are revealed in the Supreme Court's free exercise decisions, which typically address situations in which religious norms directly or indirectly conflict with secular laws. *See generally* 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 21.6-21.9 (1986) (discussing the Supreme Court's free exercise decisions).

227 Research suggests that the religiously committed "are vitally concerned about the betterment of society" and participate far more than others in a variety of charitable activities. *See* Gallup, *supra* note 225, at 170.

228 As Justice Brennan has noted, religious organizations "contribute to the well-being of the community in a variety of non-religious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the community." Walz v. Tax Comm'n, 397 U.S. 664, 687 (1970) (Brennan, J., concurring).

All of my claims concerning the instrumental benefits of religion are empirical and, to some extent, they are culturally and historically contingent.

229 *Cf.* R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 60 (1984) ("[W]hether it is called the Judeo-Christian ethic, or Christianity, or the operative social values, or a civil religion, it is the dynamic of religion that holds the promise of binding together (*religare*) a nation in a way that may more nearly approximate *civitas*.").

may have intrinsic, instrumental, or symbolic value. Nonetheless, the tension is both undeniable and unavoidable. As I am about to demonstrate, however, the Supreme Court's establishment clause doctrine gives due regard to each of the three factors that I have identified, and thereby works to mitigate the tension that exists.

B. A Political-Moral Defense of the Supreme Court's Separationist Doctrine

The dominant theme of the Supreme Court's establishment clause doctrine is the separationist philosophy that the Court first embraced in *Everson*. That philosophy has been given more concrete formulation in the Court's three-part *Lemon* test. Under *Lemon*, government action violates the establishment clause if it lacks a secular purpose, if it has the principal or primary effect of advancing or inhibiting religion, or if it fosters an excessive government entanglement with religion.[230]

Can this separationist doctrine be justified under a theory of political-moral reasoning? In light of the three general factors discussed above,[231] I believe that it can. More specifically, I believe that the Court's separationist doctrine is sound because it gives religious and irreligious beliefs the special protection that they deserve, safeguards our political community from the damaging effects of religious and irreligious exclusions, and at the same time protects the important role of religion in American society.

1. *Respecting Religious and Irreligious Beliefs.*—Individuals can suffer serious damage from actions that assault their religious or irreligious beliefs.[232] As a result, the government should respect these individual beliefs, and it should encourage its citizens to do likewise in their private conduct. The *Lemon* test can be understood to further these goals. Indeed, on this reading, the three-part *Lemon* test reduces to a single, overriding prohibition: the government may not take action that fails to respect the religious or irreligious beliefs of individual citizens.

If the government takes action that violates *Lemon* by inhibiting religion, its failure to respect the beliefs of the disadvantaged individuals is evident.[233] When the government acts to advance religion, on the other hand, the disadvantaging effect of its action is more subtle, but may

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230 *Lemon*, 403 U.S. at 612-13. For a discussion of *Everson* and the *Lemon* test, see *supra* notes 37-67 and accompanying text.

231 *See supra* notes 205-29 and accompanying text.

232 *See supra* notes 205-09 and accompanying text.

233 For arguments contending that government inhibitions on religion should be considered under the free exercise clause, as opposed to the establishment clause, see Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378-88 (1981), and Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 VAL. U.L. REV. 285 (1984).

be no less offensive. In advancing the religion of some of its citizens, the government is acting to endorse that religion. In a religiously pluralistic society, however, when the government endorses the religion of some, it necessarily disapproves the religion or irreligion of others. As a result, the government fails to respect the religious or irreligious beliefs of individuals whenever it acts either to advance or to inhibit religion. To borrow from Justice O'Connor, *Lemon* can be read to implement a prohibition on "government endorsement or disapproval of religion,"[234] but endorsement is precluded precisely because it signals a disapproval of those religious and irreligious beliefs not favored by the government's action.[235]

More generally, this type of inquiry supports Justice O'Connor's focus on the messages that are sent by the government when it acts to advance or inhibit religion.[236] The critical "audience," at least at this stage of the analysis, is the group of individuals whose beliefs are disfavored by the government action. Because we are attempting to protect these individuals from an injury that is essentially psychological, we are concerned with *their* perceptions of the government's action and whether, from *their* point of view, the government has acted to assault their religious or irreligious beliefs.[237]

The government cannot be expected to read the minds of its citizens

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234 Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). At least as I use the term, "endorsement" implies government sponsorship or approval of religious beliefs *as* religious beliefs, that is, sponsorship or approval of religious beliefs for their intrinsic truth and validity. *See generally* Smith, *Symbolism, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276-78 (1987) (describing several possible meanings of "endorsement").

235 The Supreme Court's doctrine leaves room for certain government accommodations of religion; such accommodations, if properly confined, send messages neither of endorsement nor disapproval. *See* Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in the judgment). *See generally* McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146 (1986). The Court's doctrine also leaves room for religious involvement in politics. *See generally* L. TRIBE, *supra* note 202, at §§ 14-9 & 14-14 (arguing that religious involvement in politics is permissible and important, and that the purpose prong of *Lemon* should not be read to forbid it).

236 *See generally* M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 214 (1983) (describing the establishment clause as "the only substantive constitutional restraint on what governments may say"); Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987) (arguing that O'Connor's suggested approach supports a principle of "liberal neutrality" under the religion clauses); Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049 (1986) (supporting O'Connor's endorsement-disapproval standard and discussing its application in a number of specific settings); Marshall, *"We Know It When We See It"—The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (discussing a "symbolic" understanding of the establishment clause focused on eliminating the perception of improper government action).

237 *See* Dorsen & Sims, *supra* note 7, at 857-61.

and avoid psychological assaults that it could not reasonably foresee. But a psychological assault *is* reasonably foreseeable whenever the government acts to endorse or disapprove religion, because such action almost invariably affronts the religious or irreligious beliefs of certain individuals in society. As a result, the government should be precluded from acting purposefully to endorse or disapprove religion; the first prong of *Lemon* essentially embodies such a rule. Whatever the government's actual purpose, moreover, action that has the principal or primary *effect* of advancing or inhibiting religion is likely to be *perceived* by the disfavored individuals as an act of endorsement or disapproval. Thus, the second prong of *Lemon* states that such action is also unconstitutional. Likewise, the third prong of *Lemon* guards against the harms that may be caused even by unintentional religious favoritism or disapproval, for when the government entangles itself with religion, it almost inevitably conveys a message that (depending on the nature of the entanglement) it either endorses or disapproves of the religion with which it is entangled.[238]

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238 In proposing her "clarification" of *Lemon*, Justice O'Connor actually has advocated a significant modification of the first and especially the second prongs of the test:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). O'Connor treats the entanglement prong of *Lemon* as a separate matter. *See id.* at 689. *Cf.* Aguilar v. Felton, 473 U.S. 402, 429-30 (1985) (O'Connor, J., dissenting) (questioning whether entanglement should be retained as independent prong of test).

Unlike Justice O'Connor, I do not advocate any revision of the *Lemon* formula. Indeed, Justice O'Connor's proposed revision of *Lemon*, as expounded in recent opinions, might create analytical problems that the traditional standard avoids. *See* Smith, *supra* note 234, at 276-301. What I mean to suggest is that the *Lemon* test, in its conventional formulation, works to prohibit various types of government action that can be seen to endorse or disapprove religious or irreligious beliefs, causing injury in the manner that I describe in the text.

Whether as conventionally stated or as modified by O'Connor, the *Lemon* test does not precisely identify, without over- or under-inclusiveness, those government practices that offend the religious or irreligious beliefs of individuals. The teaching of evolution in the public schools, for example, deeply offends the religious beliefs of some, and yet this practice does not violate *Lemon* because its purpose and primary effect are secular, and because it does not involve an impermissible entanglement of government with religion. Conversely, some religious and irreligious individuals might not be offended by practices that do violate *Lemon* in a manner that disfavors their beliefs. *Cf.* Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 732-34 (1987) (suggesting that virtually every government practice offends some religious or irreligious beliefs, and noting that some religious believers may not resent being treated as "outsiders"). *See generally* R. MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS (1986) (discussing religious groups that have cultivated a sense of separate identity in American culture and therefore a sense of "outsider" status); K. VONNEGUT, CAT'S CRADLE 122 (1963) (describing Bokonon's request that the government outlaw his religion to give it "more zest, more tang"). But government practices within the prohibition of *Lemon* are much more likely than other government practices to inflict injury in the manner of a psychological assault, and they are much less likely to be supported by important secular interests.

Government assaults on religious or irreligious beliefs vary in intensity, and therefore in the degree of damage they are likely to inflict.[239] For purposes of evaluation, we can divide government action into three basic groups.

First, and most offensive, is government action that is directly coercive in inducing individuals to abandon their religious or irreligious beliefs and to subscribe to conflicting beliefs of the government's own choosing.[240] Government sponsorship of religious exercises in the public schools can be seen to involve this direct coercion, given the "captivity" and impressionability of the targeted audience and the prominent effect of peer pressure for this age group.[241]

Second, even when government action does not directly coerce individuals to abandon their own beliefs, it may force them to provide substantial financial support, through taxation, for beliefs that they reject. Such support may assert indirect coercive pressure to conform to the favored beliefs.[242] In any event, the government is forcing individuals to assist in the advancement of religious beliefs[243] that they reject. This is the primary vice of government support for private religious schools.

Finally, the government may engage in symbolic behavior that endorses religious beliefs[244] but that carries only a slight risk of indirect

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And to the extent that *Lemon* does not prohibit government practices that nonetheless inflict psychological injury, such as the teaching of evolution, the offended individuals might be able to claim free exercise protection in the form of judicially-sanctioned exemptions from the practices in question. For a discussion of the Supreme Court's free exercise doctrine, see 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 226, at §§ 21.6-21.9 (1986). *See generally infra* note 318.

239 *Cf.* McCoy & Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249 (1986) (arguing that laws challenged under the religion clauses pose varying risks of religious oppression and should be evaluated accordingly).

240 The free exercise clause has been found to provide some relief from government coercion with respect to religious or irreligious beliefs. *See generally* 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 226, at §§ 21.6-21.9. As construed by the Supreme Court, "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion" and can be violated "whether [the challenged] laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, 370 U.S. 421, 430 (1962). For an argument that the original understanding of the establishment clause supports a renewed focus on coercion, see McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

241 *Cf.* Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in the judgment) ("This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.").

242 *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

243 This point would also apply to the advancement of irreligious beliefs, but in our present society, it is almost inconceivable that the government would provide financial support for irreligion as such.

244 This point would also apply to the endorsement of irreligious beliefs, but such an endorsement is almost inconceivable in our present society.

coercion and that involves only an insignificant expenditure of public monies. This type of action does show a lack of respect for the religious and irreligious beliefs of disfavored individuals, but it is less disrespectful, and therefore less damaging, than either of the first two types of government action. Examples of this type of symbolic behavior include "official" references to God or religion, such as those contained in our national motto[245] and in Presidential proclamations commending various religions and religious exercises.[246]

Each of these three types of government action can inflict psychological injury on those individuals whose beliefs are disfavored. Moreover, when the government acts in this fashion, it may encourage private actors to be equally disrespectful of the religious and irreligious beliefs of their fellow citizens, thereby compounding the damage. Standing alone, these considerations would support a vigorous and unwavering adherence to *Lemon*, one that would require the invalidation of government practices falling in each of the three groupings. To the extent that other considerations become relevant, however, it is important to note the varying intensity of these government assaults on religious and irreligious beliefs, for they inflict varying degrees of injury. The more damage that a government action may cause, the greater the need for Supreme Court vigilance in preventing that action.

2. *Maintaining a Religiously Inclusive Political Community.*—Our society has an important interest in maintaining a religiously inclusive political community. Whenever the government takes action that fails to respect the religious or irreligious beliefs of individuals, it disserves this interest; the act of disrespect has an exclusionary impact on the disfavored individuals, thereby weakening their attachment to the political community.[247] As a result, the government's interest in maintaining a religiously inclusive political community provides independent support for a prohibition on government action that fails to respect the religious or irreligious beliefs of individual citizens. It therefore provides independent support for the *Lemon* test, understood as a prohibition on messages of religious endorsement or disapproval. Just as the three prongs of *Lemon* serve to protect individuals from psychological assaults on their religious or irreligious beliefs, the three prongs also serve to protect the corresponding interest of the political community.

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245 "In God We Trust." *See* 36 U.S.C. § 186 (1985).

246 *See generally* Lynch v. Donnelly, 465 U.S. 668, 676-77 (1984).

Symbolic actions by government sometimes may cause more injury than substantial financial undertakings. In particular, a symbolic action that is especially prominent, such as government sponsorship of a religious symbol in a Christmas display, may cause more injury than a substantial financial undertaking that does not garner the same level of public attention, simply because in the latter case the disfavored religious or irreligious individuals may be unaware of the government's action. My rank ordering assumes full citizen knowledge of government actions.

247 *See supra* notes 210-21 and accompanying text.

Like the individual interest in avoiding psychological assaults, the societal interest in maintaining a religiously inclusive political community is injured more by certain types of government action than it is by others. Indeed, because the relationship of individual citizens to the political community is reciprocal, the damage to the community from religious or irreligious exclusions varies in direct proportion to the extent of the individual injury the government's action inflicts. Thus, directly coercive government action causes the greatest injury to the political community; significant financial support for religion causes a substantial, but lesser, degree of harm; and symbolic government action, while it causes some injury, is the least damaging.[248]

Justice O'Connor has argued that the establishment clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[249] In so doing, she has recognized that the Supreme Court's separationist doctrine places limits on government action that affects the relationship between individuals and the political community.[250] As she has noted, government endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[251] Protecting the status of individuals in the political community in the sense suggested by Justice O'Connor cannot be defended under a process-based theory of nonoriginalist judicial review.[252] But in protecting individuals, we protect the political community itself, and this interest does support the Court's doctrine under a theory of political-moral reasoning.

Justice O'Connor correctly observes that religious and irreligious messages send signals both to the religious "outsiders" and to the religious "insiders." The signal to the outsiders is exclusionary, and therefore damaging to the political community. The signal to the insiders, on the other hand, is a message of embracement, one that strengthens the insiders' ties to the community and, to that extent, strengthens the community itself. As noted earlier, the potential damage from exclusion generally exceeds the potential gain in loyalty that may come from the embracing effect of the government's messages.[253] Accordingly, the safer

248 *See generally supra* notes 239-46 and accompanying text.

249 *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

250 Professor Suzanna Sherry has suggested that O'Connor's reasoning may reflect a feminine perspective that emphasizes notions of community over notions of individual rights. *See* Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 593-95 (1986).

251 *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

252 *See supra* notes 148-62 and accompanying text.

253 *See supra* notes 211-16 and accompanying text.

course is to avoid the excluding effects of religious or irreligious messages, even at the cost of foregoing their embracing benefits as well. This suggests that a vigorous application of the *Lemon* test generally will support the society's interest in maintaining a strong political community. We need not be satisfied, however, with reliance on a general presumption that the damaging effects of exclusion will outweigh the positive effects of embracement. Instead, we can look to the particular government messages in question, and, with an eye to the groups receiving the signals of "insider" and "outsider" status, attempt to evaluate the potential gains and losses to the community in each individual case.

As Professor Kenneth L. Karst has noted, an identification with the American political community "comes easily, even automatically," for most American citizens.[254] By contrast, "identification with America is a choice that entails costs" for members of cultural minorities, including religious minorities.[255] This suggests that in the issuance of religious or irreligious messages, the political community should not be overly concerned with the effect of these messages on those who are part of America's religious mainstream. The community ties of these citizens tend to be strong already, as well as resilient. Attention should be focused instead on those who stand closer to the edge of society, those who hold unconventional views that may make them reluctant to attach themselves to the American political community. The community bond of these individuals is more likely to be weak and malleable. Thus, messages of embracement may significantly strengthen their community bond; messages of exclusion may destroy it altogether.

This analysis suggests that we should look primarily to the effect that any given religious or irreligious message is likely to have on individuals who hold minority religious or irreligious views, and only secondarily to the effect of the message on those who are members of mainstream religions. Certain types of messages, those that embrace religious or irreligious minorities, might provide benefits to the political community that outweigh the damaging effects of their exclusionary force. The positive effect of the embracement might be strong, whereas the damaging effect of exclusion might be modest, given that the excluded individuals—religiously mainstream—probably would be little affected in their virtually "automatic" loyalty to the American political community.

Realistically, of course, this type of message will hardly ever be sent by a political community that acts through a process of majoritarian decisionmaking. Instead, the typical religious or irreligious message sent by government action in the United States is precisely the opposite: the government sends a message of embracement to those whose religion is mainstream, and a corresponding message of exclusion to those who hold

254 Karst, *supra* note 213, at 374.

255 *See id.*

minority religious or irreligious beliefs. In so doing, however, the government engages in an act of embracement that will provide only marginal benefits to the community and an act of exclusion that may damage the community severely. In these circumstances—circumstances that will be present in almost all cases—the government message, on balance, has a damaging effect on the political community. Under this analysis, then, as under the general presumption discussed earlier, the Supreme Court in most cases will further the best interests of the American political community through a vigorous enforcement of the *Lemon* test.

When the Supreme Court invalidates government action through its enforcement of the *Lemon* test, of course, the Court itself sends messages to those who had been favored and to those who had been disadvantaged by the government action. It tells those who had been disadvantaged that they are no longer to be treated as outsiders, and it thereby tends to strengthen their ties to the political community. But it also tells those who had been favored that they are no longer to be treated as insiders; this tends to weaken the community bond of the previously favored group.

For the reasons just discussed, however, the effect of the Court's message on the political community will depend largely on its impact on religious and irreligious minorities. In the typical establishment clause case, this impact will be positive, for the Court will be signaling a removal of outsider status for these groups. The impact on mainstream religious believers, who are being denied their insider status, will be negative, but the damaging effect is likely to be modest.[256] As previously noted, these citizens tend to have a strong and resilient attachment to the American political community. Moreover, when the Court acts to deprive these individuals of their insider status, their dissatisfaction may be tempered by a realization that the Court is "adhering to a fixed rule of neutrality rather than rejecting a particular expression of religious belief."[257] Here again, this analysis supports a forceful application of the separationist doctrine represented by *Everson* and the *Lemon* test.

3. *Protecting the Role of Religion in American Society.*—Religion has intrinsic, instrumental, and symbolic importance in American society, and therefore should be maintained and protected.[258] It could be argued that although the Supreme Court's separationist doctrine protects individual beliefs and safeguards the political community,[259] it frustrates

256 This is not to deny that the Court's decision may generate considerable political controversy. *See* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 830-31 (1984). But the damaging *effect* of this controversy on the political community is likely to be modest.

257 Marsh v. Chambers, 463 U.S. 783, 806 n.17 (1983) (Brennan, J., dissenting).

258 *See supra* notes 222-29 and accompanying text.

259 *See supra* notes 232-57 and accompanying text.

our interest in supporting the role of religion in American society. On close examination, however, such an argument is flawed. The Court's doctrine does not hinder the role of religion in American society. To the contrary, our judicially enforced separation of religion and government may well invigorate religion and work to its long-term benefit.

When government action violates the *Lemon* test by inhibiting religion, the Court's doctrine obviously works to protect religion from disadvantage. Far more commonly, however, the government violates *Lemon* by taking action that is designed to advance religion. Given the nature of majoritarian decisionmaking, moreover, the benefited religion or religions are likely to be mainstream—religions with many actual and potential followers in the society. The government's action may hinder the minority religions of those not favored by the government's action, but because their numbers in the society are small, the disadvantage faced by these religions would seem more than offset by the advantage conferred upon the much more widely supported mainstream religions. On balance, then, majoritarian action designed to advance religion would appear to serve a positive function in fostering the cause of religion in American society. Conversely, the Court's separationist doctrine, by precluding majoritarian action of this type, would seem to frustrate, not protect, the role of religion in the United States.

Although superficially appealing, this argument is unpersuasive. The "religion" that is worth protecting in our society is what I will call *genuine* religion. To have intrinsic value, a religion must be theologically sound. To have instrumental and symbolic value, the religion need not be theologically sound, but it must be *perceived* by its adherents as theologically sound. Religion cannot play an instrumental or symbolic role unless it influences the beliefs and conduct of its adherents, and this influence is largely a consequence of the believers' faith in the religion for its own sake, for its intrinsic, religious worth. Thus, religion is valuable in the United States only to the extent that it is genuine—that is, intrinsically sound, at least in the eyes of the religious believers.

For three related reasons, majoritarian action designed to benefit religion tends to be unhelpful, if not counterproductive, to the cause of genuine religion. First, the majoritarian system operates primarily on the basis of secular arguments and political bargaining. Neither of these processes is well-suited for the consideration of supra-rational matters of religion. As a result, there is little reason to believe that the majoritarian system will be able to identify religion or religions that are intrinsically sound.[260]

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260 In the colonial period, Roger Williams was noted for doubting the competence of civil authorities to make decisions involving religious matters. *See* Engel v. Vitale, 370 U.S. 421, 434 n.20 (1962). For an argument that the views of Williams have been given too little attention by the Supreme Court in its establishment clause jurisprudence, see M. HOWE, *supra* note 101.

Second, given the religious pluralism that exists even among mainstream religions in our society, majoritarian action designed to support religion often proceeds at an extremely general level of abstraction, one that attempts to embrace all major elements of Christianity, and frequently Judaism as well. State-sponsored prayers in the public schools, for instance, generally have been framed in broadly "nondenominational" terms.[261] By taking what amounts to a "lowest common denominator" approach to religion, however, the government supports a "religion" that is likely to be mild and bland, if not entirely meaningless.[262] Such an approach does not support, and may even defeat, the policy of supporting genuine and vibrant religion in the United States.

Third, and most important, government "support" for religion is illusory because it tends to degrade and cheapen religion. To the extent that government action actually coerces individual adherence to "religious" beliefs, those beliefs may not have religious worth at all.[263] More generally, religion is simply too important to be reduced to the level of nonreligious political decisionmaking. Political log-rolling and "lowest common denominator" approaches may be acceptable for secular policymaking; they are unacceptable for religious matters. Religion has value because it is special and sacred.[264] Although government "support" may provide short-term benefits, it undermines religion's special and sacred character,[265] and it thereby undermines the long-term vitality

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261 The state-sponsored prayer at issue in Engel v. Vitale, 370 U.S. 421 (1962), for example, read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

262 *Cf.* G. GOLDBERG, RECONSECRATING AMERICA 62 (1984) (noting a description of the *Engel* school prayer as "such a pathetically vacuous assertion of piety as hardly to rise to the dignity of a religious exercise").

263 Many religions value the religious commitments of individuals on the premise that the individuals might choose *not* to make them. The presence of coercion undercuts that premise. As Professor Carl H. Esbeck has observed:

> [B]eginning with the Reformation there has slowly evolved a definition of religion which presupposes voluntary adherence, not coercion, with a zone of personal spiritual autonomy withdrawn from the reach of any civil authority. In Christian theology, mankind is given free will concerning the claims of God on individual lives, including the possibility of choosing unbelief and disobedience.

Esbeck, *Religion and a Neutral State: Imperative or Impossibility?*, 15 CUMB. L. REV. 67, 81 (1984). John Locke's argument for religious toleration rested heavily on this type of theological premise. *See* Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 701-03 (1987). *Cf.* R. MCBRIEN, CAESAR'S COIN: RELIGION AND POLITICS IN AMERICA 60 (1987) ("Coerced religion is an obstacle, not an aid, to genuine faith."). *But cf.* Garvey, *supra* note 209, at 791-92 (noting that religious believers may discount the role of individual choice and instead attribute their religious faith to God Himself).

264 "[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." Engel v. Vitale, 370 U.S. 421, 432 (1962) (quoting J. MADISON, *supra* note 219, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 67 (1947) (appendix to dissenting opinion of Justice Rutledge)).

265 As the Supreme Court noted in Engel v. Vitale, 370 U.S. 421 (1962), "a union of government and religion tends . . . to degrade religion," leading people to "[lose] their respect for any religion

of religion itself.[266]

At best, attempts by government to support religion are not helpful to the cause of genuine religion; at worst, they are counterproductive. Our societal interest in protecting the role of religion in the United States therefore is not well served, and may be disserved, by government "support." Conversely, a vigorous enforcement of the Supreme Court's separationist doctrine does not disserve the cause of religion in America[267] and may help support it.[268]

* * *

The Supreme Court's separationist doctrine is supported by the need to give religious and irreligious beliefs special protection, and also by the corresponding societal interest in maintaining a religiously inclusive political community. Our interest in protecting the role of religion, on close examination, does not undercut the validity of the Court's doctrine, and may actually provide it with further support. An analysis of these three considerations, then, suggests that the Supreme Court's separationist doctrine is sound as a matter of political-moral theory.[269]

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that ha[s] relied upon the support of government to spread its faith." *Id.* at 431 (citing J. MADISON, *supra* note 219, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 67 (1947) (appendix to dissenting opinion of Justice Rutledge)).

266 *Cf.* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 259 (1963) (Brennan, J., concurring) (noting that the establishment clause works to prevent "the secularization of a creed which becomes too deeply involved with and dependent upon the government"); A. DE TOCQUEVILLE, *supra* note 215, at 274 ("[W]hen a religion chooses to rely on the interests of this world, it becomes almost as fragile as all earthly powers. Alone, it may hope for immortality; linked to ephemeral powers, it follows their fortunes and often falls together with the passions of a day sustaining them."); M. HOWE, *supra* note 101, at 11 ("The ultimate strength of our religious establishment is derived . . . not from the favoring acts of government, but, in largest measure, from the continuing force of the evangelical principle of separation."); *id.* at 149 ("[T]he thesis of Roger Williams [was] that government must have nothing to do with religion lest in its clumsy desire to favor the churches or its savage effort to injure religion it bring the corruptions of the wilderness into the holiness of the garden.").

For an argument that government in the United States has increasingly attempted to secularize and co-opt religion for its own purposes, see Van Alstyne, *supra* note 109. *See also* Van Alstyne, *What is "An Establishment of Religion"?*, 65 N.C.L. REV. 909, 913-16 (1987).

267 There is little evidence that religion has been suffering under the generally separationist doctrine that the Supreme Court has enforced in the post-*Everson* era. To the contrary, recent years have witnessed "a rising tide of interest in religion." Gallup, *supra* note 225, at 173. *See generally supra* notes 222-23 and accompanying text.

268 *See* Marsh v. Chambers, 463 U.S. 783, 821-22 (1983) (Brennan, J., dissenting). *Cf.* J. MURRAY, WE HOLD THESE TRUTHS 73-74 (1960) (arguing that American religion has profited from "the maintenance, even in exaggerated form, of the distinction between church and state"); Martin, *Revived Dogma and New Cult*, 111 DAEDALUS 53, 54-55 (1982) (contrasting the vitality of religion in North America with the "icy thinness" of religion in European countries maintaining state churches). *But cf.* Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275, 280 (1986) (arguing that through the Supreme Court's religion clause cases, "virtually the full measure of judicial power is deployed to accomplish" the "demise of religious consciousness").

269 My discussion has proceeded on the premise that religion should be maintained and protected

C. A Political-Moral Defense of the Supreme Court's Subtheme

Although the Supreme Court generally has required a careful separation of religion and government, it has permitted government to favor religion in selected cases, creating an important subtheme in its doctrine.[270] In these cases, the Court frequently has relied on the presence of traditional societal support for the particular government practices in question.[271] As set forth earlier, the Supreme Court's decisions upholding traditional government practices that favor religion cannot be defended under a common values approach to nonoriginalist judicial review.[272] At least some of these decisions, however, *can* be defended under a theory of political-moral reasoning. In particular, the Court properly may uphold certain government practices that violate *Everson* and the *Lemon* test if those practices have a long history of wide support in the United States.

In evaluating the Court's dominant, separationist doctrine, we looked to the messages sent by government actions and by the Supreme Court in its rulings concerning their constitutionality.[273] The same type of analysis is appropriate here. Traditional government practices that favor religion, like nontraditional practices, send messages of disapproval to those not favored by the government's action and thereby cause damage both to the disadvantaged individuals and to the political community itself. This individual and community damage varies with the nature of the government action; direct coercion is the most damaging, significant financial support for religion is somewhat less so, and symbolic action, although still injurious, is the least troublesome.[274]

The degree of damage also varies, however, with the historical status of the government program in question. Other things being equal, long-standing government practices are less disrespectful to the disfavored individuals than are newly conceived government programs. As stable features of the political landscape, traditional practices are more likely to be accepted by the disfavored individuals as part of a preexisting status quo—something that they may not like, but that they accept essentially as a given, a fact of life. Moreover, because they are in large part products of the past, they send a less offensive message in the present; the

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because of its intrinsic, instrumental, and symbolic importance in American society. Even if this premise were rejected, however, that would not affect my other arguments in defense of the Supreme Court's separationist doctrine, that is, my arguments concerning the protection of religious and irreligious beliefs and concerning the maintenance of a religiously inclusive political community. *See generally supra* notes 232-57 and accompanying text. And those arguments, without more, might well be adequate to support the Court's separationist doctrine.

270 *See supra* notes 68-72 and accompanying text.

271 *See supra* notes 192-95 and accompanying text.

272 *See id.*

273 *See supra* notes 233-38 & 249-57 and accompanying text.

274 *See supra* notes 239-46 & 248 and accompanying text.

modern political community has not made new policies that signal a contemporary statement of disrespect, but rather has simply continued to maintain the long-standing policies of the past. As a result, the disfavored individuals will suffer a lesser degree of injury, and the corresponding damage to the political community will be similarly reduced.

Like other government attempts to favor religion, traditional "support" is in large part illusory. No less than newly conceived efforts, traditional actions purportedly in furtherance of religion do little to advance the cause of genuine religion, and may well be counterproductive.[275] Because the actions are traditional, however, their continuation may have some symbolic value for the political community. The maintenance of traditional practices concerning religion may support a sense of present-day religious similarity as well as a sense of common heritage, and these factors may strengthen the community bond of many citizens.[276] These citizens, however, are likely to be mainstream religious believers and already solid members of the American political community; the gain to the community is therefore likely to be modest.[277]

The continuation of traditional government practices favoring religion causes damage to individuals and to the political community, and the offsetting symbolic gain to the community is not substantial. On the other hand, these practices clearly are *less* harmful than similar practices lacking a traditional stature in the society. As a result, there is *less* reason for the Supreme Court to invalidate them.

When the Supreme Court acts to invalidate government action designed to favor religion, moreover, the Court itself sends messages. By enforcing a rule of neutrality it shows respect for the religious and irreligious beliefs of individuals, and it does not harm—and may help advance—the role of genuine religion in American society. Further, in the typical establishment clause case, the Court's decision strengthens the American political community. Its action weakens the community bonds of those who had been treated by the government as religious insiders, but this loss is more than offset by the strengthened bonds of the religious and irreligious minorities who had been disfavored.[278]

The invalidation of *traditional* government action, however, may on balance have a negative effect on the political community. Those favored by the challenged government action—typically, mainstream religious believers—may feel that history has given them a vested interest in the insider status conferred by the government's traditional practice, and they may regard the practice as an important symbol of American heritage. As a result, the Supreme Court's invalidation may have a more

275 *See supra* notes 258-68 and accompanying text.

276 *See supra* note 229 and accompanying text.

277 *See supra* notes 254-55 and accompanying text.

278 *See supra* note 256 and accompanying text.

damaging than usual exclusionary effect on them. At the same time, the embracing effect of invalidation on the religious and irreligious minorities disadvantaged by the government action may be only modest; if these individuals suffer only minor offense from the traditional government practice, the Court's removal of this offense likewise will have only a minor, albeit positive, impact.

Other things equal, then, the Supreme Court does less good and causes more harm when it invalidates traditional, as opposed to nontraditional, government practices that are designed to favor religion. This does not mean, however, that all such traditional practices should be upheld. Rather, the Court must weigh in each case the costs and benefits of invalidation. Some traditions are more long-standing and widely supported than others; the stronger the tradition, the greater its impact in counseling against invalidation.[279] On the other hand, the Court must also consider the intensity with which the challenged government action assaults the religious or irreligious beliefs of the individuals that it disfavors, for this determines the extent of individual and community damage the government's action is causing.

Direct coercion, even if traditional, is extremely offensive to individual beliefs and therefore extremely damaging to the political community as well; the benefits of judicial invalidation in this context surely will outweigh the costs. As a result, the Supreme Court properly has invalidated state-sponsored prayer in the public schools,[280] however traditional this practice might have been.[281] Conversely, symbolic government action, involving neither direct coercion nor a significant expenditure of public monies, should be upheld if the action is traditional, for in these circumstances the costs of judicial invalidation probably would exceed the benefits.[282] Under this reasoning, for example, the long-sanctioned "official" references to God and religion in our national motto and in Presidential proclamations should not be declared unconstitutional.[283] This reasoning also may support the constitutionality of legislative

279 *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring) ("The more longstanding and widely accepted a practice, the greater its impact on constitutional interpretation.").

280 *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

281 *See supra* note 195 and accompanying text. This rationale for the unconstitutionality of state-sponsored prayer in the public schools is sound regardless of the Court's own reasoning, which claims that such prayer is unconstitutional even though coercion may not be present. *See, e.g., Engel*, 370 U.S. at 430-31. *See generally supra* note 241 and accompanying text.

282 *Cf.* Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 B.Y.U. L. REV. 509 (arguing that the Constitution should be read to permit the government to use religious symbols that commemorate religious traditions with an enduring history of official sanction).

283 The reference to God in the Pledge of Allegiance ("one nation under God," *see* 36 U.S.C. § 172 (1985)) is considerably more problematic. In many settings, such as the public schools, the pledge is likely to be used in a manner that is directly coercive. Even in the absence of direct coercion, moreover, this practice, dating back only to 1954, may not be sufficiently long-standing to qualify as "traditional" under the analysis I have suggested. *See generally* Loewy, *supra* note 236, at

prayer,[284] Sunday closing laws,[285] and government sponsorship of religious symbols in Christmas displays,[286] although these results are more controversial.[287]

The most difficult cases involve traditional financial support for religion. This form of government action is less offensive to the disfavored individuals than direct coercion, but more offensive than symbolic action. In this area, the appropriate result may depend on the nature and extent of the financial support and the nature and extent of the government tradition. Tax exemptions for religious organizations, for example, involve only indirect financial assistance and are supported by a tradition that predates our national founding and that extends to all corners of American government. As a result, this reasoning may support the constitutionality of such exemptions.[288]

Under a political-moral analysis, government action designed to favor religion is less troublesome when it is supported by tradition, and the judicial invalidation of such action carries significant costs of its own. As a result, the Supreme Court's subtheme, recognizing exceptions to the

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1058-60 (arguing that the reference to God in the pledge should be considered unconstitutional under Justice O'Connor's endorsement-disapproval standard).

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

285 *See* McGowan v. Maryland, 366 U.S. 420 (1961).

286 *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

287 One might argue that legislative prayer and Sunday closing laws involve more than symbolic government action. Legislative prayer might be viewed as directly coercive, although the audience is hardly as impressionable as the children targeted by public school prayer. *Compare* Marsh v. Chambers, 463 U.S. 783, 792 (1983) *with id.* at 798 n.5 (Brennan, J., dissenting). In the case of Sunday closing laws, one might point to the competitive financial advantage that they provide to members of the favored religions, and thereby argue that these laws, in fact if not in form, provide substantial financial support to these religions. *See generally* Braunfeld v. Brown, 366 U.S. 599 (1961) (considering, but rejecting, a free exercise claim based on a similar argument).

Government sponsorship of religious symbols in Christmas displays, on the other hand, generally is not directly coercive and typically involves only a modest financial expense. *Cf.* Choper, *Church, State and the Supreme Court: Current Controversy*, 29 ARIZ. L. REV. 551, 553 (1987) (approving the Supreme Court's decision in *Lynch*, 465 U.S. 668, because "[n]o one was forced to do anything," and because the expenditure of tax funds was "de minimus"). But such sponsorship may not be supported by a sufficiently long-standing and widespread tradition to be upheld under the analysis I have suggested. *Cf. Lynch*, 465 U.S. at 724 (Brennan, J., dissenting) ("It is simply impossible to tell . . . whether the practice [of displaying nativity scenes] ever gained widespread acceptance, much less official endorsement, until the 20th century.").

288 In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Supreme Court upheld property tax exemptions for religious organizations. The Court noted that in granting such exemptions, "the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675. The Court also cited the American historical tradition of granting tax exemptions to religious organizations, a tradition that began in pre-Revolutionary times and that had continued since then as "an unbroken practice" at both the state and federal levels of government. *Id.* at 676-78.

Based on similar reasoning, Sunday closing laws might properly be upheld as constitutional even if they are seen to provide indirect financial support for the members of favored religions. *See generally supra* note 287.

usual doctrine of *Everson* and *Lemon*, is at least partially defensible. In particular, the Court properly may uphold traditional symbolic support for religion, and it may permit certain types of traditional financial support as well.[289]

D. Political-Moral Reasoning, Judicial Activism, and the Establishment Clause: Why the Supreme Court?

I have argued that the broad features of the Supreme Court's establishment clause doctrine—including its dominant, separationist component and at least some of its contradictory subtheme—are supported by principles and policies determined through a process of political-moral reasoning. This type of nonoriginalist constitutional decisionmaking, however, deeply undercuts the principle of majoritarian government. Quantitatively, this method of judicial review holds a theoretically limitless potential for judicial invalidation. Qualitatively, the Court's method of decision is designed neither to enhance the procedural operation of the majoritarian system nor to give effect to widespread societal values, whether past, present, or even future. Both quantitatively and qualitatively, therefore, this type of judicial role is extremely activist.[290] As a result, the case for such a judicial role must be especially persuasive if it is to succeed. For several reasons, however, the case for an activist judicial role in this area *is* especially persuasive.

First, the Court's decisionmaking creates national constitutional law, providing answers applicable nationwide regarding the proper relationship of religion and government. When the issues at stake are as important and controversial as those concerning church-state relations, it simply will not do to have a piecemeal resolution of these matters at the state and local levels. The twentieth century has witnessed dramatic changes in communication practices and personal mobility in the United States. As a result, we have become an increasingly national political community, and it has become increasingly important to support the

289 The Supreme Court sends messages not only when it invalidates government actions, but also when it upholds them. Although the messages sent by constitutional approval generally are less potent than the messages sent by constitutional invalidation, the Court should not ignore the potentially damaging effects of constitutional decisions that validate government actions. In upholding a traditional government action under its subtheme, for example, the Supreme Court may not only sanction the challenged government practice, but also give it dramatic national exposure. In so doing, the Court may broadly extend the reach of the practice's damaging impact on the religious or irreligious individuals that the practice disfavors, and thereby also increase the resultant damage to the political community. For the reasons discussed in the text, a judicial decision upholding a traditional practice, on balance, often is preferable to a decision finding such a practice unconstitutional. In some situations, however, the Supreme Court might be well advised to avoid a decision altogether by simply denying review. *Cf.* Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 56 (arguing that the Court should have denied certiorari in *Lynch*, the nativity scene case).

290 On the distinction between quantitative and qualitative measures of judicial activism, see *supra* notes 28-36 and accompanying text.

political community at that level. To ensure that our citizens identify themselves as "Americans first and Georgians or New Yorkers second,"[291] we must provide *American* answers to our most fundamental issues of principle and policy. Independent of its intrinsic merit, therefore, the Court's establishment clause doctrine serves an important function by nationalizing our society's response to issues of church and state.[292]

Second, and far more important, the Court's judicial activism leads to national answers that are, in general, intrinsically meritorious. I have just demonstrated that the thrust of the Court's establishment clause doctrine is politically and morally sound. The Court's activism therefore serves a vital function by strengthening our society both politically and morally.

Third, these nationalizing and strengthening functions can be performed effectively only by the Supreme Court. Although Congress conceivably could set national policies governing church-state relations, neither Congress nor any other majoritarian body is likely to formulate policies that are politically and morally sound. As the Court's establishment clause cases themselves attest, majoritarian officials are prone to adopt policies that give insufficient respect to individual religious and irreligious beliefs, that damage the political community, and that may actually hinder the role of religion in American society.[293] Absent the Supreme Court's activist doctrine, we likely would be governed by a patchwork quilt of majoritarian policies concerning church-state issues, policies that would differ widely from state to state. More troubling still, many of these policies would be seriously injurious both to individual citizens and to society.

It is not surprising that the Supreme Court's doctrine is politically and morally superior to the majoritarian policies that would otherwise prevail, because the Court is institutionally more capable than majoritarian officials in determining the proper relationship between religion and government. Majoritarian officials, given their temporary and politically contingent tenure in office, tend to focus on the short-term interests of politically important constituents, that is, those constituents who have sufficient numbers and political strength to affect the officials' continued tenure in office.[294] The interests of these constituents, more-

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291 "Some minimum homogeneity of social institutions is necessary if people are to consider themselves Americans first and Georgians or New Yorkers second." R. POSNER, *supra* note 29, at 193.

292 For a more elaborate discussion of the nationalizing function of nonoriginalist judicial review, see Conkle, *supra* note 31, at 26-30.

293 *See supra* notes 230-69 and accompanying text.

294 This tendency should not be exaggerated. *See generally* Tushnet, Schneider, & Kovner, *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 971-80 (1988) (discussing the electoral incentives of members of the House of Representatives).

over, often are identified more by public opinion than by careful analysis and reflection, for it is the voting public, however uninformed, that will determine the officials' political fate. As a result, even ill-advised public opinion may prevail over forceful arguments of principle and policy.

The short-term and reflexive tendencies of majoritarian decisionmaking can be problematic in various areas,[295] but they are especially troublesome when the government policies affect the relationship between church and state. In this area, majoritarian officials will be strongly inclined to adopt policies designed to support mainstream religions, despite the damaging effects of such policies. They are likely to discount, of course, the injuries that their actions might inflict on minority religious and irreligious individuals, for these persons ordinarily will not comprise any significant segment of the voting public. They also are likely to ignore the risks of damage to the political community and to the long-term cause of religion itself. These risks are primarily risks for the future, not the present. Moreover, although these risks are real and serious, my arguments also disclose that the risks are subtle, not obvious; they require a rather elaborate demonstration through a process of reasoned argument.

Average citizens, if not majoritarian officials themselves, simply lack the time and inclination to devote themselves to the type of contemplative discourse and reflection that is necessary for a proper evaluation of church-state questions. Instead, public opinion and majoritarian policy are likely to be informed by beliefs that are superficially appealing, but ultimately unpersuasive. In particular, a politically powerful majority may well believe that it is advisable for government to attempt to support the mainstream religion or religions to which most citizens adhere. Given the intensity of religious beliefs, moreover, this group may urge government support for religion with an unusual passion and emotion. As a result of all these factors, majoritarian officials are likely to adopt policies designed to favor mainstream religions, policies that are neither politically nor morally sound.

Justices of the Supreme Court, by contrast, hold a tenure that is neither temporary nor politically contingent. They are more likely to consider the future as well as the immediate effects of government policies, and they need not respond to a public opinion that may be uninformed. The "flesh and blood of . . . actual case[s]," moreover, provide the Justices with "an extremely salutary proving ground for all abstractions," ensuring "a process that tests as it creates."[296] To a far greater extent than majoritarian decisionmaking, the judicial process is a forum

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295 Witness, for example, the chronic tendency of Congress and the President to engage in deficit spending, which provides short-term benefits but may impose serious long-term costs.

296 A. BICKEL, *supra* note 75, at 26.

for reason, argument, and careful deliberation.[297] The judicial forum therefore permits a reasoned, open, and deliberative consideration of all of the relevant factors that ought to inform the relationship between church and state, including both short- and long-term considerations regarding individual beliefs, the political community, and the role of religion in the United States.[298] The Court does have institutional weaknesses, of course. It cannot conduct elaborate empirical investigations, for example, nor can it draft comprehensive regulations in the manner of a legislature or administrative body. But none of its institutional weaknesses hinders the Court in formulating and applying its establishment clause doctrine. This type of comparative institutional analysis firmly supports the Supreme Court's exercise of its decisionmaking function under the establishment clause.[299]

I say that the Court is exercising a decisionmaking function "under the establishment clause." Yet the arguments presented thus far in defense of the Court's doctrine have been entirely nontextual. These arguments would apply with equal force even if the establishment clause had never been adopted. Nonetheless, the Court could not properly engage in its nonoriginalist decisionmaking in this area in the absence of plausible textual support.

The legitimacy of the Court's nonoriginalist decisionmaking depends not only on its functional utility, but also on at least some measure of popular consent or acquiescence. Such consent or acquiescence provides a partial bridge to the principle of majoritarian government, one that helps mitigate the "deviance" of nonoriginalist judicial review in a democratic society.[300] The public need not, and frequently will not, approve of the *content* of the Court's constitutional doctrine, but it must remain generally satisfied with the nature of the Court's *process of decision*, its *method* of formulating constitutional law. Indeed, the Court necessarily relies on the popular branches to respect and implement its constitutional decisions. This occurs only because the popular branches and the people that they serve are generally satisfied with the Court's role in constitutional adjudication.[301]

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297 *Cf.* Michelman, *The Supreme Court, 1985 Term—Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 76-77 (1986) (emphasizing the importance of reasoned justification and dialogue in judicial decisionmaking). *See generally* E. CHEMERINSKY, *supra* note 6, at 89-95.

298 *See generally* Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1042-52 (1987) (presenting a comparative institutional analysis suggesting that, as compared to majoritarian officials, federal judges are more likely to give proper weight to "particularist" as well as "universalist" values).

299 *See generally* Komesar, *Taking Institutions Seriously*, *supra* note 145.

300 *See* A. BICKEL, *supra* note 75, at 18.

301 Professor Leonard W. Levy's comments concerning judicial review in general apply equally to nonoriginalist review in particular:

> Judicial review would never have flourished had the people been opposed to it. They have opposed only its exercise in particular cases, but not the power itself. They have the sovereign

Neither the popular branches nor the people have ever, or would ever, consent to or acquiesce in a limitless power of "constitutional" decisionmaking by the judiciary.[302] Instead, their consent or acquiescence extends only to an *interpretive* role for the Supreme Court, a role that assumes the constitutional *text* to have at least some meaning.[303] Popular views concerning the limits of this interpretive role no doubt are incomplete and widely disparate. In light of the increasingly public debate concerning originalist versus nonoriginalist methods of decision,[304] for example, there may be no consensus on whether the Court properly makes constitutional doctrine going beyond the original understanding. Nonetheless, majoritarian officials, and the public in general, plainly would reject "constitutional" decisionmaking not even plausibly supported by language in the constitutional text.[305]

The Court's constitutional doctrine concerning the relationship between religion and government *is* plausibly supported by the language of the establishment clause, when it is read in conjunction with the fourteenth amendment. Some might find the language supportive in originalist terms, although such a conclusion would be erroneous.[306] Others might find the language supportive on a view that the Constitution is a living, growing document, capable of being read in a way not envisioned or intended by its framers and ratifiers at all.[307] In any event, the relationship of religion and government is addressed in the establishment clause, and this provides a plausible link between the Court's doctrine and the constitutional text.[308] In the absence of this textual link, the

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power to abolish it outright or hamstring it by constitutional amendment. The President and Congress could bring the Court to heel even by ordinary legislation. The Court's membership, size, funds, staff, rules of procedure, and enforcement agencies are subject to the control of the "political" branches. Judicial review, in fact, exists by the tacit consent of the governed.

L. LEVY, *Judicial Review, History, and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 1, 12 (1967). Elsewhere I have argued that this popular consent or acquiescence is evidenced most clearly by Congress's consistent failure to exercise its power to restrict the Supreme Court's appellate jurisdiction. *See* Conkle, *supra* note 6, at 638-58.

302 *See* Lusky, *For Preservation of Judicial Review*, 3 J.L. & POL. 597, 617-19 (1987).

303 I am using the term "interpretive" to suggest this textual link, and not to refer to originalist constitutional decisionmaking. On the matter of terminology, see Conkle, *supra* note 6, at 594 n.25.

304 *See supra* note 3 and accompanying text.

305 For articles discussing the importance of the constitutional text, see, for example, Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427 (1986), and Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

306 *See supra* notes 77-143 and accompanying text.

307 For an especially powerful argument along these lines, see M. PERRY, *supra* note 73, at 121-79 (contending that in addition to its originalist meaning, the text of the Constitution has a nonoriginalist, symbolic meaning that embodies fundamental aspirations of the American political tradition, aspirations that in turn provide the operative basic standards for constitutional discourse).

308 As the Court's substantive due process cases attest, textual support for the Court's constitutional doctrines need not be especially specific or persuasive. At least in today's political and legal culture, however, some textual support is required even for doctrines that depend primarily on nontextual justifications. For arguments suggesting that this textual link may not have been critical for the founding generation, see, for example, Sherry, *The Founders' Unwritten Constitution*, 54 U.

Court's decisionmaking function almost surely would be rejected by the people and their elected representatives. In this limited but critical sense, then, the text of the Constitution does matter, and the Court in fact is exercising a decisionmaking function "under the establishment clause."

Beyond the bare text of the establishment clause, moreover, the circumstances of history have permitted the Supreme Court to support its doctrine with references to the opinions of important personalities from America's founding generation. Thus, the Court has been able to rely on the views of individual framers, including especially James Madison, and of other heroic figures, such as Thomas Jefferson.[309] This in no way makes the Court's decisionmaking originalist, for an analysis of the *collective* intentions of the framers and ratifiers of the first and fourteenth amendments clearly demonstrates that the original understanding of the Constitution does not support the Court's doctrine.[310] Nonetheless, by relying—however selectively—on the views of prominent Founding Fathers, the Court enhances its legitimacy in the eyes of the American people and their political representatives by aligning itself with historical giants, men who are broadly revered in modern American society.[311]

V. CONCLUSION

The search for a single, unifying theory of constitutional interpretation may be chimerical. Instead, different theories may be necessary for different areas of constitutional doctrine.[312] Originalism may be appropriate for the interpretation of certain constitutional provisions.[313] Non-

CHI. L. REV. 1127 (1987), and Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

309 *See supra* text accompanying notes 79-83.

310 *See supra* notes 77-143 and accompanying text.

311 As Professor Richard B. Saphire has noted, "[H]istorically-rooted principles may be especially valued by society to the extent they are perceived as representing the judgments of predecessors whose actions and wisdom are widely regarded as heroic or deserving of honor." Saphire, *supra* note 93, at 766.

312 Likewise, these different theories may have important interrelationships, which in turn may vary from one context to the next. *See generally* Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (discussing the interrelationship of various types of constitutional argument); Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988) (defending a method of decision that combines a variety of considerations, including text, history, tradition, consensus, precedent, and social policy); Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513 (1988) (suggesting that every constitutional case evokes both originalist and nonoriginalist conceptions of the Constitution, and that these competing conceptions in fact may offer complementary insights). *But cf.* M. TUSHNET, *supra* note 14, at 180-85 (criticizing attempts to rely on different theories for different areas of constitutional doctrine).

313 Professor Stephen L. Carter has argued that an originalist approach may be advisable for certain structural provisions of the Constitution. *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 847-65 (1985). For a critique of Carter's arguments and Carter's reply, see Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U.L. Rev. 47 (1986), and Carter, *The Right Questions in the Creation of Constitutional Meaning*, 66 B.U.L.

originalist theories of various types may explain and justify other aspects of the Supreme Court's constitutional decisionmaking. Process theory, for example, may illuminate many of the Court's freedom of expression and voting cases,[314] and a forward-looking theory of common values may explain numerous decisions in the areas of due process, equal protection, and the eighth amendment.[315]

None of these relatively nonactivist theories, however, adequately explains the Supreme Court's establishment clause doctrine. This doctrine requires instead a nonoriginalist theory of political-moral reasoning, a theory that permits the Court simply to identify and apply principles and policies that are sound. Such a theory calls for an exceedingly activist judicial role—a role that is deeply problematic in a society committed to the concept of majoritarian government. Nonetheless, in the particular setting of church and state, this type of judicial activism is both defensible and desirable. The relationship between religion and government is a matter of central importance in our society; it has significant effects on individuals, on the political community, and on religion itself. The Supreme Court's establishment clause doctrine, moreover, has achieved a national resolution of church-state issues far superior to that which would prevail in its absence. In large part, this is due to institutional characteristics permitting the Court to make decisions that are politically and morally superior to the decisions reached by the majoritarian process.

The legitimacy of any type of constitutional decisionmaking by the judiciary depends on the function it can perform and whether that function can be justified within a system of majoritarian government. In the words of the late Professor Alexander M. Bickel:

> The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.[316]

A function that satisfies these criteria in certain areas of constitutional law may fail utterly in other areas, resulting in the need for different theoretical justifications.

In this Article, I have presented a theory designed to support the

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Rev. 71 (1986). *See also* Carter, *From* Sick Chicken *to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719.

314 *See* J. ELY, *supra* note 22, at 105-25.

315 *See* Conkle, *supra* note 6, at 625-64.

316 A. BICKEL, *supra* note 75, at 24.

broad features of the Supreme Court's constitutional decisionmaking under the establishment clause.[317] Judicial activism of the sort defended here may be indefensible in other areas of constitutional law. In this particular setting, however, the Court's activism is not merely justified; it is essential to the political and moral health of the society.[318]

317 Justice Scalia recently has asserted that the Supreme Court's establishment clause decisionmaking in particular cases has been so erratic and unpredictable as to be "embarrassing." *See* Edwards v. Aguillard, 107 S. Ct. 2573, 2607 (1987) (Scalia, J., dissenting). Scalia's appraisal, moreover, finds considerable support in the academic community. *See, e.g.*, L. LEVY, *supra* note 92, at 162-63 (describing the Supreme Court's establishment clause decisions as "inexcusably inconsistent" and "erratic and unprincipled"); Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986) (arguing that the *Lemon* test "has been so elastic in its application that it means everything and nothing"); Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 114 (1986) (describing the Supreme Court's establishment clause decisions as radically indeterminate). *See generally* Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U.L. REV. 707 (1984); Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094 (1985).

Although I have made no attempt to evaluate all of the Supreme Court's numerous decisions under the establishment clause, I suspect that these complaints may be somewhat exaggerated. Many of the Court's "inconsistent" results may be reconcilable under the theoretical approach suggested in this Article. On the other hand, significant inconsistencies may remain, especially in cases involving aid to parochial schools. *See supra* note 66 and accompanying text. In any event, the remedy for inconsistent application of a constitutional doctrine—to the extent that such exists here—is consistent application, not abandonment.

318 My theoretical defense of the Supreme Court's establishment clause doctrine may have implications for the free exercise clause as well. Although I have not attempted to address these implications here, I suspect that my analysis would support the basic features of the Supreme Court's free exercise doctrine. In particular, I suspect that the judicial recognition of religion-based exemptions from laws of general application, to the extent required by the Court's doctrine, might work to protect individual beliefs, maintain the political community, and safeguard the role of religion in American society. If so, then the Court's free exercise doctrine might be defensible on that basis, and the doctrine might be seen to both supplement and complement the Court's decisionmaking under the establishment clause. *See generally supra* notes 235 & 238.