

The Relative Irrelevance of the Establishment Clause

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Despite the heated legal, political, and scholarly battles that rage around the Court’s Establishment Clause decisions, this Article contends that these decisions are actually quite tangential to the maintenance of the nonestablishment norm. The Article argues, first, that a pervasive feature of modern Establishment Clause jurisprudence is that the Court’s stated doctrine is underenforced; second, that there are some legitimate reasons for that underenforcement; and, third, that the Court’s decisions serve mostly as political markers that leave much pertinent activity wholly unregulated by law. By focusing not on what the Court is doing but on what it concertedly seeks not to do, the Article hopes to illuminate the relationship between law and politics in an era in which religious–political movements have become increasingly sophisticated. In light of these movements, the important question for scholars of the Establishment Clause is how the Court “manages establishment” in the political/legal culture outside constitutional law. The Article assesses four potential answers to this question and discusses a number of recent Establishment Clause decisions, paying special attention to disputes about the Ten Commandments, the Pledge of Allegiance, and faith-based initiatives. The Article concludes by suggesting how a self-conscious Supreme Court Justice might help maintain the constitutional settlement of nonestablishment despite the Court’s limited doctrinal influence.

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Introduction

Debates about the contours of the Establishment Clause and the relationship between church and state in the United States often focus on the Supreme Court and its Religion Clause decisions. Religionists claim that the Court has built a wall of separation between church and state that devalues the beliefs of religious citizens and contributes to the secularization of the culture.¹ Secularists argue that the Court is the only bulwark against a creeping theocracy and that it should do more to keep religion distinct from the state.² Meanwhile, normative constitutional scholars describe judicial

1. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 3 (1993) (lamenting that efforts to “banish religion for politics’ sake . . . have created a political and legal culture that presses the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them”); Carl H. Esbeck, *Equal Treatment: Its Constitutional Status*, in *EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY* 9, 13 (Stephen V. Monsma & J. Christopher Soper eds., 1998) (arguing that “with the arrival of the New Deal and the explosive growth in the regulatory/welfare state, enforcing strict separation confined religious education and charitable ministries to ever smaller and smaller enclaves” and that to “increasing numbers of Americans, strict separation present[ed] a cruel choice between suffering funding discrimination or forced secularization”); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 640–41 (“In these many areas of overlap, the idea of ‘separation between church and state’ is either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic.”).

2. See MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 257 (2007) (asserting that the Establishment Clause evidences the Founders’ rational fear “of the mischief that can be fostered by religious institutions, particularly when they are sovereign” and that “[t]he history leading up to the founding of the United States and the Protestant cast of governance theories at the time undermine such attempts to treat religion as though it is not a dangerous and potent social force that must be limited, just as the state must be”); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 50 (2007) (stating that “every time particular religious factions have attempted to advance their own cause by circumventing our traditional national antipathy toward the joinder of church and state, the attempts have undermined religious liberty, increased the country’s political divisions along religious lines, and even led to sectarian violence”); cf. BILL PRESS, *HOW THE REPUBLICANS STOLE CHRISTMAS: THE REPUBLICAN PARTY’S DECLARED MONOPOLY ON RELIGION AND WHAT DEMOCRATS CAN DO TO TAKE IT BACK* 71–72 (2005) (postulating that the United States is a secular nation but not a nation without values and arguing that the segregation of church and state actually allows America to be “the most religious nation on earth”).

principles and doctrines intended to strike the appropriate balance between religion and the state.

This emphasis on the Supreme Court and its doctrinal formulations and decisions is understandable. The Constitution requires nonestablishment and protects free exercise.³ And the Court has, since the advent of the modern religion clauses, been called on to mediate the relationship between church and state and has done so energetically at times.

Nevertheless, this Article contends that the Court's role in maintaining the norm of nonestablishment is significantly overstated. Despite the public attention that has greeted the Court's decisions on school prayer, religious school funding, and religious displays, the Court mostly avoids enforcing the core tenets of its stated Establishment Clause doctrine or simply does not apply it to a significant array of conduct that occurs at the intersection of religion and government. In the debates over the Court's Establishment Clause doctrine and its role in the religious culture wars, there is a lot of heat and light but—it turns out—relatively little fire. What the Court does is much less significant than what the Court does not do.

This Article argues (1) that a pervasive feature of the Court's Establishment Clause jurisprudence is that the Court's stated doctrine is underenforced⁴ or is irrelevant to a whole range of arguably pertinent conduct; (2) there are some legitimate reasons for this judicial underenforcement or irrelevance; and (3) to the extent the Court is capable of enforcing its stated nonestablishment principles, it can only do so indirectly by managing establishment in the political/legal culture that exists beyond constitutional law. How the Court does or fails to do (3) is the main subject of this Article.

I begin by describing the significant areas of interaction between religion and the state that appear to be mostly unregulated by Establishment Clause doctrine.⁵ For example, the Court's doctrine requires that laws be justified by a predominantly secular purpose. But in practice, the Court is not prepared to examine the actual intent of lawmakers. The Court, thus, does not prevent legislatures from adopting laws on the basis that those laws are required by God or a particular religious belief. Nor is the Court prepared to regulate nonlegislative government policies that are predominantly motivated in actuality by religious belief. The Court does not prevent religious organizations and activists from lobbying for such laws or policies on the basis that they are required by God and does not, except indirectly, pre-

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

4. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978) (describing the concept of underenforcement).

5. This exercise is partly inspired by Fred Schauer's argument that the Court's agenda is often tangential to the nation's. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4, 34 (2006).

vent legislators from voting for legislation because of their own individual commitments to codifying God's laws. Nor does the Court regulate the de facto exercise of power by particular religious groups, even if that exercise of power results in laws or policies that are coextensive with the tenets of a specific religion. In the political sphere, the doctrinal Establishment Clause is simply not relevant.

Moreover, except in limited formal settings, the Court does little to prevent religious endorsements despite a requirement that government officials not engage in expressions that indicate that one particular religion or religious worldview is a special favorite of the state. The Court does not prevent legislators or other government officials from making statements affirming the particular religious (often Judeo-Christian) nature of the country, from giving reasons grounded in a particular favored religion for their actions, from explicitly linking prayer and public policy, or from endorsing a particular set of explicitly religiously derived moral beliefs. Nor does the Court prevent politicians or government officials from making alliances with specific churches or religious groups or explicitly endorsing their message or asking them for financial or other assistance.

Along all these dimensions, the rules governing the relationship between church and state are a matter of constitutional culture and not a matter of constitutional doctrine. Nevertheless, normative constitutional scholarship sometimes reads as if the doctrinal category of nonestablishment was coextensive with the political category of nonestablishment. At the most, legal scholarship tends to focus on the former or the latter but not on the relationship between the two.⁶ To the extent that the domain of government acts to which the doctrinal Establishment Clause is simply inapplicable is large, this is a mistake.

This Article argues that the existence of a significant domain in which the Establishment Clause is judicially inoperative should inform the Court's substantive approach to those areas in which the Establishment Clause is operative. The goal is to develop an account of the relationship between the

6. Debates about the legitimacy of religiously based arguments in the public square, for example, normally assume that constitutional restraints will not be judicially enforced except indirectly. See, e.g., MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 44–49 (1997) (assuming a previously argued conclusion that constitutional restraints lack direct judicial enforcement while arguing the moral justifiability of religiously based arguments in public debate); Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1–6 (1994) (assuming that other participants in public discourse, rather than the courts, should determine the permissibility of religious argument in that discourse); Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 621 (1992) (“There is no legal or constitutional question about the admission of religion to the public square Religion is merely the public opinion of those citizens who are religious.”). Neuhaus's article was part of a *George Washington Law Review* symposium devoted to determining the contours of religious-political discourse. Symposium, *Religion in Public Life: Access, Accommodation, and Accountability*, 60 GEO. WASH. L. REV. 599 (1992).

constitutional doctrine of nonestablishment and the constitutional culture of nonestablishment. By focusing not on what the Court is doing but on what it concertedly seeks not to do, my hope is to illuminate the relationship between law and politics in the church–state context. That relationship is particularly fraught in an era in which religious–political movements have become increasingly ascendant and religion-inflected conflicts have attained national prominence.⁷

This Article has three parts. Part I describes the areas where religion and the state intersect but in which Establishment Clause doctrine appears to be inoperative or underenforced. Part II seeks to explain the absence of a serious judicial presence in these realms. Part III suggests a doctrinal approach to Establishment Clause disputes that is candid about these judicial limits. An important goal for such an approach is to provide criteria for determining when managing establishment in the wider public sphere may require *not* regulating establishment in the legal sphere. Throughout I discuss a number of recent Establishment Clause cases, paying special attention to disputes about the Ten Commandments, the Pledge of Allegiance, and faith-based initiatives.

The larger question (to which I offer only a tentative answer) is: how does and should the Supreme Court help maintain the constitutional settlement of nonestablishment? My view is that the Court’s doctrinal role is quite limited, though its institutional role may be more robust. But this claim relies on accounts of how the Court’s decisions affect the political and constitutional culture, and I do not pretend that these accounts are at all definitive. Focusing on the relationship between the constitutional doctrine of nonestablishment and the constitutional culture of nonestablishment, however, leads to a more accurate understanding of the Establishment Clause, for it reminds us of the Court’s (and the Clause’s) limitations.

I. Establishment Clause Underenforcement

My first claim is that, since the advent of its modern Establishment Clause jurisprudence, the Supreme Court has regularly underenforced⁸ its

7. The recent controversy over the building of an Islamic community center two blocks from the 9/11 site is only the most recent example. See Sheryl Gay Stolberg, *Obama Strongly Backs Islam Center Near 9/11 Site*, N.Y. TIMES, Aug. 13, 2010 at A1 (“The community center proposal has led to a national uproar over Islam, 9/11 and freedom of religion during a hotly contested midterm election season.”). Notably, even many of those who oppose the center have admitted that it would be unconstitutional to prevent it. See, e.g., E-mail from Howard Dean to Glenn Greenwald (Aug. 17, 2010), in Glenn Greenwald, *Howard Dean: “Mosque” Should Move*, SALON (Aug. 18, 2010), http://www.salon.com/news/opinion/glenn_greenwald/2010/08/18/dean (“[N]o one who understands the American Constitution can reasonably doubt the right of the builders to build.”). The fact that it would be unconstitutional to prevent the building has not translated into political tolerance.

8. This term is from Larry Sager’s seminal article, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, though Sager’s use of it is more formal than mine here. See

stated Establishment Clause principles. We see this across a number of principles and in a number of constitutional contexts. First, despite a doctrinal requirement that laws have a legitimate “secular legislative purpose,”⁹ the Court avoids inquiring too deeply into the *actual* provenance of legislative acts. Even if a law or government act is *actually* motivated by a particular religious constituency or religious belief, the Court will uphold it if it can be justified with reference to a plausible secular criteria.¹⁰ Thus, across a whole range of government policy making, religiously motivated decisions can be made, and the Court has little to say about it.

Second, despite a doctrinal requirement that government officials not engage in acts that “endorse”¹¹ a particular religion or religious perspective, the Court does relatively little to prevent public officials from specifically advocating a particular religious worldview, asserting that such a belief system is a prerequisite for membership in the political community, engaging in sectarian prayer as part of civic ritual, or specifically endorsing the religious claims of religious people.¹² Though the Court has regulated some formal categories of government speech in order to limit government endorsement, government officials’ religiously based rhetoric appears to be mostly immune to the doctrinally enforced nonendorsement principle.¹³

Third, despite the Court’s adoption of a principle of “no entanglement” between religion and government,¹⁴ the Court does not regulate religious–political alliances.¹⁵ While the Court has something to say about government acts that have explicit religious content, it has little to say about religiously infused and inspired policy agendas that can ultimately be justified without reference to religion. Thus, many of the central policy disputes that are currently most divisive along religious lines—abortion, contraception, stem-cell research, same-sex marriage, end-of-life care—cannot be understood through the constitutional lens of nonestablishment despite their deeply religious character. This domain of inapplicability is significant, especially so when seen from the perspective of laypersons, who regularly invoke the constitu-

Sager, *supra* note 4, at 1213. In some cases, I will be talking about formal underenforcement, i.e., situations in which the Court’s decisions regarding the contours of the constitutional norm are not coextensive with the norm. In such cases, the norm is still legally binding on other constitutional actors. In other cases, I use the term to describe how the Establishment Clause norm is subservient to competing constitutional norms. In these instances, one might not describe the Establishment Clause norm as being legally binding on other constitutional actors because those actors are also bound by the competing constitutional norm.

9. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

10. *See infra* subpart I(A).

11. *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–94 (1989).

12. *See infra* subpart I(B).

13. *PERRY*, *supra* note 6, at 32.

14. *Lemon*, 403 U.S. at 613 (citing *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

15. *See infra* subpart I(C).

tional principle of nonestablishment to protest the influence of religiously motivated persons and parties in making government policy.¹⁶

My purpose here is not to argue for or against the Court's stated Establishment Clause doctrines but rather to describe how those doctrines are wholly unapplied to large swaths of conduct that occur at the intersection of government and religion. I think this domain of underenforcement is significant and cuts across a number of the Court's stated Establishment Clause doctrines. I have mentioned the secular purpose requirement, the nonendorsement principle, and the no entanglement requirement. In addition, much government conduct that goes unregulated appears to violate the principle of neutrality, which is said to require that the government not favor one religion over another or to favor religion over nonreligion. I will also argue that the Court does not attempt to regulate government acts that arguably violate the Court's stated principle of noncoercion, which requires that government not coerce citizens to engage in acts dictated by a particular religious code.

A. *Religiously Based Lawmaking*

At the core of Establishment Clause underenforcement is the Court's disinclination to police substantive laws or policies that are based in significant part on particular religious beliefs and motivated by a particular religious constituency. The doctrinal Establishment Clause appears to prevent the government from adopting laws or policies on the basis that those laws are required by God, as God's laws are understood by a particular religious group or groups.¹⁷ But in practice, Establishment Clause doctrine has little to say about government actions that are *actually* motivated by religious constituencies and *actually* based in a particular religious code so long as the

16. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 3–8 (2008) (collecting religiously motivated political rhetoric and acts that have generated controversy in the political culture); cf. John C. Danforth, *In the Name of Politics*, N.Y. TIMES, Mar. 30, 2005, at A17 (lamenting the transformation of the Republican Party “into the political arm of conservative Christians”); Andrew Sullivan, *Terri Is the Dying Martyr the Republican Right Can Use*, SUNDAY TIMES, Mar. 27, 2005, § 1, at 15 (suggesting that President George W. Bush and the Republican Party were interested in the Terri Schiavo case as a means to energize religious zealots in preparation for midterm elections and in derogation of core Republican ideals).

17. See PERRY, *supra* note 6, at 14–16 (“[T]he nonestablishment norm forbids government to take any action based on the view that one or more religious tenets are closer to the truth or more authentically American or otherwise better than one or more competing religious or nonreligious tenets.”). But see Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 381 (1992) (“Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken. They are questions within the jurisdiction of both.”); Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 679–80 (2001) (recanting his earlier position and adopting the view that religiously based political choices do not violate the Establishment Clause).

government action can be justified with reference to some plausible secular criteria.¹⁸

That the nonestablishment norm prevents government from adopting laws predominantly on the basis that they are required by God or the religious tenets of some particular faith seems axiomatic, but it requires some defense. Some commentators have argued that laws that can be justified only on the grounds that they are compelled by God or some religious belief do not violate the nonestablishment norm unless those laws compel individuals to engage in acts of religious worship or exercise.¹⁹ Nonestablishment, on this account, merely requires that the government not coerce individuals to practice a particular religion.²⁰ It does not prevent the government from adopting laws that originate in and are justified by a specific religious belief, including a belief that God demands their adoption.

This narrow interpretation of the nonestablishment norm is not current doctrine, however. Moreover, it requires distinguishing between those acts that compel worship or religious exercise and those that do not. Does a law requiring women to wear veils compel worship or does it simply regulate the day-to-day affairs of women?²¹ Do dietary restrictions²² or laws that limit work on the Sabbath compel a form of worship?²³ What about laws dictating how one can obtain a divorce, describing the appropriate standard for negligence, or the remedies for libel?

The majority of laws that are derived from religious sources are arguably laws that have little to do with acts of worship or religious ritual. For example, Jewish law regulates commercial and domestic relations, foreign affairs, and relations between the sexes; it provides a criminal code and dictates criminal penalties; sets forth a court system and procedural rules; and

18. PERRY, *supra* note 6, at 34.

19. *See, e.g.*, McConnell, *supra* note 1, at 656–57 (stating that “[o]ne false view of separation is the view that religious ideas must not serve as rationales for public policy” and arguing that the “principle of secular rationale” rests on “inaccurate stereotypes and questionable epistemological premises”); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 803 (1993) (“[I]f a statute motivated by religion, or even intended to advance religion, is neutral in its effects on freedom of religious exercise and nonexercise, the Establishment Clause supplies no justification for outlawing it.”).

20. *See* Paulsen, *supra* note 19, at 797 (“[T]he coercion principle, properly understood, is the best single test of when government action violates the Establishment Clause.”).

21. For a discussion of French laws *outlawing* the wearing of veils, see generally Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1 (2005).

22. *See* *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 432 (2d Cir. 2002) (striking down New York’s kosher fraud laws).

23. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) (upholding Maryland’s Sunday closing laws).

regulates weights and measures, money, and agricultural practices.²⁴ Under a narrow interpretation of the nonestablishment norm, the state could adopt one or all of these rules and regulations on the grounds that Jewish law demands them so long as the rules do not require individuals to engage in some form of religious ritual or worship.²⁵ A legislature could state explicitly that it is adopting wholesale the criminal code of the Hebrew scriptures or a judge could adopt a common law rule on the basis that it is required by the Gospels, and these acts would be immune from Establishment Clause challenge.²⁶

Such a reading of the Establishment Clause would be anomalous, for while it would bar coerced religious ritual, it would permit coerced religious law. For this reason, courts have repeatedly asserted that laws that violate the nonestablishment principle are not just those that compel individuals to engage in a particular religious practice but also those that the state adopts because they are mandated by God or a religious belief system, that is, those laws that are not justified (at least in part) on nonreligious grounds. The category of impermissible lawmaking is thus in part attitudinal. A law that prohibits the charging of excessive rates of interest, that prohibits murder, or that mandates that the payment of taxes might very well have a religious

24. See generally GERSON APPEL, *CONCISE CODE OF JEWISH LAW* (1989); MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (Bernard Auerbach & Melvin J. Sykes, trans.) (1994).

25. Commentators can be unclear about this distinction. For example, Douglas Laycock rejects the secular purpose requirement, arguing that exclusively religious claims can properly undergird laws governing “morality, . . . right conduct . . . , [and] proper treatment of our fellow humans.” Laycock, *supra* note 17, at 381. But he also states that it is illegitimate for a religion to “use . . . the instruments of government . . . to directly impose their belief on others.” *Id.* at 374–75. This may indicate a distinction between religious exercise and other kinds of laws, with the former receiving more protection than the latter. Commentators might also draw distinctions between citizens’ reasons for voting and legislators’ or judges’ reasons for creating law—giving citizens more leeway than legislators and legislators more leeway than judges to act on solely religious reasons. Cf. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 231, 236–39 (1988). Moreover, some might draw a distinction between authoritative religious justifications and more generic ones, that is, between justifications based in the primacy of a particular religious code and justifications based in general claims about what God or a religiously based morality might require. *Id.* at 35 (explaining that “the tightness of connection between the religious source of guidance and the conclusion about a particular issue can vary considerably”).

26. For a somewhat oblique discussion of such a possibility, see Steven Smith, *Legal Discourse and the De Facto Disestablishment*, 81 *MARQ. L. REV.* 203, 217–18 (1998). It is not clear what is left of disestablishment if religious law can be an appropriate basis for secular law. But perhaps a distinction can be drawn between reasoning from religion (or religious principles) and treating them as authoritative. In *Legal Discourse*, Smith expresses wariness of the legal positivism that would support such a distinction. *Id.* at 218 (“This fact likely reflects the convergence of a questionable restriction on reliance of religious beliefs with a dubious legal positivism, which in combination may help account for the virtual absence of religious perspectives in legal discourse.”). But Smith proceeds to reason from religious (or moral) principles in making an argument about the appropriate principle of damages in a tort case. *Id.* at 225. Contrast that with the answer given by a student in my property class when asked what the appropriate rule in a nuisance case should be. She replied that she would determine what Canon Law required and adopt that.

provenance as well as a nonreligious one. But justifying those laws solely on religious grounds without a plausible secular basis violates a norm of nonestablishment.

This secular purpose requirement has been stated in various ways, and its judicial application has been quite uneven. Nevertheless, the Supreme Court continues to reaffirm this view of nonestablishment: the predominant reason or motivation for a law's adoption has to be secular. Laws cannot be adopted in large part because they are compelled by a particular religion or religious belief system. As the Court held in *Lemon v. Kurtzman*,²⁷ laws must have a "secular legislative purpose" to be legitimate.²⁸ This is the first prong of the *Lemon* test, which continues to be battered but remains unvanquished.²⁹ *Lemon* requires a particular intent—that the government not act solely on the basis of religious doctrine or belief.³⁰ A law that cannot be justified by "considerations of state policy other than the religious views of some of its citizens"³¹ is invalid under this test. Government actions that are animated solely by a religious purpose—for example, legislation that is adopted because God or some religious belief system requires it—are unconstitutional under the *Lemon* test.³²

But it turns out that the Court normally avoids looking too deeply at the *actual* legislative motivation for a law to determine whether it has a legitimate secular purpose. Whether one votes to criminalize homosexual conduct because one believes that homosexuality is an abomination before God or whether one does so for some nonreligious reason is not easily susceptible (except in unusual circumstances) to judicial inquiry. And secular justifications for laws, i.e., justifications based on public welfare or individual dignity or some other justifications that do not invoke religious law, are relatively easy to conjure. The result is that across a whole range of government policy

27. 403 U.S. 602 (1971).

28. *Id.* at 612; see also, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (striking down a state law that prevented the teaching of evolution because the state had offered no secular justification for its existence).

29. There are numerous critiques of the *Lemon* test and in particular of the "secular purpose" requirement. For a summary, see Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467–72, and see also STEVEN G. GEY, RELIGION AND THE STATE 219–40 (2d ed. 2006) for a good discussion.

30. 403 U.S. at 612. Even in *Lemon*, it is worth noting, the Court held that the Pennsylvania and Rhode Island laws that dispensed financial aid to nonpublic schools, including "church-related" institutions, did not have an impermissible purpose. *Id.* at 613. The Court found "no basis for a conclusion that the legislative intent was to advance religion" and nothing to undermine the stated legislative purpose to "enhance the quality of the secular education in all schools covered by the compulsory attendance laws." *Id.* Instead, the aid programs were found to violate the Establishment Clause under the third, "excessive entanglement," prong of the *Lemon* test. *Id.* at 614–25.

31. *Epperson*, 393 U.S. at 107–08.

32. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 88 (2002) (asserting that the secular purpose test "bar[s] the government from enacting laws whose only justification is based on the tenets of some religion").

making, religiously infused or motivated policy decisions can be made, and as a practical matter, the Establishment Clause does not address them.³³

The Court's reticence to examine the *actual* provenance of government legislation is reflected in the fact that the secular purpose prong of the *Lemon* test is so underused. As Justice Souter recently acknowledged, the Court has invalidated a government act because it violated the "secular purpose" requirement only five times since *Lemon*.³⁴ Most recently, it did so in *McCreary County v. ACLU of Kentucky*,³⁵ in which the Court struck down a posting of the Ten Commandments in a Kentucky county courthouse on the grounds that the county could provide no secular justification for it.³⁶

At first glance, *McCreary County* seems to indicate the Court's willingness to look carefully at legislative motive when assessing government acts under the Establishment Clause. The Court reviewed the legislative and executive history of the Kentucky display, which included statements by county officials that the display was intended to reflect the civil laws' foundation in the Ten Commandments.³⁷ The Court cited the fact that a religious official accompanied the county executive when the display was hung, that the county had made references to Jesus Christ in its resolutions supporting the Ten Commandments, and that the county had declared that one of the purposes of the display was to "publicly acknowledge God as the source of America's strength and direction."³⁸ Moreover, the majority explicitly rejected the county's argument that the Court should avoid examining legislative motives or accept a secular one offered in the course of litigation.³⁹ Justice Souter's majority opinion repeatedly defended "secular purpose" as a test with teeth, one that is not met when legislatures offer post hoc rationalizations for acts that "objective observer[s]" would easily recognize as animated by religious purposes.⁴⁰

33. See Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 737 (1996) (noting the "'underenforcement' of the full ideal of nonestablishment").

34. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 859 & n.9 (2005). In *McCreary County*, Justice Souter lists four cases: *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308–09 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 586–93 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985); and *Stone v. Graham*, 449 U.S. 39, 41 (1980). *McCreary Cnty.*, 545 U.S. at 859 n.9. *McCreary County* makes the fifth. In *Epperson*, a state law was invalidated for lacking a secular purpose, but that decision took place before *Lemon*. *Epperson*, 393 U.S. at 107–08; see also Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 59 n.46 (2007) (listing all six Supreme Court cases invalidating government actions for lack of a secular purpose).

35. 545 U.S. at 844.

36. *Id.* at 881.

37. *Id.* at 850–58.

38. *Id.* at 851, 853 (internal quotation marks omitted).

39. *Id.* at 859–65.

40. *Id.* at 864 ("[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."); *id.* at 865 n.13 (rejecting the dissent's easier formulation of the test as having "no real bite"); *id.* at 866 n.14 (maintaining that a reasonable observer can generally identify actions taken

For all its bluster, however, *McCreary County* mostly signals the weakness of the secular purpose requirement. The cases in which the Court has enforced the secular purpose prong all involve some kind of religious practice or doctrine: the Court has struck down legislation on those grounds in two school-prayer cases,⁴¹ two Ten Commandments cases,⁴² and one creationism case.⁴³ These cases involve patently religious activities—prayer or specific religion-based doctrines—in which the religious purpose was obvious on the face of the government act. The Court has never struck down a substantive law that did not involve a specific religious practice or expression of religious dogma on the grounds that it was animated by an impermissible religious motive.⁴⁴

Indeed, the Court has carefully avoided putting the state to the burden of providing secular justifications for nonreligion-specific laws even if those laws appear to have a religious provenance or coincide with the tenets of a particular religion. Abortion is the most obvious example.⁴⁵ In *Harris v. McRae*,⁴⁶ the Court rejected an Establishment Clause challenge to restrictions on abortion funding, holding that it would not assume that religion is being advanced because a law “happens to coincide or harmonize with the tenets of some or all religions.”⁴⁷ And, as Justice Scalia pointed out in his dissent in

for sectarian reasons); *id.* at 874 (“[A]n implausible claim that governmental purpose has changed should not carry the day in a court of law . . .”).

41. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–09 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985).

42. *McCreary Cnty.*, 545 U.S. at 881; *Stone v. Graham*, 449 U.S. 39, 41 (1980).

43. *Edwards v. Aguillard*, 482 U.S. 578, 586–93 (1987).

44. *But cf.* *Lawrence v. Texas*, 539 U.S. 558, 571(2003) (rejecting justifications for sodomy laws based in religious claims that homosexuality is immoral).

45. Ronald Dworkin has made a sustained argument that abortion is properly understood within the framework of the First Amendment. *E.g.*, RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* 104–10 (1996); RONALD DWORIN, *LIFE’S DOMINION* 175 (1993). Laurence Tribe also initially made the argument that abortion restrictions violated the secular purpose requirement. Laurence H. Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18–25 (1973). He backed away from that view, however. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 928 (1978). Mark Tushnet suggests that issues like abortion might be called “religion-sensitive” and argues that because of their nature courts should be involved in assessing the proper balance of interests. Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clause*, 27 WM. & MARY L. REV. 997, 1003–04 & n.18 (1986).

46. 488 U.S. 297 (1980).

47. *Id.* at 319 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)) (internal quotation marks omitted). However, Justice Stevens has at least twice provided a counter position:

In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any personal interest in the perpetuation of what the State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State’s action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.

Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 350 (1990) (Stevens, J., dissenting).

Edwards v. Aguillard,⁴⁸ a 1987 creationism case, the Court's claim that legislation is invalid if it is animated solely by religious belief is an anomaly: "We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved."⁴⁹

Justice Scalia is certainly correct that the Court does not ordinarily plumb the psyches of legislators to determine if they were motivated by God or religious belief when they voted for a particular government policy or set of policies. The Court only enforces the secular purpose requirement in those circumstances when the law mandates a particular religious practice or dogma; that is, when the intent is clear on the face of the law. But this means that important elements of a religious or church-based policy agenda are mostly immune to Establishment Clause challenge. Even if laws that provide monies to feed the hungry, criminalize abortion, or prevent stem-cell research are demanded by religious constituencies and adopted by legislators who believe that they are doing God's work, the Court will avoid applying the secular purpose requirement. The Court will either accept the secular justification provided by legislators or provide a secular justification of its own.⁵⁰

The Court signaled as much in *McCreary County*, observing that a law initially animated by a religious purpose could become clothed with a secular purpose over time and that Ten Commandments displays without a legislative history manifesting a religious purpose could be deemed constitutional in some circumstances.⁵¹ Indeed, the Court's analysis in *McCreary County*, while employing the rhetoric of secular purpose, was mostly about whether the history of the adoption of the display constituted an endorsement of religion. That is, the analysis turned for the most part on whether a

This conclusion [that life begins at conception] does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.

Webster v. Reprod. Health Servs., 492 U.S. 490, 566–67 (1989) (Stevens, J., concurring in part and dissenting in part) (internal citations omitted); *see also Bowers v. Hardwick*, 478 U.S. 186, 211–12 (1986) (Blackmun, J., dissenting) ("The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. . . . A state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."), *overruled by Lawrence*, 539 U.S. at 558.

48. 482 U.S. at 578.

49. *Id.* at 615 (Scalia, J., dissenting).

50. *But cf. Lawrence*, 539 U.S. at 571 ("The condemnation [of homosexual conduct] has been shaped by religious beliefs The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.").

51. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 874 (2005).

reasonable person observing the county engaged in the adoption of the display could *believe* that the resulting law had a secular purpose. In other words, the Court, as Justice Scalia noted in dissent, was not concerned with “the *actual purpose* of government action, but the ‘purpose apparent from government action.’”⁵²

Justice Scalia’s primary target—in his *McCreary County* dissent and elsewhere—has been the validity of the secular purpose requirement. He would abandon it altogether⁵³—a view I will consider in Part III. For now, it is worth observing that Justice Scalia is correct that the Court would not invalidate a law that provided money for the homeless because it was predominantly motivated by the belief that God required it. Though the Court has held that the Establishment Clause prevents legislators from adopting laws on the basis that they are required by God or a particular religious belief system, the Court does not fully enforce that norm. And it is to this lack of enforcement that Justice Scalia’s critique points.⁵⁴

The Court will only invoke secular purpose when the law is religious on its face—prayer in school, creationism, and the Ten Commandments—and will avoid doing so if the law is not, even if it is *actually* animated by a religious purpose. At the end of the day then, secular purpose in the Court’s parlance does not ultimately mean that laws cannot be adopted on the basis that they are required by God or a particular religious code. Secular purpose instead means that laws adopted on the basis that they are required by God cannot *look too much* like they were adopted because they are required by God.⁵⁵ The nonestablishment norm is thus applied indirectly: laws cannot *communicate* a message that they are somehow required by a religious belief system even if they are.⁵⁶

52. *Id.* at 900–01 (Scalia, J., dissenting) (quoting *id.* at 860 (majority opinion)).

53. *Id.* at 902–03 (Scalia, J., dissenting).

54. See Gey, *supra* note 29, at 470. Gey notes:

Contrary to the usual criticism of *Lemon*, the problem is not that the terms of *Lemon* mean too little; the problem is that the terms of *Lemon* mean too much. An honest application of the *Lemon* test would require a far more rigorous separation of church and state than a majority of the current Supreme Court is willing to enforce. This does not mean the test is flawed. Rather, the separation principle that gives the test meaning does not have the support necessary to provide courts applying *Lemon* with a consistent orientation.

Id.

55. See *Edwards v. Aguillard*, 482 U.S. 578, 615–16 (1987) (Scalia, J., dissenting) (noting that instances where legislators simply acted on their religious convictions or where a law merely coincided or harmonized with certain religious tenets did not violate the *Lemon* test); Koppelman, *supra* note 32, at 113–14 (arguing that the secular purpose prong of the *Lemon* test cannot always be satisfied by a mere rubber-stamp secular purpose because some legislation will be so clearly religious on its face that any purported secular purpose will be undermined).

56. See *McCreary Cnty.*, 545 U.S. at 863 (“A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.”); see also *Clayton v. Place*, 884 F.2d 376, 381 (8th Cir. 1989) (reversing district court’s determination

B. Religion-Endorsing Rhetoric and Observances

Whether the norm of nonestablishment is or should be primarily concerned with the communicative aspects of government action is subject to some debate among Religion Clause scholars.⁵⁷ But even if one maintains that the primary concern of the Establishment Clause should be to limit government communication of messages of religious endorsement, one would be disappointed with the Court's jurisprudence. Expressive violations of the norm of nonestablishment also tend to be significantly underenforced by the Court. The Court's principles of nonendorsement and neutrality require that the government not take any position favoring or disfavoring religion or endorsing a particular religious view. Nevertheless, the Court, both through its substantive Establishment Clause doctrine and its doctrines of judicial avoidance, rarely attempts to regulate large swaths of government conduct and rhetoric that do just that.

The domain of expressive governmental acts that the Court does not attempt to regulate is quite significant. The doctrinal Establishment Clause does not appear to prevent a candidate for Congress from declaring that the United States is a Christian nation or, once she is elected, from declaring that Muslims are infidels. The judicially enforced Establishment Clause does not appear to prevent the President of the United States from asserting that the United States is a country based on a specific religion or particular religious principles. Government officials' rhetorical claims that they are inspired to public office by God and for the purposes of doing God's will or that they believe certain conduct should be illegal because the Bible requires it are essentially outside the reach of the Establishment Clause.⁵⁸

That this sphere of official activity goes mostly unregulated is striking in light of the Court's preoccupation with government endorsements of religion: the Court has repeatedly asserted that government-sponsored expressive activities cannot communicate the government's endorsement of a particular religion or religion in general.⁵⁹ Of course, endorsement is a fuzzy

that school's "no-dancing" rule was adopted for religious reasons, despite the district court's finding that the rule did not have an articulated secular purpose).

57. See Koppelman, *supra* note 32, at 113–16 (explaining that a law's legitimacy under the secular purpose prong should be decided in light of how that law can be reasonably perceived by the general culture). For an explanation of the Court's endorsement doctrine, see *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592–621 (1989).

58. Cf. Robert J. Lipkin, *Reconstructing the Public Square*, 24 CARDOZO L. REV. 2025, 2062 (2003) ("The Establishment Clause requires only the final stage of lawmaking to be free from religious reasons, not debates in the media, school board meetings, and other non-lawmaking contexts of political justification."). For discussion of the state action issue in Establishment Clause doctrine, see Richard J. Anson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, The Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 6–8 (1998).

59. See, e.g., *McCreary Cnty.*, 545 U.S. at 881 (finding that displaying the Ten Commandments in a Kentucky county courthouse served a predominantly religious purpose); *Cnty. of Allegheny*,

concept, and there is a great deal of disagreement over what the principle requires.⁶⁰ A great deal turns on what the “reasonable observer” (as interpreted by the Justices) would think about a particular religious display or government expression.

That being said, one can still recognize significant gaps in enforcement—at least of endorsement’s core idea. For example, under current doctrine, the Court would likely find an Establishment Clause violation if an agency or an office of government were to assert that “America is a Christian Nation” in its official publications or on government documents, on the theory that such statements constitute an endorsement of religion and violate the principle of government neutrality toward religion. The Court has never sought, however, to adjudicate similar claims of Christian provenance by government officials, who appear to be free to make such assertions while speaking in their official capacities.⁶¹

492 U.S. at 602 (holding that the display of a crèche in a county courthouse expressly endorsed a Christian message).

60. I, along with much of the legal academy, have criticized the Court’s endorsement test. See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1875–80 (2004) (criticizing the Court’s endorsement jurisprudence for its intrusiveness into “local political authority” and concluding that “the result . . . has been to drain the religious content from patently religious symbols and to reinforce a national standard that is both arbitrarily applied and detached from local social practice”).

61. In her book *Liberty of Conscience*, Martha Nussbaum provides several examples of public officials endorsing Christianity or Christian teachings:

John Ashcroft, former attorney general, regularly asked his staff to sing Christian songs before work began in the morning. . . . Ashcroft characterized America as a “culture that has no king but Jesus.” . . . Lt. General William Boykin, a former head of U.S. Army Special Forces who is involved in the search for Osama bin Laden, said in a speech in June 2003 that radical Muslims hate the United States “because we’re a Christian nation, because our foundation and roots are Judeo-Christian and the enemy is a guy named Satan.” . . . Alan Keyes . . . claimed in a televised debate that voters should choose him because Jesus opposes his opponent, Barack Obama President Bush has recently endorsed the move to require the teaching of “Intelligent Design”

NUSSBAUM, *supra* note 16, at 5–6. Former President George W. Bush has also said that he was called by God to run for the presidency. Alan Cooperman, *Openly Religious, to a Point*, WASH. POST, Sept. 16, 2004, at A1. Similarly, politicians throughout the 1990s were outspoken about their religious beliefs and used religious gatherings to promote their political agendas. Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885, 1885–86 (2001). Political candidates have asserted “that their God and His teachings define the country’s very nature.” *Id.* at 1885. For example, then-Mississippi Governor Kirk Fordice proclaimed to the Republican Governor’s Convention in 1992 that “the United States of America is a Christian nation.” Cathy Young, *GOP’s “Christian Nation”*, BOSTON.COM (July 12, 2004), http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/07/12/gops_christian_nation (internal quotation marks omitted). Similarly, the 2004 Texas Republican Platform includes the statement that “the United States is a Christian nation . . . founded on fundamental Judeo-Christian principles based on the Holy Bible.” REPUBLICAN PARTY OF TEXAS, 2004 STATE REPUBLICAN PARTY PLATFORM, at P-8, *available at* <http://www.yuricareport.com/GOPorganizations/TexasRPTPlatform2004.pdf>. Additionally, several federal statutes in the United States Code and Executive Orders mention God. See, e.g., 10 U.S.C. § 6031(b) (2006) (“[I]t is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at

Instead, the Court's religious expression decisions tend to regulate categories of speech—prayer in school, religious displays in certain settings, or “official” ongoing government pronouncements, such as displays of the Ten Commandments.⁶² This appears to be a response to justiciability concerns. Individual government officials' pronouncements that endorse religion are fleeting and cannot be predictably repeated. And it would be difficult for a plaintiff to bring a case and to obtain a workable remedy for a violation.

But even in cases of official government pronouncements where justiciability concerns seem less dominant, courts often avoid applying the nonendorsement norm. Consider the Court's Establishment Clause standing doctrine. When frequent atheist litigant Michael Newdow challenged the prayer given at the 2001 Presidential Inauguration—during which the Rev. Franklin Graham offered his invocation “in the name of the Father, and of the Son the Lord Jesus Christ, and of the Holy Spirit”⁶³—his claim was rebuffed by both the Eastern District of California⁶⁴ and the Ninth Circuit for lack of standing.⁶⁵ The Ninth Circuit reviewed the lower court's extensive findings *de novo* and, in a surprisingly curt opinion, held that Newdow failed to demonstrate the “sufficiently concrete and specific injury” necessary to sustain a challenge to the inaugural prayer.⁶⁶

Consider also the Court's recent avoidance of the constitutional issue in *Elk Grove Unified School District v. Newdow*⁶⁷—another case brought by Mr. Newdow. Though the Ninth Circuit vindicated Mr. Newdow's claim,⁶⁸ the Supreme Court dismissed it on procedural grounds.⁶⁹ The Court went out of its way to avoid ruling on the underlying substantive question—whether

every performance of the worship of Almighty God.”); 31 U.S.C. § 5112(d)(1) (2006) (requiring that coins bear the inscription “In God We Trust”); 36 U.S.C. § 302 (2006) (declaring that the national motto is “In God We Trust”); Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955), *reprinted as amended in* 10 U.S.C. § 802 app. at 860 (2006) (requiring that a tenet of the Code of Conduct for Members of the Armed Forces shall be “I will trust in my God and in the United States of America”). There have also been legislative prayers, e.g., 151 CONG. REC. 14,525 (2005), invocations of God in legislative debates, e.g., 151 CONG. REC. 13,237 (statement of Rep. Turner) (“Mr. Chairman, Jesus Christ is my Lord and Savior.”), and inaugural prayers, e.g., 143 CONG. REC. 471 (1997). For an example of a judge praying from the bench, see *Collmer v. Edmondson*, 16 F. App'x 876, 876–77 (10th Cir. 2001). For an example of a state motto that includes God, see *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 291 (6th Cir. 2001). See generally LESLIE C. GRIFFIN, LAW AND RELIGION—CASES AND MATERIALS 483–528 (2d ed. 2010) (providing several examples of politicians, including presidents, invoking religion in speeches).

62. See *supra* subpart I(A).

63. *Newdow v. Bush*, No. CIV S-01-0218 LKK GGH PS, 2001 U.S. Dist. LEXIS 25936, at *4 (E.D. Cal. Dec. 8, 2001).

64. *Id.* at *24–25.

65. *Newdow v. Bush*, 89 F. App'x 624, 625 (9th Cir. 2004).

66. *Id.*

67. 542 U.S. 1 (2004).

68. *Newdow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002).

69. *Newdow*, 542 U.S. at 5.

the words “under God” in the Pledge of Allegiance violate the Establishment Clause—by holding that Mr. Newdow did not have standing to challenge the recitation at his daughter’s school.⁷⁰ While Newdow shared physical custody of his daughter, the girl’s mother had full legal custody.⁷¹ The Court did not foreclose the possibility that Newdow might have Article III standing but instead avoided the case on prudential standing grounds—holding that reasons of “judicial self-governance” kept the Court from conferring standing on Newdow in federal court when the proper resolution of California family law issues was unclear.⁷² Chief Justice Rehnquist, joined by Justices Thomas and O’Connor,⁷³ wrote separately that Newdow had standing and that his case should be considered and dismissed on its merits.⁷⁴

Newdow is puzzling unless one explains it as an exercise in judicial avoidance, an illustration of Alexander Bickel’s “passive virtues.”⁷⁵ Justice Stevens’s standing doctrine is not just novel; it seems wholly out of character. Justice Stevens and the Justices who joined him are normally hostile to government-sponsored religious rhetoric in the public sphere⁷⁶ and generally reticent about using standing doctrine to restrict access to the courts.⁷⁷ The Ninth Circuit’s decision striking down the Pledge, however, had been met by almost uniform public ridicule and political scorn,⁷⁸ despite some commentators’ views that it represented a principled application of the Court’s nonendorsement and neutrality doctrines.⁷⁹ For a Justice taking

70. *Id.* at 17–18.

71. *Id.* at 9.

72. *Id.* at 12, 17–18.

73. Justice Scalia took no part in the consideration of the *Elk Grove* case. *Id.* at 18.

74. *Id.* (Rehnquist, C.J., concurring in judgment).

75. See Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

76. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (concluding that a governmental preference for religion, in contrast to “irreligion,” is prohibited by the First Amendment); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding that a school prayer at a graduation ceremony was forbidden by the Establishment Clause of the First Amendment).

77. See, e.g., *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 637 (2007) (Souter, J., dissenting) (concluding that a religious organization had standing to challenge injuries caused by Executive Branch officials); *Lee*, 505 U.S. at 584 (finding it unnecessary to address a parent’s standing in a graduation prayer case and deciding the case on the merits); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 513–14 (1982) (Stevens, J., dissenting) (determining that taxpayer status granted a nonprofit organization standing to challenge the transfer of property from a federal agency to a religious institution).

78. Martin Kasindorf, *Court Rules Pledge of Allegiance Unconstitutional*, USA TODAY (June 26, 2002), <http://www.usatoday.com/news/washington/2002/06/26/pledge-of-allegiance.htm#more>.

79. See Sanford Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. POCKET PART 99, 109 (2010) (“Perhaps the best recent example of a decision that can be explained only on political grounds was the Court’s dismissal, on spurious ‘standing’ grounds, of a perfectly correct argument that would have forced them to sustain, just before the 2004 presidential election, the Ninth Circuit’s *Newdow* holding”); Philip N. Yannella, *Stuck in the Web of Formalism: Why Reversing the Ninth Circuit’s Ruling on the Pledge*

those principles seriously, it might be difficult to overturn the Ninth Circuit: the words “under God” in the Pledge contravene the letter, and arguably the spirit, of the neutrality and endorsement principles.⁸⁰ The dissenters’ eagerness to reach the merits and the majority’s eagerness to avoid them indicates a Court using procedural doctrines to avoid making constitutional decisions that might be premature or politically impracticable.

The failure of the Supreme Court to reach the substance of *Newdow*’s claim is not an exception, however. Rather, it is a high-profile example of the Court’s unwillingness to police official statements or government ceremonies that would otherwise be susceptible to the Court’s stated Establishment Clause principles. Consider the recently decided *Hein v. Freedom from Religion Foundation, Inc.*,⁸¹ in which the Court held that taxpayers did not have standing to contest Executive Branch expenditures that arguably violated the nonendorsement and neutrality principles.⁸² *Hein* involved President Bush’s use of monies to hold conferences and other events designed to promote his faith-based initiatives, at which it was alleged that government officials endorsed religion or specific religions.⁸³ The plaintiff, Freedom from Religion Foundation, claimed that the events were essentially religious revivals, sponsored and paid for by federal taxpayers.⁸⁴ The Foundation sought to establish standing under *Flast v. Cohen*,⁸⁵ a 1968 case that had permitted federal taxpayer standing in Establishment Clause cases.⁸⁶ *Flast* held that the normal rules of standing—which would not permit federal taxpayers to allege injuries based solely on their payment of taxes—are suspended in Establishment Clause cases.⁸⁷

Hein looks like a significant restriction on the taxpayer standing doctrine adopted in *Flast*.⁸⁸ But despite it being an exception designed to encourage access to federal court, *Flast* never really opened the gates to plaintiffs asserting federal-taxpayer-induced injuries and certainly did not do so with regard to government officials’ religion-endorsing speech. *Flast* it-

of Allegiance Won’t Be So Easy, 12 TEMP. POL. & CIV. RTS. L. REV. 79, 90 (2002) (noting that the Pledge violates the coercion, endorsement, and neutrality tests).

80. *But see* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–45 (2004) (O’Connor, J., concurring) (listing four reasons why the inclusion of the words “under God” in the Pledge does not violate the Establishment Clause).

81. 551 U.S. 587 (2007).

82. *Id.* at 593.

83. *Id.* at 592, 595–96.

84. *Id.* at 595–96.

85. 392 U.S. 83 (1968).

86. *Id.* at 88.

87. *Id.* at 103–06.

88. *See* Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 116–19 (detailing lower court decisions relying on *Hein* in restricting taxpayer standing in Establishment Clause-related litigation).

self had already been limited in *Valley Forge Christian College v. Americans United for Separation of Church and State*,⁸⁹ where the Court held that the *Flast* standing exception did not apply to decisions of an agency to transfer land under a statute adopted pursuant to Congress's powers under the Property Clause.⁹⁰ Moreover, even before *Flast*, municipal (and often state-taxpaying) plaintiffs could get into court based on the Court's relaxed taxpayer standing doctrine.⁹¹ That doctrine is unrelated to the Establishment Clause but helpful to plaintiffs asserting spending violations by local and state governments.⁹² Much Establishment Clause jurisprudence in the spending area has been made by state or municipal taxpayers, not by federal ones.⁹³ It is notable that only two Establishment Clause cases that have reached the Court since *Flast* relied on federal taxpayer standing.⁹⁴

For my purposes, *Hein* is not significant because it imposes yet another limitation on federal taxpayers' access to the federal courts. The importance of *Flast* was always somewhat overstated,⁹⁵ and *Hein*'s limitations, if they do

89. 454 U.S. 464 (1982). In *Valley Forge*, the underlying constitutional issue was whether the federal government's transfer of public land worth \$500,000 to a Christian educational institution, without requiring payment, under the Federal Property and Administrative Services Act of 1947, violated the Establishment Clause. *Id.* at 468–69. The Court avoided a decision on the merits of the case by holding that Americans United did not have standing to challenge the land transfer. *Id.* at 482.

90. *Id.* at 481–82.

91. See Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 629–32 (2004) (discussing examples of the Court applying less stringent standards in determining whether a state or municipal taxpayer has standing); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 800–04 (2003) (arguing that confusing Supreme Court jurisprudence regarding state and municipal taxpayer standing has resulted in more lenient standing requirements for state and municipal taxpayers than for federal taxpayers). Both the future contours of *Flast* standing as well as the possible distinction between state and federal taxpayer standing are before the Court this Term. See *Ariz. Christian Sch. Tuition Org. v. Winn*, 562 F.3d 1002 (9th Cir. 2009), cert. granted, 130 S. Ct. 3350 (U.S. May 24, 2010) (No. 09-987).

92. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 643 (2003) (lifting the traditional limitation on public funding of religious education); Schragger, *supra* note 60, at 1816 (discussing the local nature of many Religion Clause disputes).

93. See Staudt, *Modeling Standing*, *supra* note 91, at 626 (reporting that “state and municipal taxpayers . . . file many more lawsuits against state and local government officials than federal taxpayers file against the US government”). That is because these disputes often involve public schools, which are predominantly funded by state and local taxpayers. See, e.g., *id.* at 616 n.24, 629 (listing various state and municipal taxpayer lawsuits filed over public school funding).

94. *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) (citing *Flast* as the basis for standing); *Tilton v. Richardson*, 403 U.S. 672, 676 (1971) (failing to cite *Flast* but acknowledging that the plaintiffs were taxpayers).

95. See William P. Marshall & Maripat Flood, *Establishment Clause Standing: The Not Very Revolutionary Decision at Valley Forge*, 11 HOFSTRA L. REV. 63, 79 & n.95 (1982) (“Except for *Walz* [and the Establishment Clause cases], the Supreme Court has never recognized the right of a taxpayer to attack the favorable tax treatment of another taxpayer.”); see also Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. REV. 798, 802 (1983) (“[T]he Supreme Court has been reluctant to countenance such suits [(those in which the alleged injury is shared by the general public)], whether under the rubric of taxpayer or citizen standing.”); *id.* at 817 (“The law of standing, therefore, prohibits the assertion of constitutional

not contaminate municipal or state taxpayer standing, do not change that.⁹⁶ Rather, *Hein* is important because it clearly articulates the Court's already implicit hesitance to regulate the public pronouncements of government officials—whether executive or legislative, whether state or national. The plurality in *Hein* was simply not prepared to regulate the speech of Executive Branch officials, no matter how significant a violation of nonendorsement or neutrality was alleged. Indeed, *Hein* mostly insulates from Establishment Clause scrutiny federal government officials' religious rhetoric. If taxpayers cannot assert standing to challenge Executive officials' religious rhetoric, then it is going to be difficult to find a plaintiff with a particularized injury who can. *Hein*, though, is not surprising. Rather, it reflects the reticence of the Court generally to regulate government officials' religious endorsements.

This is not to say that the Court has not made forays into limiting officials' religion-endorsing expressions. As already noted, the Court has regulated the content of municipal and state religious displays⁹⁷ and most recently struck down a display of the Ten Commandments in the *McCreary County* case.⁹⁸ It has also barred prayers in public schools and at particular school events.⁹⁹

Moreover, one should not overstate the reach of the nonendorsement or neutrality principles. Those norms do not invalidate any and all religious pronouncements by government officials—only those an objective observer would view as exclusionary. That category may be somewhat narrower than a bare recital of the nonendorsement principle indicates.

Nevertheless, to the extent that the Court seeks to prevent government endorsements of religion or of particular religious beliefs, its interventions have been woefully incomplete from the perspective of its own doctrine. First, the Court has avoided enforcing its norms when it feels politically constrained. Indeed, it has never attempted to regulate government officials'

rights that are held in common, yet generalized statutory rights regularly constitute a basis to sue in the federal courts.”).

96. This is a big “if,” however. It is possible that the Court will reject both *Flast* and state taxpayer standing in the *Arizona Christian* case, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3350 (U.S. May 24, 2010) (No. 09-987), or treat them as one and the same. See Lupu & Tuttle, *supra* note 88, at 115 (asserting that “[t]he Supreme Court has on a number of occasions treated the problems of state taxpayer standing as conceptually indistinguishable from federal taxpayer standing”).

97. See, e.g., *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 601–02 (1989) (holding that the display of a crèche in a county courthouse violated the Establishment Clause); *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (holding that a Kentucky statute that required the posting of the Ten Commandments in public schools violated the Establishment Clause).

98. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005).

99. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (holding that student-led pre-football game prayer violated the Establishment Clause); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) (prohibiting mandatory in-school Bible reading); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (prohibiting daily recitation of a prayer in New York public schools).

nonformal, religious–political rhetoric, no matter how much those officials assert the favored status of a particular religion or religious group. The *Hein* decision simply makes this longstanding avoidance explicit.

Second, the Court’s uneven jurisprudence has resulted in what Mark DeWolfe Howe famously called a “de facto establishment”—an unofficial privileging of religion in some aspects of our public culture that has persisted despite the formal disestablishment of religion.¹⁰⁰ Civic practices that endorse religion are sometimes “grandfathered in” or considered de minimis.¹⁰¹ Often the de facto establishment is understood as a regrettable but necessary nod to deeply rooted cultural practices, i.e., ceremonial deism.¹⁰² Whatever it is called, the public privileging of religion is (as Howe noted) an exception to a particular formulation of the disestablishment principle, one that has been articulated by the Court as nonendorsement or neutrality. But these principles are underapplied. While the Court has significantly restricted religious rhetoric in the schools (namely school prayer),¹⁰³ it has not limited a whole range of official religious-endorsing rhetoric outside them, nor has it ever truly been prepared to do so.

C. *Religious–Political Alliances*

The Court also does not regulate religious–political alliances. This regulatory gap is significant, for the Court has declared that political division along religious lines is a central concern of the Establishment Clause.¹⁰⁴ A politics that places the salvation of citizens at issue or that involves claims by partisans that “God is on our side” demonizes political opponents not just as wrong but as godless and thus raises the stakes for supporters on both sides. Religious factionalism coupled with political power can lead directly to

100. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 11–12 (1965).

101. See *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (holding that a city’s inclusion of a nativity scene in its Christmas display did not violate the Establishment Clause and noting that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life”); *McGowan v. Maryland*, 366 U.S. 420, 431 (1961) (holding that Maryland law requiring businesses to close on Sunday does not violate the Establishment Clause because although “[t]here is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces,” the law is permissible because it also has secular motivations).

102. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (holding that the Nebraska legislature’s practice of commencing each legislative session with a chaplain-led prayer did not violate the Establishment Clause). For a general treatment, see Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Observer*, 57 *UCLA L. REV.* 1545, 1549–56 (2010).

103. See, e.g., *Engel*, 370 U.S. at 424 (holding that daily recitation of a prayer in public schools violates the Establishment Clause).

104. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (“Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”).

religious persecution.¹⁰⁵ For those concerned about religiously inspired political divisiveness, limiting religious groups' ability and incentive to compete for political supremacy and control of the apparatus of civil government seems like a wise strategy.¹⁰⁶

The entanglement prong of the *Lemon* test has sometimes been used to address this relationship between civil and religious power—to prevent too close a relationship between civil and religious authority or to bar political “takeovers” of civil government by religious groups. For example, in *Larkin v. Grendel's Den*,¹⁰⁷ the Court struck down a Massachusetts law that allowed churches to veto liquor license applications from businesses operating within 500 feet of the church.¹⁰⁸ Similarly, in *Board of Education v. Grumet*,¹⁰⁹ the Court struck down a New York law that created a school district that was coterminous with a religious sect's territorial boundaries.¹¹⁰ Even without knowing how the churches or communities at issue in those cases would exercise their power, the Court held that the formal exercise of state powers by religious authorities violated the entanglement prong of the *Lemon* test.¹¹¹

Aside from restricting these formal grants of authority to religious groups, however, the doctrinal Establishment Clause does not easily reach informal political interactions between religious groups and government officials. The doctrinal Establishment Clause does not prevent religious organizations and activists from lobbying for certain laws on the basis that they are required by God and does not, except indirectly, prevent legislators from voting for such legislation because of their own individual commitments to codifying God's laws. Additionally, under the Free Exercise Clause, the Court has affirmatively struck down laws that prevent religious officials from serving as legislators or in other capacities in the government.¹¹²

The Court also does not directly address the problem of political division along religious lines. The doctrinal Establishment Clause does not

105. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 237 (1689) (Ian Shapiro ed., Yale Univ. Press 2003) (arguing that no government official ought ever be allowed the power to act on the influence of religion, as any power that can be used “for the suppression of an idolatrous church” can just as easily be used “to the ruin of an orthodox one”).

106. See *id.*

107. 459 U.S. 116 (1982).

108. *Id.* at 126–27.

109. 512 U.S. 687 (1994).

110. *Id.* at 702.

111. *Grumet*, 512 U.S. at 696–97; *Larkin*, 459 U.S. at 126–27. Only one other case has failed the entanglement prong since *Lemon* was decided. See *Aguilar v. Felton*, 473 U.S. 402, 412–14 (1985) (holding that New York's use of federal funds to pay public employees to provide remedial instruction at parochial schools violated the entanglement prong), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

112. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (holding that a Tennessee statute prohibiting ministers from holding office violated the Free Exercise Clause).

prevent politicians from making political alliances with specific churches or religious groups, explicitly endorsing their message, or asking them for financial assistance.¹¹³ Churches may, consistent with the Establishment Clause, create political parties or be closely affiliated with them.¹¹⁴ And while we have not seen the rise of explicitly religious parties in the United States, we have seen the rise of sophisticated religious–political adjuncts to political parties, in the form of political action committees or lobbying organizations.¹¹⁵

This close affiliation is currently most evident on the political right, as the last forty years have witnessed the emergence of a politically active evangelical movement that has strong links to the Republican Party.¹¹⁶ The Moral Majority, founded by Jerry Falwell in 1979, played a significant political role in Ronald Reagan’s 1980 presidential victory.¹¹⁷ And, though the Moral Majority is now defunct, a number of other organizations have taken its place, and they have continued to exercise significant influence in Republican Party politics. The Christian Right helped George W. Bush win the presidency and has remained an active presence in the Republican Party.¹¹⁸

113. For example, politicians and government officials, including Tom DeLay, Zell Miller, Bill Frist, Rick Santorum, and Robert Bork, participated in the Justice Sunday conferences organized by the Family Research Council (a conservative Christian organization) in 2005 and 2006. Thomas B. Edsall, *Conservatives Rally for Justices*, WASH. POST, Aug. 15, 2005, at A2; Laurie Goodstein, *Minister, a Bush Ally, Gives Church as Site for Alito Rally*, N.Y. TIMES, Jan. 5, 2006, at A14. At Justice Sunday II in August of 2005, then–Congressman Tom DeLay claimed “activist courts” are “ridding the public square of any mention of our nation’s religious heritage.” Edsall, *supra*. At the same event, former Senator Zell Miller (Democrat, Georgia) criticized the Supreme Court because it “removed prayer from our public schools . . . legalized the barbaric killing of unborn babies, and it is ready to discard like an outdated hula hoop the universal institution of marriage between a man and a woman.” *Id.*

114. See Laycock, *supra* note 34, at 75 (“[T]he political arena is full of religious arguments and full of appeals to religious voters. As far as the law is concerned, churches can even create political affiliates and political action committees, although they choose not [to] do so, probably for good religious and political reasons.”); see also *McDaniel*, 435 U.S. at 629 (invalidating a provision that excluded members of the clergy from the legislature); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 670 (1970) (holding that “churches as much as secular bodies and private citizens have [the] right” to “take strong positions on public issues”); *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (holding that the rights of churches to engage in political speech eliminate any burden on free exercise from the restrictions on political speech by charities organized as nonprofits).

115. ALLEN D. HERTZKE, *REPRESENTING GOD IN WASHINGTON* 5 (1988).

116. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 350–52 (2001).

117. BARRY HANKINS, *AMERICAN EVANGELICALS* 147–48 (2008).

118. The history of fundamentalist Christians’ affiliation with politics dates back to the 1920s, when they opposed the teaching of evolution in public schools, CLYDE WILCOX, *ONWARD CHRISTIAN SOLDIERS?* 30–31 (2d ed. 2000), and lobbied for the prohibition of alcohol, HERTZKE, *supra* note 115, at 32. From the 1930s through the 1960s, their political involvement was limited but took shape in the conservative fight against communism, which was seen as promoting atheism and threatening traditional Christian values. WILCOX, *supra*, at 34. Fundamentalist Christians’ political involvement temporarily came to a head in 1964 when they supported Republican Barry

In the first decade of the twenty-first century, this close affiliation led one former Republican senator to complain that the Republican Party was becoming a “political arm of conservative Christians” and “the means for carrying out a religious program” that included opposition to homosexuality, same-sex marriage, stem-cell research, abortion, contraception, euthanasia, and the use of reproductive technologies.¹¹⁹ This debate within and outside the Republican Party was sparked in part by the case of Terri Schiavo, the Florida woman whose husband sought an order in 2005 allowing her caregivers to terminate her life by removing her feeding tube after she had been in a persistent vegetative state for almost fifteen years.¹²⁰ For many observers, the attempt by government officials to intervene in the Schiavo case reflected those officials’ or their constituents’ religious views.¹²¹

Goldwater’s presidential bid; the failure of that campaign led to a decade-long resignation from the political arena for fundamentalists. *Id.* at 34–35.

In 1976, Jimmy Carter, an evangelist and Democrat, garnered some support from evangelicals in his presidential victory. *Id.* at 36. Republican strategists saw this political reentry of evangelicals as an opportunity. *Id.* Consequently, they joined forces with the well-known evangelical leader Jerry Falwell to form the Moral Majority in 1979. *Id.* This strategy proved effective in Reagan’s 1980 victory, which marked the beginning of a clear affiliation between fundamentalist Christians and the Republican Party. HANKINS, *supra* note 117, at 146–48. The “Christian Right” proved beneficial to the Republican Party throughout the 1980s, supporting Reagan’s reelection and George Bush’s successful 1988 campaign. KENNETH WALD & ALLISON CALHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES* 228–30 (Cong. Quarterly Press 3d ed. 1997).

In the 1990s, the Christian Coalition, founded by Pat Robertson and managed by Ralph Reed, took the place of the Moral Majority as the predominant Christian Right group and shifted its focus toward affecting politics at the grassroots level. HANKINS, *supra* note 117, at 154–55. In the new millennium, the Christian Right has been represented by a wider variety of groups, including Focus on the Family and the Family Research Council, both of which were founded by James Dobson. *Id.* at 156. Their involvement is further evidenced in the 2008 Republican Platform, which referred to the “Judeo-Christian heritage of our country.” REPUBLICAN NAT’L COMM., 2008 REPUBLICAN PLATFORM 53 (2008), available at <http://www.gop.com/2008Platform/2008platform.pdf>. The Republican Platforms of 1988 and 1992 contained similar references to a Judeo-Christian national heritage, whereas those of 1996, 2000, and 2004 did not. One can search these platforms through a database maintained by the The American Presidency Project. *Political Party Platforms*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/platforms.php>. See generally *The 2004 Political Landscape*, THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, <http://people-press.org/report/?pageid=757> (finding that “[o]ver the past 15 years, religion and religious faith also have become more strongly aligned with partisan and ideological identification,” “[r]eligious commitment has increased substantially among self-identified conservatives,” and “there is a nearly two-to-one Republican advantage among white evangelicals”).

119. Danforth, *supra* note 16; see also John C. Danforth, *Onward (Moderate) Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27 (noting that moderate Christians often come to political conclusions that differ from those of conservative Christians).

120. See Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U. L. REV. 971, 976–78 (2004) (discussing the actions taken by Republican Governor Jeb Bush during the Terri Schiavo controversy and the efforts of “conservative political forces” to induce such political action); Thomas C. Marks, Jr., *Terri Schiavo and the Law*, 67 ALB. L. REV. 843, 844–45 (2004) (describing the series of events that surrounded the Terri Schiavo controversy).

121. Numerous government officials, including the Governor of Florida, the leader of the United States Senate, and the President of the United States, sought ways to block that removal on

This is not to say that the influence of religious-based political groups has been exclusive to the political right, however. The role of the black church in the civil rights struggle has often been noted;¹²² the Southern Christian Leadership Conference was and is dominated by religious leaders.¹²³ Similarly, religiously based lobbying groups and churches have been prominent in left antiwar movements in the United States.¹²⁴

Moreover, Democrats as well as Republicans have recognized the potential political benefits to religious outreach. The faith-based initiative, which seeks to channel federal monies to religious social service organizations,¹²⁵ began under President Bill Clinton,¹²⁶ a Democrat, but was

various grounds. *See, e.g.*, An Act for the Relief of the Parents of Terri Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15-16 (2005) (demonstrating Congress's will to block the removal of Shiuvo's nutrition tubes on various grounds); Statement on Terri Schiavo, 41 WKLY. COMP. PRES. DOC. 458 (March 17, 2005) (demonstrating President George W. Bush's desire to block the removal of Shiuvo's nutrition tubes).

For many commentators, this attempt to legislate an end-of-life decision reflected the influence of religious fundamentalists on the Republican Party. *See, e.g.*, *No Release from Death*, THE GUARDIAN (Apr. 2, 2005), <http://www.guardian.co.uk/world/2005/apr/02/usa.guardianleaders1> (reporting John Danforth's concern that the Republican party "was being transformed into the political arm of conservative Christians"); Andrew Sullivan, *Comment: Terri is the Dying Martyr the Republican Right Can Use*, SUNDAY TIMES (Mar. 27, 2005), <http://www.timesonline.co.uk/tol/comment/article438158.ece> (citing the furor over the Schiavo case as "proof that the religious right runs the Republican party"). In fact, the Schiavo case was invoked as an example of the Republican Party's commitment to a "culture of life," a phrase borrowed by President Bush and other Republican leaders from the late Pope John Paul II's 1995 encyclical *Evangelium Vitae*, a Catholic theological document. JOHN PAUL II, EVANGELIUM VITAE 20 (1995), available at http://www.catholic-pages.com/documents/evangelium_vitae.pdf. President Bush introduced the phrase into our political lexicon during an October 3, 2000, debate with Vice President Al Gore, arguing against abortion-inducing drug RU-486 by stating, "We can work together to create a culture of life." Mary Leonard, *Bush Woos Catholics on Abortion: Nominee Echoes Pope's 'Culture of Life' Phrase*, BOSTON GLOBE, Oct. 9, 2000, at A1. The Republican Party later adopted the phrase in its 2004 Party Platform. REPUBLICAN NAT'L COMM., 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND MORE HOPEFUL AMERICA 84 (2004). The Culture of Life Foundation was formed to promote the tenets of the Pope's teachings in American public life. *Cf. About Us*, CULTURE OF LIFE FOUNDATION, <http://www.culture-of-life.org/> ("The Culture of Life Foundation . . . exists to reveal and present the truths about the human person at all stages of life and in all conditions.").

122. *See, e.g.*, ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE 77 (1984) ("[T]he preexisting black church provided the early movement with the social resources that made it a dynamic force, in particular leadership, institutionalized charisma, finances, an organized following, and an ideological framework through which passive attitudes were transformed into a collective consciousness supportive of collective action.").

123. *SCLC Leadership*, S. CHRISTIAN LEADERSHIP CONF., <http://www.sclcnational.org/core/item/page.aspx?s=3047.0.0.2607> (noting multiple reverends on the organization's board of directors).

124. Rebecca Phillips, *Religious Left Goes Anti-War on Iraq*, ABC NEWS (Feb. 16, 2003), <http://abcnews.go.com/US/story?id=90854&page=1> (describing the religious group participation in advocating against the war in Iraq).

125. Linda C. McClain, *Unleashing or Harnessing "Armies of Compassion"? Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361, 361 (2008).

expanded by George W. Bush,¹²⁷ a Republican, and has been continued by President Barack Obama, a Democrat.¹²⁸ An explicit strategy of the Obama campaign and Administration was and has been to make overtures to evangelical Christians.¹²⁹ Religion-favoring legislation often gains bipartisan support. The National Day of Prayer was passed by unanimous consent in 1952.¹³⁰ The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act were adopted virtually without dissent.¹³¹ Both statutes were heavily promoted by a range of religious groups.¹³²

One tool that the government employs to limit religious politicking and lobbying is the Internal Revenue Service's requirements that restrict the political activities of nonprofit organizations.¹³³ The rules apply to any organization that seeks nonprofit status.¹³⁴ The IRS restriction is not religion specific, nor did it originate in a concern about enforcing the nonestablishment norm.¹³⁵ Nor is it the case that the Court's current Establishment Clause doctrine requires that churches that engage in politicking be denied a tax exemption; only that they may be.¹³⁶ Finally, it is worth noting that the

126. 151 CONG. REC. 21,065 (2005) ("Former President Bill Clinton signed four laws explicitly allowing faith-based groups to staff on a religious basis when they receive Federal funds.").

127. Steven Fitzgerald, Note, *The Expansion of Charitable Choice, the Faith Based Initiative, and the Supreme Court's Establishment Clause Jurisprudence*, 42 CATH. LAW. 211, 211 (2002).

128. The program has been renamed "White House Office of Faith-Based and Neighborhood Partnerships." Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 5, 2009).

129. Russell Goldman, *Strange Bedfellows: Obama and Evangelicals*, ABC NEWS (June 12, 2008), <http://abcnews.go.com/Politics/Vote2008/story?id=5053866&page=1>.

130. 98 CONG. REC. 1546, 3807 (1952).

131. The Religious Freedom Restoration Act was passed by unanimous consent in the House, 139 CONG. REC. 27,241 (1993), and passed in the Senate by a vote of 97-to-3, *id.* at 26,416. The Religious Land Use and Institutionalized Persons Act was adopted by unanimous consent. 146 CONG. REC. 16,623, 16,703 (2000).

132. See, e.g., B.A. Robinson, *Religious Freedom Restoration Acts: Federal Legislation*, RELIGIOUS TOLERANCE.ORG (2003), <http://www.religioustolerance.org/rfra1.htm> (stating that "[o]ver 60 religious organizations and civil liberties groups combined" to "promote the Religious Freedom Restoration Act"); B.A. Robinson, *Religious Freedom Restoration Acts: Additional Attempts at Federal Legislation: RLP and RLUIPA*, RELIGIOUS TOLERANCE.ORG (2005), <http://www.religioustolerance.org/rfra3.htm> ("[The Religious Land Use and Institutionalized Persons Act] was supported by a most unusual coalition of religious and civil liberties groups, including the *American Civil Liberties Association*, *Christian Coalition*, *Family Research Council*, and *People for the American Way*").

133. I.R.C. § 170(c)(2)(D) (2006); I.R.C. § 501(c)(3) (2006).

134. I.R.C. § 508(a).

135. See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1145 (2009) (indicating that there is no evidence that Congress intended to restrict the activities of houses of worship in enacting the IRS prohibition).

136. See *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 855 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (finding that an organization's political activities must be balanced in the context of the organization's objectives to determine if a substantial part of its activities was aimed at influencing legislation); see also *Regan v. Taxation with Representation of*

IRS has rarely revoked the nonprofit status of a church because of inappropriate politicking.¹³⁷ The agency stepped up its enforcement in 2004, but it seems to use its power to suppress political activities in churches sparingly.¹³⁸ And churches or religious groups that segregate their political activities can do so with no limits.

The Judiciary has almost no role in regulating these political activities, and perhaps for obvious reasons.¹³⁹ The state action requirement has been interpreted in most cases to constrain government actors, not private ones. Religious constituents and lobby groups are not exercising state power—at least not directly or formally. The Court could seek to regulate those who do—the government officials who join in alliances with those groups or exercise power in close connection with them¹⁴⁰—but it has never ventured into that territory.¹⁴¹

Wash., 461 U.S. 540, 551 (1983) (upholding the right of the IRS to limit the lobbying practices of nonprofits).

137. Depending on the source, the IRS is said to have revoked the tax-exempt status of a church for political activities either once or twice. Several sources list the IRS as having done so only once—revoking the exempt status of the Church at Pierce Creek in Binghamton, New York, in 1992 after it took out a full-page ad urging Christians not to vote for Bill Clinton. The revocation was upheld by the D.C. Circuit in *Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000). See Benjamin M. Leff, “*Sit Down and Count the Cost*”: A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban, 28 VA. TAX. REV. 673, 696–97 (2009) (“In May of 2000, the U.S. Court of Appeals for the District of Columbia Circuit decided what is apparently the only case—*Branch Ministries v. Rossotti*—in which the Service revoked the tax-exempt status of a church for engaging in campaign intervention.”). However, on a couple of different occasions, the IRS has stated that it has revoked the status of two churches for political activities. Although it is clear that one of these churches is the Church at Pierce Creek, the identity of the second church is unclear. See ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 1–2 (2008) (“In 2002, the IRS indicated that only two churches have lost their § 501(c)(3) status due to campaign intervention. One of these is the Church at Pierce Creek in Binghamton, New York The identity of the second church is not clear.”); Suzanne Sataline, *Obama Pastors’ Sermons May Violate Tax Laws*, WALL ST. J., Mar. 10, 2008, at A1 (recounting that only two churches have had their tax exemption status revoked since tax law amendments in 1954 restricted campaign activity by nonprofits, the most recent being Branch Ministries Inc. of Binghamton, N.Y. for placing “full-page ads in two newspapers in 1992 urging Christians not to vote for then-candidate Bill Clinton”). In addition to these two churches, there have been a number of religious nonprofit organizations that have had their tax-exempt status revoked. See Mayer, *supra* note 135, at 1148 & n.50 (claiming that five charities have lost tax-exempt status).

138. Mayer, *supra* note 135, at 1144.

139. Cf. Schauer, *supra* note 5, at 12–36 (discussing the contrast between the issues on the Court’s agenda and those important to the American public).

140. The Court has diluted the state-action requirement in the past. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (ruling that private discriminatory covenants become state-action if enforced by a court); *Smith v. Allwright*, 321 U.S. 649, 654, 664–66 (1944) (ruling that the Democratic Party of Texas’s exclusion of black voters from participating in primary elections constituted state action).

141. Establishment Clause doctrine assumes a state-action requirement, so we may not consider these to be examples of judicial underenforcement. My point here is not that the state action doctrine should not exist (though one can certainly question it, see, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 550 (1985), in which he suggests that the state-

Regardless of the reason, the doctrinal Establishment Clause is irrelevant to a whole range of activities that arguably implicate the Court's entanglement or neutrality principles. Again, I do not want to overstate the power of these principles—their meaning, reach, and application are subject to a great deal of dispute. My main point is that the Court leaves the resolution of religious–political entanglements almost exclusively to the political sphere. As Justice Brennan observed in his concurrence in *McDaniel v. Paty*,¹⁴² the Establishment Clause prevents the “government from supporting or involving itself in religion,” but it does not prevent political actors from “inject[ing] sectarianism into the political process.”¹⁴³ The check against religious–political alliances is “refutation in the marketplace of ideas and . . . rejection at the polls.”¹⁴⁴

This is so despite the fact that one of the Court's stated Establishment Clause objectives is to avoid too close a connection between civil and religious power.¹⁴⁵ Churches and religiously based lobbying organizations play a significant role in American politics, seeking to influence policy and legislation at the local, state, and national levels.¹⁴⁶ The Court, however, has almost never attempted to limit that role.

action requirement should be eliminated), but that it significantly constrains the reach of judicial doctrine and especially Establishment Clause doctrine.

142. 435 U.S. 618 (1977).

143. *Id.* at 642 (Brennan, J., concurring).

144. *Id.*

145. *See supra* notes 107–15114 and accompanying text.

146. Religious lobbies have a long history of influence in the United States. Quakers helped start the movement for the abolition of slavery, DANIEL J.B. HOFRENNING, IN WASHINGTON BUT NOT OF IT 42 (1995), and in the 1920s, Methodist prohibition proponents were a significant religious force in Washington, D.C., HERTZKE, *supra* note 115, at 28–29. In 1943, the Quakers created the first official religious lobby to advocate for the protection of conscientious objectors during World War II, and the Civil Rights Act of 1964 was supported by a slew of liberal religious groups, including various Protestant denominations and black evangelical organizations. *Id.* at 29–31, 43. The 1980s marked the emergence of the fundamentalist Christian lobbies, which have not achieved their specific goals but have nonetheless influenced policy making. HOFRENNING, *supra*, at 44. For example, although fundamentalists have not succeeded at reinstating school prayer or banning abortion, they helped in passing the Equal Access Act of 1984 (which provided certain rights for extracurricular religious groups in public schools) and have brought about various restrictions on abortion funding. WALD & CALHOUN-BROWN, *supra* note 118, at 263. Today, fundamentalist lobbies are more focused at the state and local levels, where many education and abortion issues are decided. WILCOX, *supra* note 118, 93–94. For examples of right-wing religious lobbyists, see John Chadwick, *Politics from the Pulpit: Evangelicals Pushing America Toward the Right*, THE RECORD, Mar. 13, 2005, at A1, available at 2005 WLNR 26670367 (describing the movement of some evangelical leaders to “mobiliz[e] churchgoers into a political force”); Holly Edwards, *Christian Right Leader Has Bush's Ear*, TENNESSEAN, Feb. 20, 2005, at B1, available at 2005 WLNR 26789535 (describing Richard Land as the embodiment of the “growing number of politically savvy evangelicals who are increasingly making masterful use of their broad religious support to influence government policy and promote a conservative agenda”); Farah Stockman, *Christian Lobbying Finds Success, Evangelicals Help to Steer Bush Efforts*, BOSTON GLOBE, Oct. 14, 2004, at A25, available at 2004 WLNR 3613233 (“Increased political savvy among conservative Christians and an increased focus on international affairs have played a role in the

D. Summary: The Domain of the Doctrinal Establishment Clause

Why these arenas of church–state interaction go unregulated is not my concern yet—the next Part will consider the reasons for underenforcement. It is sufficient here to describe the significant areas at the intersection of religion and government in which the Court’s doctrine seems inoperative. Despite the claim that the Court is hostile to all things religious,¹⁴⁷ religion-endorsing rhetoric in the public sphere and religiously infused policy making can and does take place without significant Court oversight. De facto establishments are pervasive. Moreover, the Court’s Establishment Clause decisions barely address religiously motivated political movements or the legislative outcomes of those movements—arguably a core concern of nonestablishment.

I am not arguing here that the Judiciary should address these areas but only that the stated domain of the doctrinal Establishment Clause is large and its operative domain is relatively small. Thus, the secular purpose requirement, which is supposed to police legislation to prevent it from being motivated solely for religious reasons, only seems to apply to legislation or policy making that *appears* to be motivated by religion, not to legislation or policy making that is *actually* motivated by religion. The nonendorsement principle, which is supposed to prevent government from signaling its approval and support of particular religions and sending a message of exclusion to others, has been applied half-heartedly and only to formal religious exercises but seems unable to reach many official endorsements of religion. The neutrality principle, which has been applied mainly in the context of government funding, has mostly been absent when it comes to government officials’ religious rhetoric. And while the entanglement prong of the *Lemon* test applies to de jure grants of civil or political authority to religious organizations, it does not seem to have any applicability to de facto grants of civil or political authority to those same organizations.

At this point, one might raise the following three objections. First, one might dispute my descriptive claim, arguing that the Court has not been at all shy about extensively regulating numerous aspects of the church–state relationship. I think there are domains in which this is certainly the case. For example, the Court’s doctrinal Establishment Clause has been deployed aggressively in the public schools context, where the Court has regulated the

success of evangelical lobbying.”). The Catholic lobby has sided with fundamentalists on some issues (i.e., abortion) and with liberal Protestants on others (i.e., military policy). HERTZKE, *supra* note 115, at 36–37. Jewish lobbyists have typically sided with liberal Protestants and, perhaps because of their history of persecution, have been especially focused on advocating the strict separation of religion and government. *Id.* at 37–38.

147. See CARTER, *supra* note 1, 109 (explaining how some critics of the Establishment Clause doctrine blame the Supreme Court for what they see as religion’s position of disfavor in America); RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE* 161 (1984) (decrying the Court’s disapproval of state-sponsored prayer in schools).

funding, curriculum, and practices of school officials to ensure that the Judiciary's stated Establishment Clause norms are preserved.¹⁴⁸ Beyond the schools, however, the record is much spottier, especially when it comes to religiously infused policy agendas and religious rhetoric. The Court refuses to understand significant areas of government policy that have obvious religious overtones through the lens of nonestablishment. Moreover, it seems obvious that the Court is struggling—especially recently—with the balance between fealty to stated doctrinal principles and political expediency. Judicial avoidance seems to be alive and well in the Establishment Clause realm.

Second, one might argue that the Court has not had the opportunity to regulate certain kinds of behaviors because public officials tend to comply with the Court's general nonestablishment principles. But this seems plainly wrong. Public officials often seem to be purposefully rejecting the Court's doctrinal Establishment Clause by engaging in religion-endorsing rhetorical or policy-making behavior. And many religious groups reject the nonentanglement or nonneutrality principles altogether—arguing quite explicitly that civil power should be an instrument of godly power.¹⁴⁹ Indeed, to the extent religious constituents and groups have knowledge of the Court's doctrine, they are not particularly fond of it. In other words, there seems to be plenty of room for government officials to test the Court's resolve. Arguing that the disputes have not arisen is inaccurate.

Third, and finally, one might dispute the appropriate reach of Establishment Clause doctrine as I have framed it. One might argue that the nonendorsement principle is not being underenforced because it is a quite limited doctrine—when properly understood. Perhaps the same can be said for neutrality or secular purpose or the Court's other doctrinal formulations. Certainly, it may be possible to explain some of what the Court does not do

148. See *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987) (invalidating a state statute that required the teaching of creationism in schools); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779–80 (1973) (invalidating state laws granting financial aid to private schools); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223–27 (1963) (holding unconstitutional a state law requiring prayer and daily reading of Bible verses in public schools, even though students could be excused upon written request of the parent); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (finding a state-agency directive requiring daily prayer in New York public schools to be “wholly inconsistent with the Establishment Clause”).

149. See, e.g., KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* 217 (2006) (observing that some fundamentalist religious constituencies want their government “to come from religious institutions, with the imprimatur of a president who openly favors at least some transfer of power”); Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS. J. 555, 560 (2005) (remarking on the emboldening of religious groups after the 2004 national election, and referring to one commentator who described the election as a possible “window of opportunity to impact a morally degenerating culture with the gospel”).

as being consistent with its stated doctrine.¹⁵⁰ Nevertheless, I think that Justice Scalia is correct when he argues that the Court often fails to fully embrace its stated principles. Consider the recent standing decisions. In *Hein*, the plurality acknowledged that the President may have violated the Court's stated Establishment Clause doctrines and may do so again in the future.¹⁵¹ But the Court held that these violations are unlikely to be addressed by the courts.¹⁵²

A slightly different version of this last objection goes to the appropriate content of the Establishment Clause itself. One might argue that the Court does not apply its stated doctrine because the Establishment Clause does not require it. For example, an originalist of a certain bent might argue that the Establishment Clause is wholly jurisdictional and merely prevents Congress from intervening to disrupt state-level establishments.¹⁵³ But this objection does not address my descriptive claim, which is that the doctrine *as given* is significantly underenforced.

Of course, anyone who has examined the Court's Establishment Clause cases over the last twenty years recognizes that the doctrine is in considerable upheaval, or is, at the least, unevenly applied. Thus, there is some peril to my claiming a doctrinal "content" that can be "underenforced." That being said, the Court continues to assert and apply a set of basic principles that it has yet to disavow. That the Court's stated doctrine is admittedly much more expansive than what some Justices or scholars think is proper does not undermine my point. While I have made some claims about what the Establishment Clause requires, I have kept those claims to a minimum.

Nevertheless, I think that even an Establishment Clause doctrine that is being narrowed in important ways will generate some significant underenforcement. In other words, even if the reach of the doctrine was significantly limited, the descriptive claim still holds: the nonestablishment norm is inconsistently enforced by the Supreme Court through its constitutional doctrine. This is certainly so in the case of the Court's stated doctrine—the secular purpose and entanglement prongs of *Lemon* and the endorsement and neutrality principles—which are mostly honored in the breach.

It is also the case for the principle of government noncoercion—a principle that has been advocated by those who view the Establishment

150. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33–45 (2004) (O'Connor, J., concurring in the judgment) (arguing that in-school recitation of the Pledge of Allegiance should not be disallowed because it does not violate the Establishment Clause).

151. See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 589 (2007).

152. *Id.* at 612.

153. See *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (arguing that the Establishment Clause should never have been incorporated against the States).

Clause as a relatively minimal limitation on government action.¹⁵⁴ As I have already observed, laws that coerce conduct based on religious law might have little to do with actual religious practice. Compulsory church attendance is easily recognized as a violation of the nonestablishment norm. Religiously motivated legislation or policy that regulates nonritual conduct (a category that is difficult to define, as I have already argued) mostly avoids Establishment Clause scrutiny, however. The possibility and existence of coercive religiously based laws, however, means that the noncoercion principle is subject to the same underenforcement problems that bedevil nonendorsement and neutrality. Nonritual religiously based laws coerce just as much as laws that compel ritual.¹⁵⁵

The principle of noncoercion is thus of limited use if the only coercion it reaches is coerced religious ritual. In fact, the Establishment Clause is arguably not even necessary to prevent such coercion—a robust Free Exercise Clause would likely prevent most kinds of government-required religious rituals.¹⁵⁶ Where the Establishment Clause might have some independent bite is through the invalidation of laws that do not directly impinge on free exercise rights but that coerce compliance with nonritual religious law or reflect a tendency toward theocratic governance. But, as I have already argued, the Court is not prepared to prevent the government from adopting laws on the basis that those laws are required by God or a particular religious belief.

II. Why Underenforcement?

What explains the Court's unwillingness to regulate large areas of activity that occur at the intersection of religion and the state? I have alluded to some of the reasons for Establishment Clause underenforcement, and they are consistent with the reasons for judicial underenforcement generally: political pragmatism, institutional competence, and privileging democratic-process values.

These rationales, however, take on a particular cast in the Establishment Clause context because of the special nature of religion and religious argument in a liberal democratic society. Two difficulties are faced by those who

154. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise”); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (“[G]overnment may not coerce anyone to support or participate in any religion or its exercise”).

155. Indeed, nonritual-specific laws are in some ways more coercive than ritual-specific laws because they may have more substantive effects on people's lives and life prospects.

156. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 53 n.4 (2004) (Thomas, J., concurring) (“It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause”); *id.* at 54 n.5 (“[C]oercive government preferences might also implicate the Free Exercise Clause and are perhaps better analyzed in that framework.”).

want to draw a clear line between secular and religious governance. The first is that influential elements of the American legal tradition assert that law cannot avoid a moral justification¹⁵⁷ and that moral justifications can only be expressed in religious terms or originate in a belief in God or a belief in a religiously based moral framework.¹⁵⁸ The claim that the civil law must be grounded in a (religious) morality is certainly disputable. The fact that many hold that view is not.

The second difficulty is that—whether or not law requires a foundation in a religiously derived morality—American political culture is significantly influenced by religion. The moral arguments that undergird policy are often religiously based.¹⁵⁹ Because the political culture is also democratic, those influences are invariably brought to bear on public policy. A Judiciary that resists those influences would be deeply countermajoritarian. Not only would it sometimes act to overturn legislative majorities, but it would also be enshrining a particular notion of law shorn of morality derived from religious belief that much of the electorate shares. That kind of cultural countermajoritarianism is risky and explains in part why the Court seeks to avoid it.

These concerns are sometimes articulated using the terminology of separation of powers. What judges mean when they use that phrase, however, is that our constitutional tradition privileges speech, association, and democratic processes more than nonestablishment values. In the United States, our constitutional instincts are to give the widest berth possible for democratic deliberation and decision making, even if that deliberation or decision making is infused with religion and even if it invites the possibility of theocratic governance.

157. See, e.g., Jerome E. Bickenbach, *Law and Morality*, 8 *LAW & PHIL.* 291, 292 (1989) (“We cannot but be aware of the evident analogies between morality and the criminal law, for example, or notice that legal discourse depends upon, indeed seems committed to, moral categories like responsibility, fault, compensation, justice, and rights.”); Jurgen Habermas, *Law and Morality*, in 8 *THE TANNER LECTURES ON HUMAN VALUES* 219, 230 (Steven M. McMurrin ed., Kenneth Baynes trans., 1988) (“The moral principles of natural law have become positive law in modern constitutional states.”).

158. See, e.g., Harold Berman, *The Interaction of Law and Religion*, 31 *MERCER L. REV.* 405, 406 (1980) (emphasizing President Jefferson’s statement that “the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God”).

159. See, e.g., DAVID C. LEEGE & LYMAN A. KELLSTEDT, *REDISCOVERING THE RELIGIOUS FACTOR IN AMERICAN POLITICS* 12 (1993) (describing the moral logic of American political history as consisting of a belief that “[a] higher law gives purpose to the state” and that “[a] state gains legitimacy by invoking that higher law”); Berman, *supra* note 159, at 411 (discussing how our society values free speech and rights to privacy but that these values find their foundation in the freedom of religion and of religious exercise).

A. *Political Pragmatism*

Consider first the political pragmatism rationale. The most obvious explanation for Establishment Clause underenforcement is that the Court may be concerned about its inability to enforce its judgments in the civic arena against individual government speakers or a populace that is unwilling to accept the Court's pronouncements. Justice Scalia has made this argument, suggesting that the Court is unwilling to enforce its stated Establishment Clause doctrine because it is politically powerless to do so. In his dissent in *McCreary County*, a decision striking down a Ten Commandments display, Scalia argued that if the Court enforced the Establishment Clause as its principles required, it would lose "the willingness of the people to accept its interpretation of the Constitution as definitive."¹⁶⁰

It is an uncontroversial assertion that the Court is a political actor.¹⁶¹ The preservation of its political capital is an important and perhaps unavoidable enterprise for an institution with no real power to enforce its judgments but its stature as the authoritative interpreter of the law. The Court's political pragmatism can manifest in different ways, however.

The recent Pledge of Allegiance case and the Ten Commandments cases illustrate these differences. Recall that *Elk Grove Unified School District v. Newdow* involved a challenge to the recitation of the Pledge of Allegiance, which includes the phrase "under God."¹⁶² The Court dismissed the case for lack of prudential standing,¹⁶³ a move that may have been designed to protect the Court's institutional prestige. As I have already noted, *Newdow* seems like a classic case of judicial avoidance, both because of the novelty of Justice Stevens's prudential standing argument and because of the obvious political import of a decision declaring portions of the Pledge unconstitutional.¹⁶⁴

Similarly, many commentators have explained Justice Breyer's decision to switch votes in the Ten Commandments cases—the first striking down the display of the Commandments in a county courthouse,¹⁶⁵ the second upholding the display of the Commandments on a monument outside a state

160. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

161. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 269 (2008). Judge Posner entitles his book's tenth chapter as "The Supreme Court Is a Political Court." *Id.*

162. 542 U.S. 1, 5 (2004).

163. *Id.* at 17–18.

164. Consider the reaction to the Ninth Circuit's decision that the phrase "under God" was, in fact, a violation of the Establishment Clause. President Bush called the decision "ridiculous," the Senate's Democratic Leader Tom Daschle called it "just nuts," and the U.S. Senate unanimously passed a resolution condemning the Ninth Circuit's decision. Debra Carrolton Harrell & Margo Horner, *Court Rejects Pledge of Allegiance in Schools*, SEATTLE POST-INTELLIGENCER (June 27, 2002), http://www.seattlepi.com/national/76318_pledge27.shtml (internal quotation marks omitted).

165. *McCreary Cnty.*, 545 U.S. at 881.

capitol¹⁶⁶—as a pragmatic political decision.¹⁶⁷ It appears that Justice Breyer may have been concerned that a decision striking down both Ten Commandments displays would have risked the Court’s political legitimacy. By changing his vote from *McCreary County*, which invalidated the Kentucky courthouse display, to *Van Orden v. Perry*, which permitted the Texas display, Justice Breyer may have been attempting to avoid popular political fallout from a combined decision to strike them both. In light of the seemingly inconsequential differences between the displays in Kentucky and Texas,¹⁶⁸ it is difficult to understand Justice Breyer’s votes in any other way.

Nevertheless, there are important differences between Stevens’s opinion in *Newdow* and Breyer’s opinion in *Van Orden*. In *Newdow*, Justice Stevens uses the doctrine of prudential standing to avoid ruling on the constitutionality of the Pledge.¹⁶⁹ The Court’s stated and only reason for dismissing *Newdow*’s claim on standing grounds is to avoid interfering with the domestic relations law of California.¹⁷⁰ But the Court’s avoidance of the constitutional issue is opaque. Justice Stevens’s opinion makes no attempt to connect the Court’s ruling to any substantive Establishment Clause concerns. He never attempts to counter the dissenters’ arguments that the majority is dodging a difficult constitutional decision. There is no acknowledgement that the prudential standing doctrine is being employed to avoid hard constitutional questions or to effectuate a substantive purpose.

In contrast, Justice Breyer’s concurring opinion in *Van Orden* is remarkably—though still not entirely—candid about the political basis for his decision to “switch” his vote and create a 5–4 majority to uphold the Texas monument containing the Ten Commandments. Justice Breyer does

166. *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

167. See Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 101–02 (2005) (noting the merits of Justice Breyer’s concurrence given the “political character of constitutional adjudication”); Tom Curry, *Breyer Casts Decisive Vote on Religious Displays*, MSNBC.COM (June 27, 2005), <http://www.msnbc.msn.com/id/8378199/> (“Hinting at practical political consequences, Breyer also worried that if the court banned long-standing displays of the Ten Commandments, it might spark public outrage . . .”).

168. The display struck down in *McCreary County* was entitled “The Foundations of American Law and Government Display” and included nine framed documents of equal size. 545 U.S. at 856 (internal quotation marks omitted). One document included a text of the Ten Commandments and explicitly cited the “King James version” of the Bible at “Exodus 20:3–17.” *Id.* at 851–52. Other documents included in the display were “copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the National Motto [“In God We Trust”], the Preamble to the Kentucky Constitution, and a picture of Lady Justice.” *Id.* at 856. Similarly, the display upheld in *Van Orden* was one of seventeen monuments on the Texas State Capitol grounds and included a text of the Ten Commandments as well as symbols including “two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ.” 545 U.S. at 681.

169. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004).

170. See *id.* at 17 (stating that where standing is based on family law rights that are in dispute, the Court should “stay its hand rather than reach out to resolve a weighty question of federal constitutional law”).

not state explicitly that he is doing so because he believes that a contrary decision by the Court would be unenforceable. He does acknowledge, however, in a way the Court often does not, that the Court's decisions themselves have political effects that need to be taken into account as a matter of substantive constitutional law.¹⁷¹ A contrary decision, writes Justice Breyer toward the end of his concurrence in *Van Orden*, "might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."¹⁷² This statement comes fairly close to an acknowledgement that a fear of political backlash animates Justice Breyer's decision.

Justice Breyer's concurrence in *Van Orden* and Justice Stevens's majority opinion in *Newdow* can both be described as politically pragmatic. Yet Justice Stevens's prudential standing argument for avoidance is plausible but mostly invented—it is a sleight of hand. Justice Breyer's argument for avoidance, by contrast, is substantive. He mostly tells us what he is doing, which is avoiding the political repercussions of a contrary decision. This avoidance, however, is not justified explicitly because it preserves the Court's political capital. Rather, it is justified because it is consistent with one of the chief purposes of the Establishment Clause: to avoid religious divisiveness.

Justice Breyer, in other words, adopts a purpose-driven account of the Establishment Clause that not only constrains legislative and executive action but also limits the Court's review of legislative and executive action. The Court is bound by the primary norm of avoiding religious divisiveness, which prevents it from sometimes enforcing a secondary norm of government nonendorsement or neutrality. To the extent that a judicial decision would create a religious backlash in the political arena, it should be avoided. Both Justice Stevens and Justice Breyer understand that the Court is implicated by politics. Justice Breyer is willing to integrate that fact into the Court's substantive constitutional doctrine.

Thus, the underenforcement of the norm of nonestablishment could be a product of the Court's timidity, as Justice Scalia argues,¹⁷³ or it could be a product of the norm of nonestablishment itself. These two reasons for the Court's underenforcement are importantly different. In the first, the Court uses procedural doctrines to avoid the application of principles that would otherwise apply. In the second, the Court is required to apply its principles hierarchically, conscious of its own role in their possible contravention.

171. *Van Orden*, 545 U.S. at 698–705 (Breyer, J., concurring).

172. *Id.* at 704.

173. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (“[T]he Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.”).

Justice Breyer's switched vote in the Ten Commandments cases is not convincing if one attempts to understand it as a straightforward application of the Court's principles of nonendorsement or neutrality. His votes are more defensible, however, if one understands them as an application of the hierarchically superior principle of political nondivisiveness. One could agree that the principles of nonendorsement and neutrality require the Court to strike down the Ten Commandments display in *McCreary County* while simultaneously arguing that the principle of nondivisiveness requires the Court to permit the display in *Van Orden*. This result would be justified by a norm of nonestablishment that privileges the value of political nondivisiveness and understands the Court to be a central contributor to that state of affairs.¹⁷⁴

B. Institutional Competence

That the underenforcement of the doctrinal Establishment Clause might serve to advance Establishment Clause values is somewhat surprising. When the Judiciary underenforces a particular constitutional command, it often does so in order to advance a competing constitutional value.¹⁷⁵ The familiar notion of "institutional competence" as a limit on judicial enforcement partakes of this idea more generally, for it concerns the appropriate role of the Court in a constitutional system of separate and coequal branches. The competence argument explains the Court's reticence to police laws for an improper religious motive. First, as with many cases in which legislative motive is at stake, courts find it difficult to determine what motivates particular legislators. Second, and more specific to the Establishment Clause, courts cannot wholly exclude religious rationales as an appropriate basis for lawmaking.

The first is a generic concern. As I have already discussed, courts are loath to examine too closely the motives of lawmakers in Establishment Clause cases. Even in instances when there are objective indicia of motive, legislators will often be able to provide plausible secular reasons for reli-

174. As a formal matter of underenforcement, it might follow that a different court that does not have the same political salience as the Supreme Court should follow *McCreary County* instead of *Van Orden* on the reasoning that a subconstitutional court does not implicate the same divisiveness concerns as does the Supreme Court. That is, the Ninth Circuit does not experience the same kinds of substantive Establishment Clause limits on its ability to strike down legislation which violates the nonendorsement or neutrality principle. Thanks to John Harrison for this point. See also Sager, *supra* note 4, at 1251–52 (arguing that nonuniform answers to federal constitutional questions among state courts "should be welcomed as an exercise which can richly inform future federal judicial enforcement decisions").

175. See, e.g., *Idaho Dep't of Emp't v. Smith*, 434 U.S. 100, 104–05 (1977) (Stevens, J., dissenting in part) (arguing that the Court should abstain from deciding certain cases because "this Court's random and spasmodic efforts to correct errors summarily may create the unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights"); Sager, *supra* note 4, at 1214 (arguing that the Court often refrains from deciding cases because of "concerns of the Court about its institutional role").

giously inspired laws if required to do so. Thus, determining actual motive would entail a forensic capability that courts do not have. The *McCreary County* Court acknowledged this, rejecting “judicial psychoanalysis of a drafter’s heart of hearts” in favor of an objective test of legislative purpose, by which an objective observer would consider the “traditional external signs” of purpose: “text, legislative history, and legislative implementation.”¹⁷⁶

Of course, these traditional signs only help in narrow categories of government action, those with obvious religious content for which legislatures did not provide a secular justification. Indeed, *McCreary County* all but invites savvy legislatures to mask their true religious purposes. Responding to arguments that secular purpose is easily feigned, the majority asserted that this was not a constitutional problem. There is “no reason for great constitutional concern” when a lawmaker has a “secret [religious] motive,” wrote Justice Souter, because a secret motive does not constitute a “divisive announcement that in itself amounts to taking religious sides.”¹⁷⁷ A true but unarticulated religious motive for legislation does not render the legislation unconstitutional. In this way, the *McCreary County* majority saved the secular purpose prong of *Lemon* by turning it into a formality.

The second reason for judicial underenforcement is more specific to the Establishment Clause. The Court’s unconcern about sham motives is in part a function of its inability to engage in “judicial psychoanalysis.” But lurking beneath the debate about legislative motive is a more profound set of concerns that explain the Court’s disinclination to fully enforce the secular purpose rule. As I have argued, the secular purpose requirement prevents legislatures from adopting laws because those laws are mandated by God or a particular religious belief system—a core concern of nonestablishment. But the Court underenforces the secular purpose requirement because it is not prepared to eliminate entirely religious motives for lawmaking except in the most obvious circumstances.

This reticence makes some sense. The appropriate basis for legal regulation and the corresponding obligation to obey the law is heavily contested.¹⁷⁸ Laws can have utilitarian or dignitary justifications or can be based on rights, conceptions of human relationships, charity, or good works. Laws are always based in some culturally contingent moral code, one that is often derived from a particular religious tradition or traditions. Isolating one

176. 545 U.S. at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

177. *Id.* at 863.

178. Perry makes a number of these kinds of arguments, as do others. See, e.g., Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 672 (2001) (“For virtually every moral belief on which a legislature might be tempted to rely in disfavoring conduct . . . it is the case that although for many persons the belief is religiously grounded . . . , for many others the belief . . . is grounded wholly on secular (nonreligious) premises.”).

or another justification for lawmaking is both difficult and highly tendentious.

The search for a nonreligious basis for law has produced a number of philosophies of law. (Indeed, the concept of popular sovereignty itself constitutes an attempt to divorce law from the divine, replacing God with the people as the legitimate source of law.) Unlike religiously based theories of law, foundational theories of political morality are not based in a supernatural morality. John Rawls's political liberalism is an example.¹⁷⁹ The goal of nonreligiously based foundationalism is to generate the minimum agreement necessary to govern in a pluralist society, in large part by agreeing to disagree over ultimate questions of salvation and cabining debate on those terms. Rawls, among other theorists, thus argues that religious reasons for government action are inappropriate and that the discourse of judges, legislators, and politicians should comport with what he calls "public reason"—justifications that can be understood by all members of a polity in which there is deep disagreement about foundational beliefs.¹⁸⁰

Those who object to this limit on religious reason-giving argue that the Enlightenment culture of nonreligious foundationalism is itself reflective of a particular religious worldview—that of Enlightenment deism or "reason" as understood through a tradition of vaguely tolerant Protestantism.¹⁸¹ According to these critics, those who claim that laws should not be based on religious grounds do not truly mean it; they mean only that laws should not be based on enthusiastic or hierarchical religions—that the "reason" on which laws should be based cannot be evangelical, fundamentalist, or Catholic, for instance.¹⁸²

This argument is not entirely unfair; certainly the founding generation shared a set of religious convictions that grounded their constitution making, including their arguments in favor of religious tolerance.¹⁸³ Behind the

179. JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

180. *Id.* at 212–54. For a seminal discussion of this question, see KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988). See also Joshua Cohen, *Establishment, Exclusion and Democracy's Public Reason* 27 (Nov. 2009) (unpublished manuscript), available at http://128.122.51.12/ecm_dlv2/groups/public/@nyu_law_website__academics__colloquia__constitutional_theory/documents/documents/ecm_pro_063731.pdf ("Endorsement excludes because it conflicts with the ideal of public reason, which requires that political justification proceed on a shared terrain of argument . . .").

181. See, e.g., McConnell, *supra* note 1, at 651–52 (explaining that some theorists argue that seemingly objective beliefs rely on the same faith claims that support religious beliefs); cf. Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 152 (1992) ("[A]ttorneys for traditionalist parents have tried to portray secular ideology as the religion of 'secular humanism' . . .").

182. See McConnell, *supra* note 1, at 652–53 (indicating that Catholicism and fundamentalism are the two religious views secular liberals are most concerned about).

183. Recall that Jefferson's Act for Establishing Religious Freedom begins: "Whereas, Almighty God hath created the mind free . . ." VA. CODE ANN. § 57-1 (2007) (recodifying the Act drafted by Thomas Jefferson in 1777); John Locke, *A Letter Concerning Toleration*, in TWO

“reason” of Enlightenment political philosophy there was often a foundational deism of a particularly Protestant kind.¹⁸⁴

This challenge to the core idea of what constitutes a “religious” or a “secular” reason is often accompanied by the wholesale rejection of nonreligiously based foundationalism. For some, belief in God—that is, belief in a monotheistic entity—is a prerequisite for law, secular or religious. Certainly, variants of the three main Western religions—Judaism, Christianity, and Islam—share the view that a moral code is incoherent unless grounded in a belief in God. There is also a sociological tradition that asserts that religion is, at the very least, a salutary basis for civil law in that it promotes respect for the rule of law, liberty, and civic responsibility. Alexis de Tocqueville famously made this latter claim.¹⁸⁵

Moreover, the existence of robust alternatives to religious foundationalism has not prevented natural lawyers throughout American history from urging obedience to the law only so long as it is consistent with God’s law. The antislavery movement of the nineteenth century and the civil rights struggle of the twentieth are often given as examples of religiously based legal–political movements.¹⁸⁶ To what extent these movements were ultimately grounded in and derived their strength from religious dogma is the subject of some historical dispute.¹⁸⁷ What is not disputed is that many advocates in these causes based their arguments in claims about God’s

TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, *supra* note 105, at 22, 25 (“The toleration of those that differ from others in matters of religion, is so to agreeable the Gospel of Jesus Christ . . .”).

184. McConnell makes this argument. See McConnell, *supra* note 1, at 644–45 (listing various theorists known for grounding their enlightened political philosophy in theology). Locke, the contract theorist most central to the American experience, had the divine at the heart of his natural rights theory. See Alex Tuckness, *Locke’s Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 9, 2005), <http://plato.stanford.edu/entries/locke-political/> (detailing Locke’s philosophical positions, many of which invoked Christian theology and teachings).

185. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 392 (Francis Bowen ed., Henry Reeve trans., Univ. Press 4th ed. 1863) (observing that Americans “combine the notions of Christianity and of liberty” such that they view their religiosity as integral to their freedom).

186. See, e.g., McConnell, *supra* note 1, at 647–48 (“Unless we regret the religiously-motivated activism of . . . Harriet Beecher Stowe, Sojourner Truth, William Jennings Bryan, Dorothea Dix, and Martin Luther King, Jr., how can we say that presenting religious arguments in political debate is an act of bad citizenship?”); Claire McCusker, *When Church and State Collide: Averting Democratic Disaffection in a Post-Smith World*, 25 YALE L. & POL’Y REV. 391, 396 (2007) (“The role of religion in abolitionism and the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments, the temperance movement and the Eighteenth Amendment, female Suffrage and the Nineteenth Amendment, and the civil rights movement and the repeal of Jim Crow laws is well documented by scholars.”).

187. Compare McCusker, *supra* note 186, at 396, with Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493, 525 (2009) (“Abolitionism in the nineteenth century and the civil rights movement of the twentieth century were strongly rooted in religious values; but slaveholders and opponents of civil rights also claimed to find justification in religion.”).

requirements.¹⁸⁸ As is often observed, rights claims are often grounded in a foundational God, the most famous example being the Declaration of Independence.¹⁸⁹ Whether those claims must be so grounded as a philosophical matter does not make much difference. Religiously based justifications for obedience to the law are popular in the United States.¹⁹⁰ As a cultural matter, Americans' moral (and therefore legal) codes tend to be justified with reference to some religious tradition.¹⁹¹

Establishment Clause underenforcement is thus both a nod to this cultural reality and a recognition that the Court is not capable of resolving a difficult philosophical question about legal foundations. For all the language of secular purpose, the Court is hesitant to define too rigorously or explicitly the legitimate grounds for lawmaking. While religious motivations are out-of-bounds, they are not *too* out-of-bounds. Perhaps that is what *McCreary County's* invitation to legislative dissembling tells us: the *appearance* of a secular purpose may be the best we can do in a world of disputed first principles about the appropriate foundations of the law. There are good reasons why the Court is not prepared to abandon its position that religious reasons for government action violate the nonestablishment principle as a formal matter. There are also good reasons why the Court is not ready to fully enforce that position.

188. See John L. Hammond, *Revival Religion and Antislavery Politics*, 39 AM. SOC. REV. 157, 183–84 (1974) (summarizing the role that Christian revival played in the antebellum abolitionist movement); Letter from Martin Luther King, Jr. from Birmingham Jail to Fellow Clergymen (April 16, 1963), available at http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/annotated_letter_from_birmingham/ (invoking Christian teachings to demonstrate that segregation “is not only politically, economically and sociologically unsound, it is morally wrong and awful”).

189. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .”).

190. See, e.g., Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 48 (1985) (“Although Christians through the ages have had very different interpretations of the relevant biblical passages and of the citizen’s obligations to the state, the basic premise that political authority is ordained by God has been one basis for assigning the claims of the state a high priority.”); Richard Land, *The Christian and the Government: A Delicate Balance*, THE ETHICS & RELIGIOUS LIBERTY COMM’N OF THE S. BAPTIST CONVENTION (July 10, 2007), <http://erlc.com/article/the-christian-and-the-government-a-delicate-balance> (“It is our godly duty to obey the law even when no one’s looking . . .”).

191. See GEORGE GALLUP, JR. & D. MICHAEL LINDSAY, *SURVEYING THE RELIGIOUS LANDSCAPE: TRENDS IN U.S. BELIEFS* 97 (1999) (“Within this country, individuals have employed religious dogma to conclusively settle matters such as slavery and segregation, prohibition and pacifism, and on many topics, people have later renounced these conclusions again on spiritual grounds.”); ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 496 (2010) (observing that “most Americans, even those that are not particularly religious, endorse a moral code based on the laws of God”); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1265 (1994) (“The second nonsectarian argument for the constitutional privileging of religion appeals to our desire as a society to remain alive to the moral, non-self-regarding aspects of life, and sees organized religion as a taproot of this vital aspect of human flourishing.”).

C. *Privileging Democratic Process Values*

This cultural reality may also explain the Court's hesitance to apply its principles of nonestablishment fully to religious rhetoric in the public sphere. This underenforcement can be explained in part by institutional pragmatism: it would be quite difficult for the Court to enforce a proscription against legislators' or politicians' statements endorsing God or a particular religion. Separation of powers might also counsel against enforcing speech codes on Congress or the President. These latter concerns animated Justice Kennedy's concurrence in *Hein*, the faith-based initiatives case.¹⁹²

These concerns might be more than pragmatic, however. It may be offensive to democratic theory for the Court to attempt to control public religious discourse beyond cabining certain ideal, "formal" types of government speech. This reason for the underenforcement of government-endorsing religious rhetoric is thus similar to the reason for underenforcing a strict secular purpose requirement—it may be inconsistent with democratic norms for the Judiciary to prevent citizens or their representatives from advocating the adoption of laws for whatever reason, including religious reasons. Here we see Justice Kennedy's stronger claim in *Hein* that underenforcement is a function of the fact that open discussion (including religious discussion) is "essential to democratic self-government."¹⁹³ On this argument, the expansive debate and deliberation necessary for a functioning democracy requires that the Court not close off any justification for political decision making, including the justification that particular laws are required by God or a specific religious worldview.

That democratic political process norms are more important than the nonestablishment norm is reflected in the privileged constitutional position of speech and associational rights in the United States.¹⁹⁴ The doctrinal Establishment Clause has never been understood to prevent religious organizations or persons from lobbying for laws on the basis of their religious beliefs or advocating that representatives adopt laws because they are required by God.¹⁹⁵ By extension, the Establishment Clause rarely limits

192. See *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 615–18 (2007) (Kennedy, J., concurring).

193. *Id.* at 616.

194. Cf. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association.").

195. See *id.* at 642. In *McDaniel*, Justice Brennan stated,

Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes. These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government may not go. The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the

pronouncements by government officials that they will or should follow the dictates of God or God's law in pursuing public, governmental ends.¹⁹⁶ Other countries with more rigorous concerns about religious divisiveness are not so speech-favoring.¹⁹⁷ For example, the French norm of "secularism"—derived from a long history of Catholic domination of the political system—is privileged in a way that the American norm of nonestablishment is not.¹⁹⁸

Indeed, to the extent that speech rights come into conflict with a nonestablishment norm, speech generally wins. The Court has continually held that speech rights trump nonestablishment concerns. In a number of cases, the Court has held that the government cannot bar religious speakers from public forums even if the purpose of the bar is to avoid church–state entanglement.¹⁹⁹

The Court's privileging of speech does have some limits: it applies to wholly private speech not publicly sponsored speech, which can be regulated.²⁰⁰ In addition, the Court has not held that government limits on advocacy by nonprofit organizations, many of which are religious, violate any norm of free exercise or association.²⁰¹ As I have already observed, the IRS may, according to the Court, condition nonprofit status on a willingness to forgo certain practices, including engaging in political speech.

marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

Id.

196. *But see* *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 857–58 (2005) (striking down a posting of the Ten Commandments in a Kentucky courthouse).

197. *See, e.g.*, James A. Huff, Note, *Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws*, 10 RUTGERS J.L. & RELIGION (2009) (article at 25) (“[The High Court of India] also held that you could limit free speech to encourage public order. The court upheld the conviction of an editor of a magazine . . . because the editor ‘deliberately and maliciously’ outraged the religious feelings of a particular religious class . . .”).

198. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 236 (2005) (“They have it much easier in France, for example, where the principle of *laïcité*—in effect, constitutionalized strong secularism—simply rejects the notion that religion is an inherently meaningful source of values, and so can easily conclude that religion can be excluded from the public sphere altogether.”).

199. *See, e.g.*, *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding that the University of Virginia could not deny funding to a student newspaper on the basis of its religious message).

200. Note, however, that the public/private distinction can also permit religious speech by deeming it private. *See* *Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010) (concluding that a district court erred in enjoining the government from implementing a statute transferring federal land containing a privately placed cross to a private party). *But cf.* *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125, 1129 (2009) (determining that privately donated religious monuments in a park reflect government speech rather than private speech).

201. *Cf., e.g.*, *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849, 857 (10th Cir. 1972) (denying tax-exempt status to a religious nonprofit with significant involvement in lobbying and elections), *cert. denied*, 414 U.S. 864 (1973).

But these restrictions, far from being at the center of the nonestablishment norm, are actually at the fringes. The Court's doctrine privileges speech, religious or otherwise, over nonestablishment, and it privileges association and political participation with little regard for Establishment Clause concerns. Religious organizations or religiously motivated individuals cannot be prevented from engaging in the same associational, political, and lobbying activities as any other organization or group. The constitutional norms of association and speech would not tolerate differential treatment of these organizations, and the state action requirement limits enforcement of nonestablishment norms against nongovernmental groups. Moreover, even when government officials are implicated, their relative receptiveness to political efforts is almost entirely a matter of constitutional culture and not a matter of constitutional doctrine.

The notion that the doctrinal Establishment Clause should not (as a normative matter) or cannot (as a practical one) impose too stringent limits on public deliberation and debate—whether claims about the sources of law or the source of law itself—helps explain the underenforcement of nonestablishment in the political arena more generally. Underenforcement is a pervasive feature of the nonestablishment norm in large part because that norm is submerged to norms of self-governance. And it turns out that the norm of self-governance could, in theory and practice, permit governance by religious law. Religiously motivated laws and religiously motivated advocacy are mostly unregulated, which means that concerted religiously infused political agendas are not readily susceptible to Establishment Clause scrutiny.

The result is a sense of dislocation. For example, one reading the Republican Party Platform of 2008 finds a document that asserts America's "Judeo-Christian heritage"²⁰² and proclaims the Party's opposition to abortion,²⁰³ same-sex marriage,²⁰⁴ and homosexuals in the military.²⁰⁵ The Platform also asserts the Party's support of school prayer and religious school vouchers.²⁰⁶ Those who support these policies and those who oppose them recognize quite clearly that they are of a piece: the Party's statement that America is a Judeo-Christian country is intimately related to the Party's opposition to abortion and support of school prayer. More importantly, the Party's rhetoric and its specific policies arguably arise out of similar religiously grounded values and norms that, for supporters, constitute a unified political agenda.

202. REPUBLICAN NAT'L COMM., *supra* note 118, at 53.

203. *Id.* at 52.

204. *Id.* at 53.

205. *Id.* at 5.

206. *Id.* at 44–45.

The Court's Establishment Clause jurisprudence, however, disaggregates these religiously infused statements and policies. The jurisprudence therefore appears partial and incoherent both to religionists and nonreligionists. The former wonder why the Court is hostile to cultural indices of religion: school prayer or public statements of religious endorsement. The latter wonder why the Court has nothing to say about explicit religiously inspired political agendas. Neither side can make sense of a jurisprudence that limits prayer at high school graduations²⁰⁷ but that permits the President to issue a Thanksgiving Day Proclamation,²⁰⁸ Congress to declare a "Day of Prayer,"²⁰⁹ or a religious official to invoke Jesus Christ during presidential inaugurations.²¹⁰

This dissonance seems at first to represent a failure of doctrine, but it may instead represent a lack of execution.²¹¹ Whether one adopts a principle of nonendorsement, neutrality, or noncoercion as the chief tool of Establishment Clause analysis will not prevent these principles from being embarrassed by a significant category of government acts that have never been susceptible to judicial regulation. Attempts to distinguish these government activities using a particular doctrinal principle will always be unconvincing.

III. Managing Establishment

One effect of focusing on the Establishment Clause's pervasive underenforcement is that it changes our perspective on the frailties of legal doctrine. The recognition that the Court's nonestablishment doctrine is significantly underenforced takes some pressure off the principles the Court employs in resolving Establishment Clause disputes. And it shifts the debate away from the coherence of those principles to a debate about the limits of judicial action in enforcing them. There is an implicit balancing in the Court's decision making between nonestablishment and norms of democratic

207. *Lee v. Weisman*, 505 U.S. 577, 598–99 (1992).

208. *See Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) (mentioning that the presidential Thanksgiving Proclamation is one of several examples of "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders").

209. *See id.* at 677 (mentioning that the National Day of Prayer is another example of the government acknowledging America's "religious heritage"). *But see* *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 n.52 (1989) ("It is worth noting that just because [the Court has] sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional.").

210. *Newdow v. Bush*, No. CIV S-01-0218 LKK GGH PS, 2001 U.S. Dist. LEXIS 25936, at *4 (E.D. Cal. Dec. 8, 2001).

211. *See Gey, supra* note 29, at 470 (arguing that the *Lemon* test is a useful analytic tool but that applying the test by its terms "would require a far more rigorous separation of church and state" than the Supreme Court would willingly endorse).

governance. We may question the results of that balancing, but it is no doubt taking place.

An additional reason to think about underenforcement as a pervasive characteristic of the Establishment Clause is that it focuses our attention on the relationship between doctrinal nonestablishment and political nonestablishment. The pragmatic and philosophical limits on judicial enforcement serve as a reminder that constitutional adjudication is dynamic. The Court does not act in a static manner to prevent establishment but rather interacts with the other institutions of government and the constitutional culture in order to manage it.²¹² The shift to a dynamic perspective helps us to understand both the possibilities and limits of judicial doctrine. How should the Court best use its admittedly limited judicial capital to influence the overall amount of establishment in the constitutional culture? What should a self-conscious Justice who understands the Court's institutional limits but desires to enforce the Court's stated doctrine do?

Of course, these questions assume that the Court plays some role in enforcing constitutional limits—that its decisions have some effect on what government officials and political actors do. This assumption is itself controversial.²¹³ By some lights, the Court could have little to no effect on the political and governmental space in which those actors operate. It is instructive to remember that disestablishment was initially politically, not judicially, compelled.²¹⁴

Or, alternatively, causation could be reversed. The Court's doctrine and decisions could be a product of politics and the wider constitutional culture, rather than an influence on it. A persuasive story can be told that the Court's initial modern forays into regulating the church–state relationship were a reflection or outcome of Catholic–Protestant religious politics, not a shaper or cause of that politics.²¹⁵ And so there may be a historical response to the question of judicial influence, and one that can only be answered by determining the causal relationship between the Court's decisions and the nonestablishment norm. That history may indicate that the Court normally follows political majorities or acts mostly to reinforce an already existing

212. Cf. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 30–31 (1994) (describing the interactions between the Executive, Legislative, and Judicial Branches in the lawmaking process).

213. See Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 394 (1992) (concluding that judicial independence is “seldom found” when Congress is opposed to Court opinion); Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011) (seeking to explain why political actors would obey constitutional commands that they oppose).

214. See Steven D. Smith, *Separation and the “Secular”*: *Reconstructing the Disestablishment Decision*, 67 TEXAS L. REV. 955, 960 (1989) (characterizing the disestablishment of religion as a “public decision” in the 18th century).

215. Jeffries & Ryan, *supra* note 116, at 312–15; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 46 (1996).

political settlement.²¹⁶ The judicial enforcement of the Establishment Clause may be best understood as political history—the Court’s shifting doctrines may simply reflect that history and not substantially alter it.²¹⁷

I will return to this possibility, but for now I want to cabin it in its most aggressive form. Many historians would accept a more nuanced relationship between what the Court does and politics writ large.²¹⁸ So for this third Part, I assume a world in which the Supreme Court plays a preeminent role in articulating constitutional law and that by articulating constitutional law, the Court has an effect on political and governmental actors and shapes what they, lower courts, the public, and other institutions of government do going forward.

With that assumption in hand, this Part canvasses four approaches to Establishment Clause (non)enforcement. I discuss these approaches with a few goals in mind. First, I want to say something about the relationship between judicial doctrine and political/cultural behavior and how the Justices might reconcile the gap between the two. Relatedly, I want to say something to the Justice who is at least somewhat committed to the Court’s existing doctrine and worries about how to put it into effect. And finally, I want to say something about the role that the Court might play in maintaining the core political principle of nonestablishment under the current conditions of underenforcement—recognizing that the core is contentious, but that it is not unbounded.

A. *Abandon the Establishment Clause*

A first possible response to the gap between stated Establishment Clause doctrine and its application is to abandon the doctrine, either because

216. For the most recent articulation of this view, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). For other accounts of how the Supreme Court does not readily depart from existing political settlements, see GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1993), and MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). See also KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 40–50 (1999).

217. See Klarman, *supra* note 215, at 47 (attributing the shift in the Court’s Establishment Clause doctrine to dramatic political, social, and ideological changes). It is notable that a recent prominent treatment of religion and religious attitudes in the United States barely mentions the Supreme Court and has no index entry for “Establishment Clause” or “Free Exercise Clause.” Aside from *Roe v. Wade*, the book appears to mention only two other Supreme Court cases, both in passing. See generally PUTNAM & CAMPBELL, *supra* note 191.

218. See, e.g., SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 4 (2010) (emphasizing the mutual influence between religious views and legal doctrines); Jeffries & Ryan, *supra* note 116, at 369–70 (recognizing that both internal and external factors have contributed to the Court’s dynamic Establishment Clause jurisprudence); Klarman, *supra* note 215, at 47 (acknowledging that evolving political views shaped Establishment Clause transformation).

it is wrong or because it cannot be honestly applied in light of the structural limitations described in Part II. Another reason to abandon the doctrine is because it is discriminatory—it singles out religion in a way that is inconsistent with modern constitutional sensibilities. In both instances, it can be argued that other constitutional doctrines that better fit the current constitutional culture—like equality—more effectively serve to advance the values of nonestablishment. In both cases, the Establishment Clause as interpreted by the Supreme Court does comparatively little work in maintaining the nonestablishment norm. If nonestablishment flourishes constitutionally, it will not be because the Court enforces it judicially.

Justices Scalia and Thomas have made the first kind of abandonment argument.²¹⁹ Justice Scalia in particular has argued both that the Court’s doctrine is wrong and that we know that it is wrong because it has never been honestly and consistently followed.²²⁰ Justice Scalia specifically rejects the secular purpose prong of *Lemon*, the nonendorsement rule, and even aspects of the noncoercion principle (as I have described it), in large part on the grounds that the principles cannot be and have never been applied to a significant array of government conduct.²²¹ In the place of these doctrines is a very narrow notion of what constitutes establishment. In his almost twenty-five years on the Court, Justice Scalia has never joined a majority to strike down a government action on Establishment Clause grounds.²²²

Both Justices Scalia and Thomas take a quasi-originalist view that seeks to reconcile current Establishment Clause doctrine with the original practices and traditions of the founding generation. This approach mostly defines nonestablishment in terms of majoritarian preferences and practices at the

219. Justice Scalia has urged the court to adopt an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central feature of which is that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.

Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring). *See also id.* at 692–94 (Thomas, J., concurring) (arguing that the Court should reconsider Establishment Clause incorporation against the states or, in the alternative, only prohibit government acts that coerce).

220. *See, e.g., McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (“[T]he Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.”); *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (arguing that the Court should adopt an Establishment Clause jurisprudence “that can be consistently applied”).

221. *See, e.g., McCreary Cnty.*, 545 U.S. at 908–09 (Scalia, J., dissenting) (casting doubt on the noncoercion principle by arguing that there is no agreed upon standard or definition for what constitutes coercion); *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (rejecting the nonendorsement rule by explaining that there should be “nothing unconstitutional in a State’s favoring religion generally” since this is in accordance with “our Nation’s past and present practices”).

222. *But see Hernandez v. Comm’r*, 490 U.S. 680, 713 (1989) (O’Connor, J., dissenting) (arguing, joined by Justice Scalia, that the contested government action violated the Establishment Clause).

point in time when the country was overwhelmingly Protestant and overwhelmingly theistic. The long history of religious proclamations, religious references, religious favoritism, and religious behavior by American public officials is thus proof of the Establishment Clause's meaning, not of its underenforcement through time.²²³ The nonestablishment principle thus operates within a civic culture that is in the main monotheistic and Christian.

Justice Thomas has been most explicit in his willingness to abandon the Establishment Clause.²²⁴ He has argued that all the work that the Clause does could be done through the Free Exercise Clause.²²⁵ The nonestablishment norm merely prevents coercive religious ritual and some (but not all) forms of religious preferentialism, and very little else.²²⁶ Justice Thomas also rejects Establishment Clause incorporation, on the ground that some states in the eighteenth and early nineteenth centuries maintained established churches.²²⁷ And both Justices Scalia and Thomas appear to embrace the idea that civil law could be a pure reflection of religious law, at least where the law does not compel religious worship.²²⁸

A different form of abandonment is proposed by scholars who would replace much of Establishment Clause doctrine with neutrality or nondiscrimination principles borrowed from free speech²²⁹ and equal protection

223. See, e.g., *McCreary Cnty.*, 545 U.S. at 885–89 (Scalia, J., dissenting) (relying on the government's past and present religious acts and support to illuminate the Establishment Clause's meaning).

224. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring).

225. See *Cutter v. Wilkinson*, 544 U.S. 709, 728 n.3 (2005) (Thomas, J., concurring) (“I note, however, that a state law that would violate the incorporated Establishment Clause might also violate the Free Exercise Clause.”).

226. Justice Thomas stated as much:

It is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments. . . . To be sure, I find much to commend the view that the Establishment Clause “bar[s] governmental preferences for *particular* religious faiths.”

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 (2004) (Thomas, J., concurring) (quoting *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring)). See also *id.* at 53 n.4 (“It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause . . .”).

227. *Id.* at 49–50.

228. See, e.g., *McCreary Cnty.*, 545 U.S. at 885–94 (Scalia, J., dissenting) (relying on the government's past and present religious acts and support to illuminate the Establishment Clause's meaning); *Cutter*, 544 U.S. at 729 (Thomas, J., concurring) (characterizing mandatory religious observance as a constitutionally prohibited establishment of religion).

229. Cf. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2978 (2010) (applying First Amendment free speech analysis to the claims of a religious organization against a “public law school[s] condition[ing of the group's] official recognition . . . on the organization's agreement to open eligibility for membership and leadership to all students”). As Stanley Fish recently pointed out, *Christian Legal Society* was “squarely about religion” but could not be analyzed under the Establishment or Free Exercise Clauses. Stanley Fish, *Is Religion Special?*, N.Y. TIMES (July 26, 2010), <http://opinionator.blogs.nytimes.com/2010/07/26/is-religion-special/>; cf. Mark Tushnet, *The Redundant Free Exercise Clause*, 33 LOY. U. CHI. L.J. 71, 83 (2001)

doctrine.²³⁰ This approach is animated in part by a concern that religion, religious individuals, and religious claims are being treated differentially—either worse or better than their secular equivalents.²³¹ One can suppress this differential treatment by reading the Establishment Clause as a nondiscrimination provision rather than as a special limit on specifically religious conduct, religious speech, or religious political activity.

The shift away from the Establishment Clause to other constitutional principles is attractive because it replaces a set of doctrines that are only weakly applied and often misunderstood with principles that may be more familiar. The emphasis on nondiscrimination as opposed to nonestablishment in particular may be salutary because it assimilates religion into the mainstream of constitutional law, with its emphasis on equal and nonarbitrary government treatment. And to the extent that nonestablishment is concerned with sectarian favoritism or preferentialism, equal protection can do most of that work.

Nondiscrimination also provides a different language for talking about particular hot-button issues that have deeply religious content, such as abortion or homosexuality. It is notable that challenges to opposite-sex marriage laws have primarily been brought under the Equal Protection and Due Process Clauses, not under the Establishment Clause.²³² Nevertheless, when

(arguing that the Free Speech Clause provides protection for almost all of what the Free Exercise Clause does).

230. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 51–77 (2007) (describing a model of religious freedom based on equality); Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEXAS L. REV. 1185, 1186 (2007) (asserting that Supreme Court decisions and commentators can be found to support a nondiscrimination approach to the Religion Clauses). For a discussion about the shift to neutrality in Religion Clause adjudication, see Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 11–12 (2000), and compare NUSSBAUM, *supra* note 16, at 21–22, 229–31 (discussing equality and neutrality in the context of establishment issues and recent challenges by members of the Court to the consensus behind the neutrality approach). See generally Douglas Laycock, *supra* note 34 (discussing his concept of “substantive neutrality”).

231. The abandonment of the Establishment Clause is also animated by the apparent conceptual difficulties in defining religion and describing its proper bounds vis-à-vis other comprehensive belief systems. According to scholars of this ilk, the irreconcilable gap between judicial doctrine and constitutional practice is simply a product of these intractable conceptual difficulties. See, e.g., STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM *passim* (1995) (arguing that there is no way to distinguish religious from non-religious claims and no possibility of a neutral principle that would not privilege certain worldviews over others); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, in LAW & RELIGION: A CRITICAL ANTHOLOGY 383 *passim* (Stephen M. Feldman ed., 2000) (discussing liberalism’s inability to generate a theory of religious freedom without contradicting core liberal commitments); Larry Alexander, *Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory*, 24 CONST. COMMENT. 243, 243–44 (2009) (arguing that the difficulty of distinguishing between what is religion and what is not religion hampers any effort to generate a coherent theory of religious liberty).

232. See, e.g., Gill v. Office of Pers. Mgmt., 699 F.2d 374, 377 (D. Mass. 2010) (holding that the Defense of Marriage Act violates the Equal Protection Clause); *In re Marriage Cases*, 183 P.3d

testing such laws for a rational basis, courts have indicated that they will not consider religious rationales for the opposite-sex limitation, effectively importing a secular purpose requirement into equal protection doctrine.²³³ Indeed, the courts take it as a given that a rational basis cannot be in the form of a religious objection. In the recently decided same-sex marriage case out of California, the district court cited *Everson v. Board of Education of Ewing Township*²³⁴—one of the first of the Court’s modern Establishment Clause decisions—in requiring that the defenders of opposite-sex marriage offer non-religious reasons for the restriction.²³⁵ The defenders of the marriage ban did not contest that requirement in any way.

Why not test these laws more straightforwardly under the Establishment Clause and its secular purpose principle? Perhaps the invocation of equal treatment is more attractive in the wider political and constitutional culture and more consistently applicable through doctrine.

The move towards neutrality or nondiscrimination is less responsive to other nonestablishment norms, however. It does not readily address the concern about religious factionalism or of government-sponsored religion-endorsing speech—at least not directly. Nor does it address the problem of religiously motivated lawmaking. It is fully possible that other constitutional doctrines should dominate even when religion or religiously inspired politics

384, 453 (Cal. 2008) (declaring that state laws prohibiting same-sex marriage violate equal protection, due process, and privacy principles), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *amendment ruled unconstitutional*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010); *Lewis v. Harris*, 908 A.2d 196, 211, 215–17 (N.J. 2006) (holding that there is not a fundamental right to same-sex marriage under the New Jersey Constitution but that same-sex couples must be afforded the same rights as opposite-sex couples based on equal protection principles); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961, 969 (Mass. 2003) (declaring that the marriage licensing statute denying marriage licenses to same-sex couples does not have a rational basis and, thus, violates the Massachusetts Constitution); *Baehr v. Lewin*, 852 P.2d 44, 57, 67 (Haw. 1993) (holding that there is not a fundamental right to same-sex marriage under the Hawaii Constitution but that Hawaii laws prohibiting same-sex marriage will be subjected to strict scrutiny in equal protection challenges).

233. *See Varnum v. Brien*, 763 N.W.2d 862, 904–06 (Iowa 2009) (addressing the unspoken religious element of the challenged opposite-sex marriage law, even though the proponents of the law offered only secular justifications, and striking down the law on equal protection grounds). In defense of the holding in *Goodridge*, Justice Greaney wrote:

I do not doubt the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common-law definition of what constitutes a legal civil marriage is now, or ever would be, warranted. But, as a matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.

798 N.E.2d at 973 (Greaney, J., concurring); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (“Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy Our obligation is to define the liberty of all, not to mandate our own moral code.”).

234. 330 U.S. 1 (1947).

235. *Perry*, 704 F. Supp. 2d at 930–31.

are at stake: privacy (for abortion or end-of-life decisions), speech and association (for political participation), or equal protection (for discriminatory laws). But though these doctrines can vindicate some non-establishment values, they cannot vindicate them all. And these other doctrines—one thinks of privacy in the abortion context or equal protection in the same-sex marriage context—are not necessarily any more tractable than nonestablishment.

B. *Avoid Backlash*

A second approach would retain an independent Establishment Clause doctrine but with heightened sensitivity to the political costs of its enforcement. The dominant trope here is avoiding political backlash. The relationship between the Court's Establishment Clause doctrine and the political culture of nonestablishment has often been discussed in these terms. Commentators sometimes argue that a politically active Religious Right developed in response to the liberalizing "anti-religion" decisions of the Warren Court.²³⁶ The agenda of the Republican Party has long included overturning the Court's bar to school prayer and aid to sectarian schools, as well as *Roe v. Wade*.²³⁷ To the extent that nonestablishment is undercut by a heightened religiously based politics, the Court could be seen as inhibiting nonestablishment through its rulings instead of advancing it.

A judge concerned about the overall amount of establishment in the constitutional culture might rightly be attentive to how a specific Establishment Clause decision is likely to be received by the public and by particular political actors. This attentiveness could be generic or doctrine specific. In either case, we hear echoes of Bickel's notion of political capital.²³⁸

Consider Bill Eskridge's "pluralism-facilitating judicial review."²³⁹ According to Eskridge, the Court should be attentive to the polarizing effects of its decisions and should actively use judicial review to lower the stakes of

236. Cf. Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions* 101–02 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 10-038, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691661 (claiming that the school prayer decisions contributed to the "culture wars"). But cf. PUTNAM & CAMPBELL, *supra* note 191, at 115–16 (offering evidence that the 1960s Supreme Court decisions concerning prayer in school were "at most, a modest contributor" to the rise of evangelicalism).

237. 410 U.S. 113 (1973). To view the Republican Party platforms, which advocate these policy positions, see *Political Party Platforms*, *supra* note 118.

238. See generally Bickel, *supra* note 75 (discussing the political influences on the Supreme Court's decision regarding whether, when, and how to adjudicate).

239. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1294 (2005) (internal quotation marks omitted).

politics.²⁴⁰ Eskridge argues that the Court should seek to “ameliorate politically destructive culture wars by denying groups state assistance in their efforts to exclude, demonize, or harm groups they dislike.”²⁴¹ In doing so, however, the Court should avoid “raising the stakes of politics” by sidestepping national resolutions to controversial issues when local ones will do, adopting narrow and incremental interpretations of constitutional and statutory provisions, and by using “procedural dodges” to avoid deciding tough constitutional issues.²⁴² Judicial review can facilitate democratic decision making by enforcing neutral rules of political engagement while avoiding political backlashes like those that Eskridge argues followed *Roe v. Wade*.²⁴³

Richard Primus offers a more doctrine-specific approach, arguing that sometimes judges should take public opinion into account as part of their first-order interpretation of particular constitutional commands.²⁴⁴ Here, the doctrinal answer to the question “what does the Constitution require?” includes consideration of potential public reaction. As Primus puts it:

[T]he consequentialist, backlash-fearing argument, which persuades many theorists that judges should sometimes stop short of what the law truly demands, presumes that there are cases in which the public has a view different from that of the judges, that judges are aware of the divergence, and that judges should alter their behavior accordingly. If there are in fact cases where these conditions obtain, it may be better to think of the public’s strongly held view as one of the elements constituting the right answer rather than as something with which the right answer must compromise.²⁴⁵

Primus recognizes that there is a certain formalism in thinking about constitutional adjudication as producing something that “the law truly demands” against which political considerations must be balanced and taken into account.²⁴⁶ But it does seem plausible to assume that a self-conscious judge might think in these terms. Under such conditions, the backlash-limiting approach might be a way of reconciling doctrinal nonestablishment, cultural nonestablishment, and the gap between the two.

Certainly, Justice Breyer’s opinion in *Van Orden* seems to be an example of Primus’s approach. As I have already described, in *Van Orden*, Justice Breyer treated as a first-order condition the possible adverse reaction

240. See *id.* at 1301–10 (discussing methods by which judges can and should actively employ judicial review to lower the stakes of politics).

241. *Id.* at 1283.

242. *Id.*

243. *Id.* at 1313.

244. Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 1–3 (2007).

245. *Id.* at 3.

246. *Id.*

to a decision to apply the Establishment Clause to order the removal of permanent Ten Commandments displays. In determining that the Establishment Clause would be undermined instead of advanced by a ruling that ordered their removal, Justice Breyer was exercising more than judicial self-restraint in the face of the Court's limited political capital. He was also doing something more than generically lowering the stakes of politics. In *Van Orden*, Breyer interpreted the Establishment Clause as a mandate to avoid sectarian strife and argued that vindicating that important nonestablishment norm was paramount despite the religious provenance, nonneutrality, and endorsing nature of the display.

There are reasons to be skeptical of judges shaping their jurisprudence or political behavior to avoid backlash or to seek to ameliorate conflict in this way. Theories of political backlash are often based on small, historical samples over relatively short timeframes—*Brown v. Board*,²⁴⁷ *Roe v. Wade*,²⁴⁸ *Lawrence v. Texas*²⁴⁹—and they tend to overestimate the impact of Court decisions. It also seems unlikely that the Justices will be able to accurately predict when a decision will generate a backlash. Indeed, not long ago, theorists believed that the Court could ameliorate politically divisive culture wars by deciding cases and taking issues *out* of the political process.²⁵⁰ Backlash theories also cannot predict the long-term consequences of a Court's decision. Consider Michael Klarman's argument that the *Brown* decision did not advance the civil rights struggle but that the violence engendered by the decision did.²⁵¹ Southern political backlash led to a counterpolitics of racial justice that became ascendant with the civil rights acts of the 1960s.²⁵² One can imagine backlashes and counter backlashes, *ad infinitum*.

In the same way, the rise and fall of religiously motivated politics is far from predictable. As I have already noted, it is commonly theorized that the

247. 347 U.S. 483 (1954).

248. 410 U.S. 113 (1973).

249. 539 U.S. 558 (2003).

250. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court stated, "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."

505 U.S. 833, 866–67 (1992).

251. KLARMAN, *supra* note 216, at 441–42 ("The post-*Brown* racial fanaticism of southern politics produced a situation that was ripe for violence, while *Brown* itself created concrete occasions on which violent opposition to school desegregation was likely. . . . By helping lay bare the violence at the core of white supremacy, *Brown* accelerated its demise.").

252. See generally *id.* at 442 (stating that the backlash resulting from *Brown* was necessary to "enable[] transformative racial change to occur as rapidly as it did" under the Civil Rights Act of 1964).

Christian Right developed in response to the Supreme Court's decisions on school prayer and abortion or to the cultural upheavals of the 1960s. However, there is another theory that says the Christian Right was created by Republican strategists who took advantage of widespread Christian contempt for the IRS's removal of tax-exempt status from racially segregated private Christian schools in the 1970s.²⁵³

According to this account, *Bob Jones University v. United States*²⁵⁴—which upheld the IRS's penalization of a fundamentalist Christian university for its racially discriminatory policies²⁵⁵—is a more direct cause for the political response that followed than was *Roe* or the school prayer decisions. Indeed, according to Paul Weyrich, a conservative strategist during the 1970s, past attempts had failed at mobilizing fundamentalist voters based on abortion and prayer in school.²⁵⁶ The tax issue was different, however, in that it inhibited the fundamentalists' ability to take refuge in their own subculture.²⁵⁷ Weyrich contends that the abortion issue was tacked onto the Republican agenda after the Christian Right was formed in response to the IRS taxing issue.²⁵⁸

The possibility that *Roe* played less of a role than *Bob Jones* in generating a political response²⁵⁹—at least initially—counsels against drawing easy political conclusions from particular Supreme Court

253. RANDALL BALMER, *GOD IN THE WHITE HOUSE: A HISTORY* 94–97 (2008).

254. 461 U.S. 574 (1983).

255. *Id.* at 605.

256. WILLIAM MARTIN, *WITH GOD ON OUR SIDE* 173 (1996).

257. HANKINS, *supra* note 117, at 144. When the teaching of evolution became widely accepted following the Scopes Monkey Trial in 1925, many fundamentalists were content to withdraw from national politics because they could take refuge in their own isolated communities. BALMER, *supra* note 253, at 97. Private Christian schools were seen as a sanctuary, where students were free to pray and were not subject to the teaching of evolution. MARTIN, *supra* note 256, at 168 (“Although many of these schools were ‘segregation academies,’ formed in the aftermath of *Brown*, ‘most scholarly investigations have concluded . . . that by the mid-1970s integration was no longer a significant factor in their continued proliferation.’” (internal quotation marks omitted)). Thus, when the IRS reached into the private realm of these Christian schools (on the basis of segregation), fundamentalist Christians were outraged. *Id.* at 168–69. Republicans saw this outrage as an opportunity to revive fundamentalist Christians' political involvement in favor of the Republican Party, which claimed to be opposed to intrusive governmental actions; thus, fundamentalists were motivated to reenter the political realm, and the Republicans won their renewed voting bloc by convincing fundamentalist leaders that the Democratic Carter Administration was responsible for the IRS removal of Bob Jones University's tax-exempt status (even though the IRS decision regarding Bob Jones University was made before Carter came into office). BALMER, *supra* note 253, at 98, 100–01.

258. BALMER, *supra* note 253, at 100.

259. Cf. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 417–18 (2007) (noting the influence that *Bob Jones* had on the opposition to *Roe*); PUTNAM & CAMPBELL, *supra* note 191, at 392 (noting that it “took a few years for evangelical leaders to embrace the pro-life cause”).

decisions.²⁶⁰ It seems somewhat naïve to believe that a split decision in the Court's Ten Commandments cases or the Court's avoidance of a decision in the Pledge of Allegiance case will effectively reduce religious-political activity. In fact, political and cultural operatives who oppose the Court's pronouncements on religion have used the decisions in the Ten Commandments cases to press for the erection of additional Ten Commandments monuments,²⁶¹ while simultaneously arguing that the Court is hostile to religion in the public square.²⁶² The very ambiguity of the Court's decisions may inflame the ongoing political and cultural debate.

The notion that "the public" has identifiable interests and opinions on particular judicial subjects might be similarly naïve. In avoiding "unpopular" decisions, the Court may only be avoiding the ire of particular interests. It is very difficult for the Justices to know when they should consider the demands of "the people" and when the people are indistinguishable from powerful interest groups. We might be less inclined to countenance departures from the Court's stated jurisprudence when that departure looks like it is a response to a particular political constituency.

Nevertheless, a general theory of judicial review that emphasizes the Court's role in lowering the stakes of politics is attractive in the Establishment Clause context. One can argue whether Justice Breyer's concurrence in *Van Orden* was a strategic, stakes-lowering political move—like Justice Stevens's standing decision in *Newdow*—or an example of how constitutional "law" can be sensitive to public reaction. And one can dispute the actual political effects of these decisions. Nevertheless, both *Newdow*

260. Cf. Post & Siegel, *supra* note 259, at 375–77 (arguing that, although most commentators view backlash as problematic, there are positive benefits that can result from backlash). A recent example of a backlash that was unanticipated was the public's response to the Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), a takings case. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2163–64 (2009) (describing the backlash to *Kelo* as anomalous given the decision's consistency with relevant precedent).

261. See, e.g., Andy Kanengiser, *Ten Commandments Display Receives OK from Senators*, CLARION LEDGER, Mar. 30, 2005, at A1, available at 2005 WLNR 27035709 (detailing the Mississippi Senate's overwhelming approval of legislation allowing the Ten Commandments to be displayed at public buildings); Ken Kusmer, *State Lawmakers Want Monument in Place*, FORT WAYNE NEWS SENTINEL, June 28, 2005, at L1, available at 2005 WLNR 10175356 (describing Indiana legislators' calls for the installation of a Ten Commandments monument on the statehouse grounds); cf. Melanie Hunter, *Amendment Would Reverse Ruling on Ten Commandments*, CNSNEWS.COM (June 30, 2005), http://www.gopusa.com/news/2005/july/0701_ten_commandments.shtml (describing a constitutional amendment introduced by more than one hundred congressmen that would create the right to post the Ten Commandments on public property).

262. See, e.g., Hans Hacker, *Moses v. Jesus: Why do Conservative Christians Prefer Moses' Commandments to Jesus' Beatitudes*, EZINE ARTICLES (July 6, 2005), <http://ezinearticles.com/?Moses-v.-Jesus:-Why-do-Conservative-Christians-Prefer-Moses-Commandments-to-Jesus-Beatitudes?&id=48961> ("Rejection of the Ten Commandments by courts has contributed to disaffection with the society, belief that Christian values are under attack, and sustained political and legal action on the part of the conservative Christian social movement.").

and *Van Orden* emphasize the need for an account of the Establishment Clause that recognizes the role of the Court in shaping the political culture. A pragmatic institutionalist worries both about the contours of Establishment Clause doctrine and the political costs and benefits of applying it fully.

C. *Permit Symbols but Regulate Money*

A third potential approach to managing establishment has much in common with “avoid backlash” but emphasizes an adjustment of the Court’s Establishment Clause priorities. Specifically, some commentators have argued that the Court’s sporadic regulation of symbolic or expressive establishment harms is misplaced and that the Court should be more concerned with harms that arise from government funding or subsidization of religious activity.²⁶³

Noah Feldman has addressed this argument directly to the political culture. He argues for a kind of political truce: Religionists would be permitted most of their expressive and symbolic acknowledgements of religion while secularists would get limitations on most kinds of government funding.²⁶⁴ In contrast, I have argued for a shift from symbols to money in the course of developing a decentralized account of the Establishment Clause²⁶⁵—something I will say more about in the next section.

Both accounts share a common view that regulating symbols unnecessarily heightens religious tensions. First, the regulation of symbols and expressive government acts generates a politicized environment by forcing public officials and groups to take sides in highly emotional and fraught cultural battles. The disputes over crèches, Christmas displays, and Ten Commandments displays are extremely divisive and have little middle ground. Often these battles are local, but litigation heightens their profile. The costs in terms of religious polarization and politicization are high; the Court’s decisions striking down governments’ religiously infused speech tend to contribute to religious–political factionalism rather than reduce it. Court decisions foster grievances that can be exploited by political operatives and leveraged in the service of larger political and social goals.

Second, while government expression is important, it does not have the political effect of money, which aligns the interests of religious groups and the government in a more thoroughgoing way. Money raises the political stakes for religious groups, who may compete for access to government

263. See FELDMAN, *supra* note 198, at 236–37 (“I believe that the history of church and state in America . . . point[s] toward an answer. . . . [O]ffer greater latitude for public religious discourse and religious symbolism, and at the same time insist on a stricter ban on state funding of religious institutions and activities.”).

264. *Id.* at 237.

265. Schragger, *supra* note 60, at 1880. *But see* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 977–79 (2010) (arguing that there are high costs to allowing noncoercive religious endorsements).

funds. It also raises the stakes for government officials, whose electoral prospects might hinge on how much largesse they deliver to substantial religious constituencies. Money thus creates political leverage on both the government and religion side.

Consider again the President's faith-based initiative. This program may be a way of bringing religious organizations into the mainstream of the federal-funding and grant-making systems. But it is also a way for the political parties to distribute resources to particular religious constituencies. And those constituencies will certainly be aware of a particular political party's role in providing that support. Government financial support of religious institutions, thus, may have significant political repercussions as religious groups become reliant or dependent on government largesse. Religious "pork" is particularly dangerous at the national level where the sums are significant and the stakes for religious organizations are high.

That being said, whether divisiveness increases or decreases in response to particular judicial decisions is an empirical question, and we may want to hesitate before assuming that certain judicial settlements will produce equivalent political settlements.²⁶⁶ In terms of Feldman's cultural *détente*, it is not clear which religionists and which secularists are going to lay down their political arms. There is no reason to think that either side will be satisfied with his proposed institutional compromise. One cannot stop Mr. Newdow from bringing lawsuits to enforce the nonendorsement principle or religionists from seeking public funding for sectarian activities.

It also might be the case that a permissive approach toward religious symbols will prefigure a permissive approach toward money. If the Court permits a form of government-sponsored Christian civic religion, this may undermine efforts in other areas to assert nonestablishment values. The expressive force of the Court's decision to strike down a Ten Commandments display may be at its height precisely because it constitutes an important and underappreciated message to the political culture.²⁶⁷

The symbols–money distinction also might mistake the national mood. In a religiously diverse society, the government's deployment of specific

266. Consider Justice Breyer's assessment of divisiveness in two recent cases. In *Zelman*, Justice Breyer made a strong case in dissent for why vouchers and other kinds of financial transfers to religious entities would produce religious factionalism. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 724–25 (2002) (Breyer, J., dissenting) (voicing concern that efforts to enforce the criteria that will invariably accompany government funds expended on voucher schools "not only will seriously entangle church and state, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government" (citation omitted)). In *Van Orden*, he found that the ongoing existence of the Ten Commandments display at issue had not generated similar divisiveness. *Van Orden v. Perry*, 545 U.S. 677, 700–04 (2005) (Breyer, J., concurring).

267. Cf. Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1084 (1986) (arguing that the Court might choose to resist the political culture's embrace of unconstitutional but otherwise widely accepted acts).

sectarian symbols may be more offensive than the government's funding of sectarian programs—at least if that funding is available to all religious groups on an equal basis. It may be that money no longer raises substantial concerns because the Protestant–Catholic battles that marked the mid-twentieth century have been replaced by a more diverse set of religious concerns and public support of sectarian education is no longer viewed as a cultural or political threat.²⁶⁸ As a number of commentators have noted, the Court's decisions have moved in this direction—less regulation of money and more regulation of symbols²⁶⁹—and thus may reflect an emerging political consensus.

D. Decentralize Establishment

A final approach to managing establishment does not divide up the world primarily in terms of subject matter (money vs. expression) but instead according to the level of government that is engaged in the religion-burdening or -favoring activity.²⁷⁰ This approach seeks to take advantage of the dispersal of power to reinforce nonestablishment principles. By limiting the exercise of centralized power, one can limit both religion's influence on the state and the state's influence on religion. As operationalized, the doctrine would treat federal funding of sectarian schools and federal religious expression differently from local funding and local religious expression. Courts would scrutinize the former more closely than the latter; local religion-favoring or -burdening activities would be treated with more deference than equivalent state or national religion-favoring or -burdening activities.

I have made this argument at length elsewhere,²⁷¹ so I will just sketch its outlines here. At its conceptual heart, Establishment Clause decentralization

268. Cf. Jeffries & Ryan, *supra* note 116, at 366 (observing that religious schools are no longer all Catholic and school aid no longer favors any one religion).

269. See Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 772–73 (2001) (describing how cases in Establishment Clause jurisprudence have been tending in the direction of regulating symbols).

270. See Schragger, *supra* note 60, at 1818–19 (arguing that courts should be cognizant of the level of government against which rights are being asserted).

271. *Id.* at 1831–91. Others have made versions of it as well. See Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 89–104 (2006) (articulating a theory of partially incorporating the First Amendment to maintain core nonestablishment norms while explicitly expanding state leeway to promote and support religious enterprise); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 669 (2003) (suggesting that it is desirable to tailor constitutional limitations based on whether the government actor is a federal, state, or local entity); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516–17 (2005) (arguing that tailoring of application of constitutional principles to different levels of government has merit and should not be categorically rejected); see also Steven D. Smith, *Our Agnostic Constitution*, 83 NYU L. REV. 120, 153 & n.126 (2008) (discussing federalism as a potential solution to church–state conflicts).

reduces political tension by denationalizing a significant array of religion-benefiting or religion-burdening government conduct. It thus has affinities to the “avoid backlash” and “permit symbols but regulate money” approaches already discussed. It also calls for somewhat less regulation of local religion-benefiting or -burdening activities, so it “abandons” the Establishment Clause to some degree at these lower levels of government.

But decentralization is less strategic than these alternatives for it is motivated by a robust account of the structural requirements of nonestablishment. Decentralization has two purposes. First, borrowing from Christopher Eisgruber, I argue that America’s tradition of decentralized local government helps promote American-style religious pluralism.²⁷² Government fragmentation provides numerous jurisdictional opportunities to engage in both community and church formation. The existence of thousands of somewhat autonomous local governments encourages the formation of new communities, new churches, and the religious competition that results.²⁷³ This competition among sects is the chief structural barrier to national dominance by any one sect.

Second, decentralization has a basic Madisonian foundation: while religious factions in a part of the nation may be divisive, it is unlikely that localized factions will generate a stable oppressive faction in the whole.²⁷⁴ The extended sphere creates a structural difficulty for larger-scale organization. Combine the extended sphere with the decentralization of political authority and you have a structural barrier to large-scale religious–political alliances and the political divisiveness that those alliances arguably generate.²⁷⁵ The Court best preserves nonestablishment by ensuring the political preconditions for nonestablishment.²⁷⁶ And it does this by taking into account the scale of government activity when determining an Establishment Clause violation.²⁷⁷

This judicial attentiveness to scale can promote pluralism in three ways. First, the decentralized Establishment Clause subjects national-level religion–state relationships to increased scrutiny in order to prevent the undermining of religious pluralism through the favoring of highly motivated, issue-specific religious groups. Second, it limits judicial involvement in local matters, thus providing room for localities to serve as sites for resolving religious–political disputes in diverse and locally responsive ways. And third, it reduces religious tension by avoiding the national politicization of local religion–state controversies. In this way, stakes lowering can be a pri-

272. Schragger, *supra* note 60, at 1828.

273. *Id.* at 1829.

274. *Id.* at 1823.

275. *Id.* at 1853.

276. *Id.* at 1815.

277. *Id.* at 1818–19.

mary tenet of Establishment Clause doctrine, not just an exception to its enforcement.

This attention to scale can be accommodated within existing doctrine. Both the advancement and entanglement prongs of the *Lemon* test can treat as doctrinally salient the institutional location and political import of particular government regulations or acts. And while the Court would continue to have to draw contentious lines, those lines would be related to the actual, substantive effects of a government program or act rather than to the vindication of abstract principles of government conduct. According to this argument, funding of religious institutions and organizations—and, in particular, centralized funding of such institutions—is generally more dangerous than local religious endorsements. Decentralization thus overlaps with “permit symbols but regulate money” but only insofar as many religious endorsements are local.

There are some obvious objections to a decentralized Establishment Clause regime. One might object that local governments are more likely than Congress to oppress minority religious groups. Borrowing from Madison’s *Federalist 10*, one could argue that smaller-scale governments can be more easily captured by majoritarian factions.²⁷⁸ On this theory, the religious-benefiting or -burdening behavior of Congress is likely to be relatively more benign than the religious-benefiting or -burdening behavior of local governments. Congressional legislation has to appeal to a wider audience and cannot readily favor one sect in the nation over another.

I have countered this argument elsewhere so will not spend significant time on it here.²⁷⁹ Suffice it to say that even if Congress is less susceptible to majoritarian faction (and I am not sure that is right), it is oftentimes more susceptible to minoritarian faction.²⁸⁰ One has to pick one’s preferred political pathology, as public choice theory has taught.

Moreover, some recent history points away from the assumption that centralized religious-favoring activities will be mostly neutral or nondenominational. Consider again the White House’s faith-based initiative, which, while ostensibly denominationally neutral, has been alleged to favor Christian and more evangelical churches.²⁸¹ Consider also the line of

278. THE FEDERALIST NO. 10, at 83–84 (James Madison) (Clinton Rossiter ed. 1961).

279. See Schragger, *supra* note 60, at 1823–31 (asserting that decentralization under “constitutional conditions in which religious activity will more likely be pursued” serves as a “structural check on religious aggrandizement” that encourages “healthy religious pluralism,” the “chief structural check on religious factionalism”).

280. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12–37 (1991) (examining the role of interest groups in the political process).

281. See DAVID KUO, TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION 159–60 (2006) (recalling conservative Republicans’ efforts “to allow groups that aimed to convert people to a particular faith to be able to receive direct federal grants”).

congressional-enacted statutes that have been promoted by particular religious groups. These include the placing of “In God We Trust” on U.S. money,²⁸² the adoption of an official national “Day of Prayer,”²⁸³ and, most recently, the designation of a large white cross on formerly public land as a national war memorial.²⁸⁴ It seems that religious favoritism is not restricted to local governments. Church influence might in fact be at its height in Congress, where extraordinary national pressure can be brought to bear on noncompliant members.²⁸⁵

That is not to say that localism answers the problem of religious oppression—only that the Court’s doctrine should reflect the reality of institutional power and its implications for the overall relationship between religion and the state. The local funding of religious schools should not be treated the same as the national funding of religious schools. The political stakes at the national level are significantly higher than the political stakes at the local level, and the imposition of national religious-favoring or religious-disfavoring norms by the Court, Congress, or the President contributes more to the creation of religious–political factions than do local ones. Moreover, giving room to localities to operate as sites for the resolution of religiously infused disputes and encouraging some regulatory experimentation and diversity encourages a healthy religious pluralism.

By accounting for scale, a politically aware Establishment Clause doctrine might be able to reduce the political stakes of symbolic religious fights.²⁸⁶ A decentralized doctrine thus achieves both a substantive and a strategic goal: it advances religious peace by dampening the pressure for national-level religious–political alliances.

E. Summary: Doctrinal and Institutional Relevance

Decentralization is a process-oriented approach—it turns on the Madisonian claim that religious pluralism is the best strategy for maintaining the nonestablishment norm. It further claims that political decentralization

282. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122–23 (1996).

283. *Id.* at 2151.

284. *See* Salazar v. Buono, 130 S. Ct. 1803 (2010).

285. *See* FARBER & FRICKEY, *supra* note 280, at 146 (concluding that “relatively compact groups,” such as religious organizations, “are likely to exercise undue influence”); HERTZKE, *supra* note 115, at 49–69 (discussing the intense grassroots lobbying power of various religious organizations).

286. This admittedly may be naïve. Consider how a local zoning issue involving a mosque project in lower Manhattan has produced a national firestorm. *See* Stolberg, *supra* note 7 (describing the debate—which has elicited statements from President Barack Obama and other public figures—as both a “high-profile battle” and “thorny”). It may be that the Court’s main task should be to rein in outliers, which is a form of centralization. *See* Eskridge, *supra* note at 239, 1283; Levinson, *supra* note 213, at 736 (“[M]ost of the Court’s major interventions have been to impose an emerging or consolidated national consensus on local outliers.”).

promotes religious pluralism and that judges can foster decentralization when regulating church–state relations.

Two important questions require some attention in this concluding section, however. The abandonment of the Establishment Clause in favor of constitutional doctrines like equality, the generic avoidance of political backlash, the regulation of money instead of symbols, and the decentralized Establishment Clause are all potential mechanisms for managing the relationship between legal nonestablishment and political nonestablishment. These approaches are addressed to the courts and to the Supreme Court in particular. But (1) what if the judicially enforced Establishment Clause has little causal relationship to the constitutional settlement of nonestablishment, or at least a highly unreliable relationship to it? And (2) even assuming such a relationship, is it possible to say anything about how specific judicial decisions contribute to that constitutional settlement?

As to the first question, there are reasons to believe that a judicially enforced Establishment Clause is not necessary for the maintenance of a core nonestablishment political norm. The experience of other countries with weak judicially enforced disestablishment traditions but a strong culture of nonestablishment might be a guide.²⁸⁷ Looking at our own history of religious freedom, it may be that the particular circumstances of colonial religious pluralism—at least among Protestant sects—was the primary driver of religious tolerance and nonestablishment. This is a common story and one Madison seems to have embraced.²⁸⁸ It holds that nonestablishment got off the ground in early America because it was politically sensible for competing sects to lay down their (political) arms; under circumstances of relative equality, all could agree not to attempt to take over the state.²⁸⁹

Religious pluralism and the initial act of formal disestablishment—which helped to increase religious pluralism by setting the conditions for tolerance—may be the chief reasons that the core nonestablishment norm in the United States has remained relatively robust over time.²⁹⁰ As noted above, government fragmentation and the extended sphere may have also

287. GRIFFIN, *supra* note 61, at 88 (providing examples of countries where religious freedom has been achieved in the absence of a constitutionally mandated nonestablishment norm).

288. See Schragger, *supra* note 60, at 1823–25 (discussing Madison’s “positive pluralism”).

289. John Ragosta offers a more nuanced version of this story in the case of Virginia. JOHN A. RAGOSTA, *WELLSPRING OF LIBERTY: HOW VIRGINIA’S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY* (2010). He argues that the Anglican political establishment traded religious freedom to gain the support of Presbyterians and Baptists in the run up to the Revolution. *See id.* at 52–62. When the war was over, those dissenting sects sought to consolidate their gains in the face of establishment leaders’ efforts to retrench. *See id.* at 115–32. That political effort and the support of Enlightenment intellectuals among the gentry culminated in the adoption of Thomas Jefferson’s Statute for Establishing Religious Freedom. *See id.* at 133–34, 169.

290. Cf. PUTNAM & CAMPBELL, *supra* note 191, at 4, 494–95, 523 (describing America’s fluid religious environment as the central contributor to religious pluralism and civil peace).

contributed by fostering the creation of sects and the competition between them. These are structural characteristics of the American constitutional order over which the Court may have limited direct influence.

“Limited” does not mean no influence, however. The Court can attempt to reinforce these structural defenses of nonestablishment, particularly when it is aware that its doctrines have limited reach. On balance, a judicial strategy that aims to foster religious pluralism is better than one that does not. And under conditions of uncertainty, it may be the best that the Court can do.

This brings us to the second question. Assuming that the Court’s jurisprudence matters to some degree, how do specific judicial decisions contribute to maintaining nonestablishment as a political norm? To the extent an institutional innovation like nonestablishment is preserved, the political actors in the system have to be incentivized to respect or at least not to challenge it.²⁹¹ It may be that the constitutional settlement is in the actors’ immediate self-interest (understood in bargaining terms), but there are also reasons for political actors to defer to judicially enforced constitutional norms even if particular court decisions are not in the actors’ short-term self-interest. An ample literature seeks to explain why judicial supremacy would be supported by Congress or the President.²⁹² This literature highlights the potential strategic political benefits these actors gain from an institutional arrangement in which the Judiciary is tasked with certain kinds of constitutional enforcement.²⁹³

The possibility of judicial maintenance of the core political norm of nonestablishment may thus be a function of the political class’s need—and the political culture’s respect—for courts more generally. One can certainly question whether the Court’s Establishment Clause decisions receive such respect—the long and sometimes continuing resistance to the school prayer

291. See Levinson, *supra* note 213, at 662–63 (identifying one focus of Madisonian constitutional design as providing political incentives to comply with constitutional rules).

292. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 230–32 (2004) (noting broad changes in the general public attitude towards the inherent legitimacy of the Supreme Court as the locus of constitutional authority as a reason why astute politicians may hesitate to publicly oppose judicial rulings); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 *AM. J. POL. SCI.* 354, 364 (2003) (observing that the American public currently bestows a great deal of institutional legitimacy on the Supreme Court); Levinson, *supra* note 213, at 733–45 (explaining several benefits to both the Legislative and Executive Branches in having an independent Judiciary with the power of judicial review).

293. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 293–95 (2007) (discussing various political incentives to giving deference to courts and allowing judges to become more assertive); Levinson, *supra* note 213, at 742 (“An independent judiciary can also serve the interests of political leaders by taking responsibility for contentious or divisive issues those leaders would prefer to avoid.”).

decisions comes to mind.²⁹⁴ Nevertheless, a judicially articulated Establishment Clause may have some expressive value, especially to the extent that the Judiciary has become institutionally entrenched. The Founders believed that nonestablishment was part and parcel of a republican project that would reinforce Enlightenment and republican habits of thought. The program of nonestablishment was in part a cultural one—intended both to ameliorate religious enthusiasm and to direct it toward the preservation of political liberty. The nonestablishment norm thus has a specific role to play in creating the civic conditions for liberal democratic government. To the extent that the Court can articulate those norms and propagate them, it will have achieved some of those purposes.

All of which is to say that the Court's Establishment Clause decisions are mainly rhetorical—they advance the political value of nonestablishment by articulating themes, framing debates, or by restating political values. As Justice Souter observed in *McCreary County*, the principle of religious neutrality is not “an elegant interpretive rule” that can “draw the line in all . . . multifarious situations” but rather “has provided a good sense of direction.”²⁹⁵ Neutrality cannot “possibly lay every issue to rest” but “invoking neutrality is a prudent way of keeping sight of something the Framers of the First Amendment thought important.”²⁹⁶ Justice Souter may have continued that the principle of religious neutrality tells something to the political branches and the constitutional culture at large—that departures from neutrality should not be the norm.²⁹⁷ Such a principle serves as a rhetorical touchstone, to be referenced for use by Congress and the Executive Branch, lower courts, and state courts and legislators.

Of course, to the extent that the Court is engaged in the rhetorical practice of nonestablishment, it has to be aware of how that rhetoric will be received in the wider political culture. The costs of enforcement in certain cases might be an increase in religious polarization or the hardening of religious-political alliances that are not susceptible to judicial scrutiny.²⁹⁸ But how to assess the Court's long-term effect on constitutional culture is quite difficult.

294. See Ellis Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. PUB. L. 396, 401 (1965) (analyzing the political and social backlash following the Supreme Court's ruling that daily Bible reading in public schools was in violation of the Establishment Clause).

295. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005).

296. *Id.* at 876.

297. Whether the political culture listens is altogether another question. Recall again the recent dispute over the lower Manhattan Islamic center. See Stolberg, *supra* note 7.

298. Fred Schauer's discussion about how courts should approach official behavior that is all-but-inevitable but nevertheless unconstitutional is useful here. Schauer distinguishes between “strategies of accommodation” and “strategies of resistance”—which can be mapped onto the approaches I have described above. Schauer, *supra* note 267, at 1084.

Conclusion

We thus end where we began—with the relative irrelevance of the Establishment Clause. I have argued that the doctrinal integration of scale and institutional location would advance a politically sensitive Establishment Clause. But that is a somewhat modest proposal in light of the many church–state issues that the Court has never addressed and never will. On many of the core issues that animate religionists and serve as fuel for the religious and political culture wars, the Establishment Clause as doctrinally enforced by the Judiciary is irrelevant.

The constitutional protection against religiously motivated and infused laws that do not touch on religious practice or church aid has to come from elsewhere, outside of the Establishment Clause. As I have already observed, the Court's equal protection jurisprudence can prevent religious majorities from putting into place religious moralities that are at odds with the liberal democratic commitment to equality and can ensure the enforcement of political process norms that prevent political entrenchment. The Court's privacy jurisprudence (to a much lesser extent) can prevent religious majorities from demanding adherence to laws that are based predominantly on a religiously grounded morality that interferes with basic human goods. And speech and voting rights can ensure that majoritarian processes are open and fair.

All of this assumes that the Court can act at least somewhat independently of majoritarian preferences or at least can act to shape those preferences. To the extent that this is true, the Court has no choice but to enforce the Establishment Clause under circumstances in which potentially dangerous church–state relationships are never fully foreclosed. The Court can be candid about this possibility and can embed such candor into existing doctrine. Or the Court can keep this possibility at arm's length by acting as if its Establishment Clause doctrine reaches to its fullest stated extent.

One might object that the Court should not make it a practice of articulating principles that it cannot ultimately enforce. But this objection should be made with due regard for the Court's institutional role. Certainly the Court should do its best to provide rules of decision that can be applied by lower courts and that provide guidance to legislators, citizens, and potential litigants. But the Court can provide those rules while describing the limits of judicial action.

The Court can do this informally through mechanisms of avoidance, as Justice Stevens did in *Newdow*. But it also can do so explicitly by devolving responsibility for full enforcement of certain nonestablishment principles to other political actors. As the political question doctrine illustrates, there is a world of difference between a judicial decision holding that a court cannot enforce an existing constitutional norm and a judicial decision holding that a particular constitutional norm does not apply. The former represents a statement about the limitations of judicial competence, not a statement about

the norms themselves. Lack of judicial enforcement does not relieve the political branches of their duty to obey the Constitution—an acknowledgment of underenforcement constitutes an implicit expectation that those branches will fulfill their own duties. Of course, this expectation constitutes the purest of rhetorical jurisprudence.

In arguing that the Court is a relatively bit player in the maintenance of the nonestablishment norm, I have now treaded on the long-running debate about the efficacy of parchment barriers. How constitutional norms are maintained even in the face of popular pressure to dispense with them is a large and important question, but not one that can easily be answered here.²⁹⁹ The Court certainly plays some role, but how and in what direction is quite open to debate.

I do not want to leave the impression that the Court can never act in a heroically countermajoritarian manner, but only that when it does (as historians have now thoroughly documented)³⁰⁰ the consequences can undermine the Court's explicit purposes. In the Establishment Clause arena, the Court does not regulate large swaths of conduct at the intersection of church and state that have the capacity to undermine the Court's stated principles of nonestablishment. I have argued that there are sometimes legitimate reasons for this underenforcement—or at least reasons that are deeply embedded in a set of constitutional values that often trump the value of nonestablishment.

This does not mean that judicial decisions do not have real effects. The Establishment Clause as interpreted by the Supreme Court does prevent certain kinds of government action. The state cannot officially declare one church to be the true church; it cannot cede the exercise of civil power to religious entities; it cannot currently fund religious education directly or discriminate between religions when distributing funds; it cannot currently introduce certain religious practices into schools—like prayer; and it currently cannot engage in some kinds of religion-infused government expression or ceremonies. These are real limits on government action, though my contention has been that they are relatively narrow limits when examined from the perspective of the Court's stated doctrine.

If that is the case, then what maintains the core political value of nonestablishment and what can the Court do to contribute to that maintenance? It may be that nonestablishment is self-enforcing, a result of a lucky confluence of eighteenth-century religious pluralism and a new invention called disestablishment. Or maybe nonestablishment is an inevitable

299. See Levinson, *supra* note 213, at 659 (asking why popular majorities in power have infrequently broken constitutional rules when constitutional limitations proved inconvenient to their interests).

300. Cf. Klarman, *supra* note 215, at 59 (discussing the school prayer decisions of the early 1960s).

result of modernity and the decoupling of religion and state that is a part of the larger assertion of freedom of conscience that has arisen out of the same Enlightenment tradition.

We are interested in doctrine, however, and so we have to ask: how much of this is attributable to the Judiciary? In this Article, I have argued that much less is attributable to the courts than is sometimes assumed by both proponents and critics of the Court's Establishment Clause doctrine. That doctrine is mostly subordinated to norms of self-governance that tend to overwhelm the nonestablishment principle. If that is so, then we have to rely on other mechanisms to ensure that religion and the state are not too closely allied.