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The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities

by Patrick M. Garry*

A survey of Establishment Clause doctrines and commentary reveals that the Clause is often interpreted as a minority rights provision, protecting religious and nonreligious minorities from being exposed in certain ways to society's dominant religions. This Article argues against such an interpretation. It portrays the Establishment Clause as a structural provision of the Constitution, concerned with democratic processes and limited government, much like the doctrines of federalism and separation of powers. This Article also asserts that democratic values and concern for majority rule constitute core values of the Establishment Clause. Whereas the Free Exercise Clause protects minority rights, the Establishment Clause protects the democratic, majoritarian aspect of religion. The Establishment Clause guards the side of religious freedom involving the right to gather into groups that in turn interact with the public sector of society. Hence, the Establishment Clause should not be interpreted in a way that limits the right of religious groups to publicly assert their messages or that confines their social outreach activities to some private sphere within society.

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1. U.S. CONST. amend. I.
2. U.S. CONST. amend. I.
INTRODUCTION

A strong body of commentary and caselaw suggests that the First Amendment Establishment Clause\(^3\) is a kind of anti-democratic provision, primarily concerned with protecting minority groups and secular society from the oppressive and destructive influences of the dominant religions.\(^4\) Under this view, the Establishment Clause provides a check on the public role and influence of religion.\(^5\) Indeed, too much of a public presence of religion is seen as threatening the stability and functioning of civil society.\(^6\) Consequently, the Establishment Clause is interpreted as reflecting the Framers’ desire to avoid the type of social divisiveness and majoritarian oppression that only religion can produce.\(^7\) This interpretation then leads to the “wall of separation” doctrine, which has long characterized the Court’s Establishment Clause jurisprudence.\(^8\) But such a doctrine carries immensely anti-democratic overtones. Even though religion and religious associations have historically played a prominent role in democratic society, even though individual members of society freely choose their involvement in those religions and religious associations, and even though religious associations are the type of nongovernmental social associations that are free to exert whatever influence their members choose, the separationist interpretation of the Establishment Clause is used to exert a paternalistic veto, essentially holding that the religious choices of individuals have to be checked by judges, who apparently know more about the health of democracy than the citizens who support and conduct that democracy.

Part I of this Article sets forth the argument that the Establishment Clause is a structural provision of the Constitution. As such, it is not akin to an individual rights provision geared to the protection of minority interests from majoritarian infringement. Instead, it is more concerned with social structures. Similar to constitutional doctrines, such as federalism and separation of powers, the Establishment Clause is focused on the structural or institutional make-up of democratic society. Like the limited government provisions of federalism and separation of powers, the Establishment Clause focuses not on increasing

4. The Establishment Clause states: “Congress shall make no law respecting an establishment of religion.” Id.
6. Id.
7. Id.
8. Id.
the power of the central government, insofar as that government is able
to dictate a uniform set of religious boundaries throughout all the
diverse communities in the nation, but on restricting the power of
government to interfere with or repress the religious impulses of a
democratic society, as those impulses are reflected through the
functioning of religious organizations.

Part II of this Article outlines the contrary view of the Establishment
Clause, which reads the clause as a substantive protection of religious
or nonreligious minorities from certain kinds of exposure to or interac-
tion with the more dominant religions in society. This view has been
instrumental in one of the predominant tests now used to measure
Establishment Clause violations—the endorsement test.

In Part III, this Article discusses how the notion of the Establishment
Clause as a minority protection provision has expanded into an
application of the Clause as a guardian against the unique kinds of
political divisiveness that religion can cause. This application envisions
the Establishment Clause as protecting a secular society from the
destabilizing influences of religion.

In Part IV of this Article, a different view of the Establishment Clause
is offered. This view sees the Establishment Clause as compatible with
both democracy and the religious choices of individuals. Unlike the Free
Exercise Clause, the Establishment Clause is seen as more concerned
with preserving the majoritarian impulses of society than with protect-
ing certain minority rights. In this view, the Establishment Clause
is compatible with other structural provisions of the Constitution, insofar
as those provisions are intended to support the functioning of a
democratic government of checks and balances.

I. THE ESTABLISHMENT CLAUSE AS A STRUCTURAL PROVISION

A view persuasively articulated by Professor Steven Smith is that the
Establishment Clause is structural. In this respect, the Establish-

10. For a discussion of the differences between the Establishment and Free Exercise
Clauses, see GARRY, supra note 5, at 129-39.
11. See generally id.
12. U.S. CONST. amend. I.
13. See generally STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A
CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 29 (1995) (hereinafter SMITH,
CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM); see also Gerard V. Bradley, The No
Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone
of Itself, 37 CASE W. RES. L. REV. 674, 678-79 (1987). According to Professor Steven Smith,
[The Framers of the Establishment Clause did not intend to adopt any particular
right or principle of religious freedom, but rather intended simply to reconfirm in
ment Clause has been interpreted as having a federalism component, insofar as it provides a "constitutional promise to the states that the federal government would not interfere with certain forms of state religion policy." This is the view Justice Thomas has adopted, leading him to argue that the Establishment Clause never should have been applied to the states by way of incorporation through the Fourteenth Amendment. As he explained in his concurring opinion in *Elk River School District v. Newdow,* the Establishment Clause is a federalism provision, which . . . resists incorporation." Justice Thomas further observed that "[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with [the] state[s]." In this same vein, Justice Stewart had earlier recognized that "the Establishment Clause was primarily an attempt to insure that Congress not only would be

writing the jurisdictional arrangement that preexisted the Constitution and that
no one wanted to alter: this was an arrangement in which religion was a subject
within the domain of the states, not the national government.


As a consequence of viewing the Establishment Clause as a structural or federalism provision, rather than one which protects individual rights, Professor Akhil Amar concluded that the Establishment Clause should not have been incorporated through the Fourteenth Amendment to apply to the states. See Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1157-61 (1991); Akhil Reed Amar, *Some Notes on the Establishment Clause,* 2 Roger Williams U. L. Rev. 1 (1996); see also Muñoz, supra at 631 (arguing that because the Establishment Clause did not constitutionalize a personal right of non-establishment it should not have been incorporated).

17. Id. at 45 (Thomas, J., concurring).
18. Id. at 49.
powerless to establish a national church, but would also be unable to interfere with existing state establishments."\(^{19}\)

Given that the Establishment Clause was meant to prevent the federal government from establishing a national state religion, such as what existed in England, it essentially serves as yet another constitutional mandate for limited government.\(^{20}\) The Establishment Clause was meant to keep the federal government out of the area of religion and to restrain the federal government from imposing a single, uniform religious code on a religiously diverse nation.\(^{21}\) Thus, similar to the reasons underlying the limited government provisions of federalism and separation of powers, the Establishment Clause served to keep the federal government from stunting democratic freedoms by extending the government's centralized, uniform mandates across the whole nation.\(^{22}\) Freedom and democracy, to the Framers, required a national government of limited powers, particularly in the areas of religion and religious institutions.\(^{23}\)

According to Professor Daniel Conkle, the Establishment Clause was intended by the Framers to effect "a policy of federalism on questions of church and state."\(^{24}\) As originally conceived, the Establishment Clause would prohibit the federal government from interfering with the states' freedom to legislate on matters of religion.\(^{25}\) The issue of federalism

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20. According to Professor Muñoz, the Anti-Federalists who pushed for the First Amendment opposed religious establishments "only in connection with a consolidated, unlimited national government." Muñoz, supra note 15, at 617.
21. Id. at 614-17; see also Kyle Duncan, Subsidiarity and Religious Establishments in the United States Constitution, 52 VILL. L. REV. 67, 121 (2007) (arguing that the Establishment Clause relates to federalism, that it "concerns the assignment of competences among constituent governmental structures," and that it serves as "a negative provision vis-a-vis the federal government").
22. According to Steven Smith, the Establishment Clause "reenforced [sic] the strategy of limiting governmental power by explicitly declaring that Congress—and hence, in those days of innocent or at least professed faith in the efficacy of separation of powers, the national government as a whole—lacked power over particular subjects." Smith, The Jurisdictional Establishment Clause, supra note 13, at 1850 (emphasis omitted) (footnote omitted). As to the argument that the Establishment Clause is a federalism type of clause, Smith notes that "Americans of the time were much more concerned about the possibility of a national church than about national interference with state establishments." Id. at 1872.
23. Id. at 1849-50.
25. Id. at 1135.
was central to the debate surrounding the drafting of the First Amendment. Professor Gerard Bradley has called the Establishment Clause a device to "preserve existing state constitutional regimes from intermeddling federal legislation." According to Steven Smith, the "religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom." Akhil Amar describes the Establishment Clause as being "utterly agnostic on the substantive issue of establishment; it simply mandated that the issue be decided state by state and that Congress keep its hands off." Not only did the drafters not intend to apply the Establishment Clause to states and localities, but the historical "evidence strongly suggests that the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to state government action." Indeed, such a result would obviously impart a much more democratic nature to the Establishment Clause because states and localities would have more freedom to acknowledge or interact with religion than they currently have.

As a structural provision, the Establishment Clause should not be applied to block the freedom of religious majorities because such an application would inhibit both democracy and limited government. Private social associations, particularly religious associations, have always provided a check on an abusive or oppressive government. Indeed, the American Revolution was inspired by the notion of natural rights bestowed by the Creator. Thus, to interpret the Establishment Clause as restraining the democratic freedom of religion and religious associations is to interpret the Establishment Clause contrary to its nature as a structural provision within the constitutional scheme of limited government.

27. GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 92 (1987).
30. Conkle, supra note 24, at 1136. There is specific evidence that the framers and ratifiers of the fourteenth amendment, whatever their intentions with respect to the Bill of Rights generally, at least did not intend to incorporate the establishment clause for application to the states. In 1875 and 1876, after the adoption of the fourteenth amendment, Congress considered, but rejected, a resolution that was specifically designed to make the religion clauses of the first amendment applicable to the states. Id. at 1137.
II. THE VIEW OF THE ESTABLISHMENT CLAUSE AS A MINORITY-PROTECTING PROVISION

The United States Supreme Court has used the Establishment Clause to strike down many local accommodations of religious exercise, including all kinds of public displays of religious symbols. Creating a minority "dissenter's right" out of the Establishment Clause, the Court has given a constitutional trump card to individuals who claim their rights have been violated by a prayer delivered by a rabbi at a high school graduation, a crèche displayed on public grounds, a prayer recited by a student prior to the start of a high school football game, and most recently by a plaque of the Ten Commandments hanging in a courthouse. This minority dissenter's right has been uniformly applied throughout the whole nation to block the religious expressions of the larger community, regardless of the religious traditions or sensibilities of the local communities in which the religious displays or expressions take place. Through enforcement of this judicially created right, the decisions of the Supreme Court have "reduced the role of religion in public life, and the scope of religious freedom in private life, to less than that intended by the framers and ratifiers of the First Amendment's religion clauses." In a case that reflects a minority rights view of the Establishment Clause, Skoros v. City of New York, the United States Court of Appeals for the Second Circuit upheld a New York City public school policy on holiday season displays that forbade Christmas crèches but

32. U.S. CONST. amend. I.
33. According to Professor Conkle, the Supreme Court has used the Establishment Clause "to enforce a wavering, but relatively strict, separation of church and state at all levels of American government." Conkle, supra note 24, at 1117 (footnote omitted). As Justice Kennedy stated in County of Allegheny v. ACLU, 492 U.S. 573 (1989), the Court has displayed "an unjustified hostility toward religion" and a "callous indifference toward religious faith." Id. at 655, 664 (Kennedy, J., concurring in part and dissenting in part). According to the Court in Lynch v. Donnelly, 465 U.S. 668 (1984), when courts enforce a strict separation of church and state, they assault the freedom of religious exercise as guaranteed in the First Amendment. Id. at 673.
39. 437 F.3d 1 (2d Cir. 2006).
allowed the Chanukah menorah and the star and crescent of Islam. The government defended this policy on the ground that the Jewish and Islamic symbols had "secular" meaning for most students—in particular, Christians, because two-thirds of the students were from Christian families—but that the Christian nativity scene had only religious significance. Thus, as the court apparently recognized, the Establishment Clause only extended to majority religions and functioned primarily as a protection for minority religions that, in turn, possessed privileges of religious expression that the majority religions did not enjoy.

The use of a minority rights application of the Establishment Clause also occurred in *Santa Fe Independent School District v. Doe.* At issue in *Santa Fe* was a Texas school district's practice of having a student, who was annually elected to the office of student council chaplain, deliver a prayer over the public address system before each varsity football game. The Court held that this practice was a violation of the Establishment Clause. The Court held that the prayer practice was coercive, insofar as objecting witnesses, who were in the minority, were put into the position of either attending a personally offensive religious ritual or foregoing a traditional gathering of the school community.

Previously, in *Lee v. Weisman,* the Court likewise held that a religious activity is unconstitutionally coercive if the government directs it in a way that forces objectors to participate. At issue in *Lee* was a prayer offered by a school-invited rabbi at a graduation ceremony. The Court held that because graduation exercises are virtually obligatory, objectors to the prayer were unconstitutionally coerced into participating. Acutely sensitive to the feelings of minority objectors, the Court implied that "non-governmental social pressure occurring in a government-provided forum could constitute coercion forbidden by the
establishment clause.\textsuperscript{51} Thus, because of feelings of exclusion or discomfort, a minority dissenter can stop a public prayer inserted into a high school graduation ceremony, even when that dissenter had no obligation to participate in the prayer, and even when the only pressure felt by the dissenter was the result of some social discomfort for not participating.\textsuperscript{52} Yet in rendering its decision, the Court used this discomfort, felt by a very small minority, to transform a prayer recitation into a state establishment of religion.\textsuperscript{53}

The Court's use of the endorsement test also reveals the way in which the Court has created and applied a minority dissenter's right. In \textit{Lynch v. Donnelly},\textsuperscript{54} the Court began using the endorsement test to decide Establishment Clause issues.\textsuperscript{55} Subsequently, this test has become the Supreme Court's preeminent means for analyzing the constitutionality of religious symbols and expression on public property,\textsuperscript{56} and has been accepted to some degree by every current sitting justice.\textsuperscript{57} Under this test, the government unconstitutionally endorses religion whenever it conveys the message that a religion or particular religious belief is favored by the state.\textsuperscript{58} In \textit{County of Allegheny v. ACLU},\textsuperscript{59} the Court decided that the display of a crèche violated the Establishment Clause, but the display of a menorah next to a Christmas tree did not.\textsuperscript{60} The crèche was considered an endorsement of the Christian faith, but the tree and menorah were acceptable, insofar as together they did not give the impression that the state was endorsing any one religion.\textsuperscript{61}

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\textsuperscript{52} \textit{Lee}, 505 U.S. at 594-98. The Court's decision in \textit{Santa Fe} also concerns such pressure. 530 U.S. at 311.
\textsuperscript{53} \textit{Lee}, 505 U.S. at 597. For a discussion of why the Court should have applied the Free Exercise Clause in \textit{Lee} and \textit{Santa Fe}, rather than the Establishment Clause, see Patrick M. Garry, \textit{The Institutional Side of Religious Liberty: A New Model of the Establishment Clause}, 2004 UTAH L. REV. 1155, 1167-70 (2004).
\textsuperscript{55} \textit{Id.} at 678.
\textsuperscript{56} Alberto B. Lopez, \textit{Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment}, 55 BAYLOR L. REV. 167, 195 (2003). Since \textit{County of Allegheny}, which confirmed the endorsement test as the Court's preferred method of analysis, 492 U.S. at 593-94, the Court has continued its reliance on the endorsement test for Establishment Clause cases. The Court recently applied the test in \textit{Santa Fe}, 530 U.S. at 316.
\textsuperscript{58} \textit{County of Allegheny}, 492 U.S. at 593.
\textsuperscript{59} 492 U.S. 573 (1989).
\textsuperscript{60} \textit{Id.} at 600-02, 619-20.
\textsuperscript{61} \textit{Id.} at 620-21. In \textit{County of Allegheny}, the Court concluded that as to the crèche, "[n]o viewer could reasonably think that it occupie[d] this location without the support and
Court held that a crèche located on the steps of a county courthouse was prominent enough to constitute an endorsement. On the other hand, the religious message conveyed by a publicly displayed menorah was sufficiently diluted by the presence of a Christmas tree to keep it from becoming a state endorsement.

The endorsement test is grounded upon the premise that the Establishment Clause prohibits the government from conveying ideas that divide the community into outsiders (the minority) and insiders (the majority). In Lynch, Justice O'Connor wrote that "endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." But under this interpretation, the endorsement test becomes a vehicle for ensuring an equality of treatment between all religions—a kind of religious equal protection clause.

Strict separationists argue that the endorsement test should even prohibit private religious speech that ostracizes nonadherents. They claim that private religious speech on government property can marginalize religious dissenters—for example, a private religious group might so dominate a public forum that a dissenter might feel that he or she is not welcome as a full-fledged member of the political community. In such a scenario, the Establishment Clause would be used to protect anyone who might suffer a sense of alienation because of his or her nonbelief. If necessary, strict separationists argue, the Establish-
ment Clause should impose special regulations (similar to time, manner, place restrictions) aimed at ameliorating any isolating effects of religious speech in public forums.\textsuperscript{70} Other suggestions include interpreting the Establishment Clause to include a kind of \textit{Brown v. Board of Education}\textsuperscript{71} element, imposing a sort of social affirmative action policy aimed at achieving equality between believers and nonbelievers.\textsuperscript{72} 

In \textit{Jewish War Veterans v. United States},\textsuperscript{73} one Jewish individual altered his travel route to avoid seeing a Latin cross on U.S. Navy property, alleging that the cross made him feel like an "alien."\textsuperscript{74} According to proponents of a broadly empowered Establishment Clause, this sense of exclusion is what the First Amendment is all about, and the only way to combat the isolation that minority groups feel may be to ban all religious messages from public property.\textsuperscript{75} But the First Amendment is all about freedom, not social engineering or individual feelings of exclusion.\textsuperscript{76} Moreover, if government actions ever rise to the point of truly excluding minority beliefs from the public square, then the Free Exercise Clause\textsuperscript{77} should come into play.

A problem with the endorsement test is that it contains a degree of subjectivity that necessarily informs a court's conclusions regarding what impressions viewers might have of some religious display or speech. Because the test calls for judges to speculate about the impressions that unknown people might have received from various religious speech or symbols, it is incapable of achieving certainty.\textsuperscript{78} One judge has written that the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary."\textsuperscript{79} In \textit{County of Allegheny}, this meant that the Court had to examine "whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols" to draw attention away from the religious symbol in the display.\textsuperscript{80}

\textsuperscript{70} Id. at 219.  
\textsuperscript{71} 347 U.S. 483 (1954).  
\textsuperscript{72} Lopez, \textit{supra} note 56, at 221-22.  
\textsuperscript{73} 695 F. Supp. 3 (D.D.C. 1988).  
\textsuperscript{74} Id. at 8.  
\textsuperscript{75} Lopez, \textit{supra} note 56, at 224.  
\textsuperscript{76} Moreover, the whole purpose of religious faith and exercise is to confront people and make them uncomfortable with the status quo of their lives.  
\textsuperscript{77} U.S. CONST. amend. I.  
\textsuperscript{79} Am. Jewish Cong. v. City of Chi., 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).  
\textsuperscript{80} 492 U.S. at 674 (Kennedy, J., concurring in part and dissenting in part).
In their application of the endorsement test, courts often go out of their way to side with the dissenting minorities. The court took this approach in *Buono v. Norton*, 81 when it ordered that a cross be removed from a federal preserve. 82 The cross was a memorial to veterans who died in World War I; it had been erected by the Veterans of Foreign Wars in 1934, sixty years before the land on which the cross stood was made part of the federal preserve. Approximately 130,000 acres comprised the preserve, and the cross, less than eight feet tall, stood on undeveloped land, well off of a narrow secondary road winding through the preserve. Almost all the viewers of this cross were automobile travelers who made a conscious decision to drive through that particular secondary road. 83 But, contrary to free speech cases, the court did not require offended viewers to take any steps to "avoid[] the harm," such as taking another road or not looking up at the cross as their cars passed by. 84 The court also seemed indifferent to the context of the cross, concluding that "the size of a cross and the number of people who view it are not important for deciding whether a reasonable observer would perceive the cross" as a governmental endorsement of religion. 85 In making this ruling, the court disregarded the plaque displayed at the base of the cross, which specified the purpose for which the cross had been erected. 86

Under the endorsement test, the minority dissenter's rights have almost no concrete boundaries. In other words, there is nothing so minute that it cannot rise to the level of an official government endorsement of religion. One such endorsement was found within an Ohio school district, which had a policy that permitted nonprofit community groups such as Little League, the Red Cross, and the YMCA to distribute leaflets advertising their activities. 87 Religious groups could also distribute their materials, but only after the principal

82. Id. at 1217.
83. Id. at 1204-05.
84. Id. at 1211.
85. Id. at 1216.
86. Id. at 1215. A court has held that a school improperly endorsed a religion when a classroom teacher studied his Bible in front of students during a fifteen-minute silent reading period. Roberts v. Madigan, 921 F.2d 1047, 1049 (10th Cir. 1990). In another case, even though the students were adults and not children, endorsement occurred when a professor at a public university organized an after-class meeting on religious topics, which was attended by several of his students. Bishop v. Aronov, 926 F.2d 1066, 1068-69 (11th Cir. 1991). In *Bishop* the professor prefaced his remarks by labeling them his "personal 'bias,'" thus denying any implication of institutional endorsement. Id. at 1068.
scrutinized those leaflets, ensuring that they only advertised specific activities and did not engage in any proselytizing. Moreover, the leaflets were not even handed out personally to the children; rather, they were placed in mailboxes from which students could retrieve them at the end of the school day.\(^8\) Yet despite these precautions, the court held that "the practice of distributing religious material to students could be construed as an endorsement of religion by the school."\(^9\) In another case, a court held that the singing of the Lord's Prayer by a high school choir violated the Establishment Clause.\(^{10}\) According to the court, just the rehearsal of the prayer during choir practice was enough to constitute a violation.\(^{11}\) Even a city's leasing of land to the Boy Scouts on favorable lease terms was held to be an unconstitutional establishment of religion.\(^{12}\)

The endorsement test does not seem to allow for any remedial action. For instance, a city that erected a crèche on the lawn of its civic center was not allowed to modify that display to comply with endorsement test mandates.\(^{13}\) After receiving complaints from the ACLU, the city added the following decorations to the crèche scene displayed outside the civic center: several reindeer, a large Santa Claus with a sack of presents, three-foot-tall candy canes, a snowman flanked by gift boxes, and various animals, including lambs and donkeys.\(^{14}\) Despite these changes, however, the court concluded that they "did not rescue the display from impermissible endorsement."\(^{15}\) Consequently, the end result is once an endorsement, always an endorsement; once a dissenter's rights have been violated, no remedy short of a complete removal will suffice.\(^{16}\)

88. Id.
89. Id. at 858.
91. Id.
94. Id. at 1071.
95. Id. at 1075.
96. See id. For another case showing that the endorsement test renders nearly impossible any remedial efforts, see Mercier v. City of La Crosse, 276 F. Supp. 2d 961 (W.D. Wis. 2003). In Mercier the plaintiffs sued to force the removal of a monument bearing the Ten Commandments from a public park. The monument had been placed in the park forty years earlier by the Fraternal Order of the Eagles. In an attempt to avoid the lawsuit, the City sold the twenty foot by twenty foot plot of land on which the monument stood back to the Eagles. Subsequently, the Eagles installed a four-foot-tall iron fence around the perimeter of the parcel, with signs at each corner of the fence stating that the monument was the private property of the La Crosse Eagles. Six months later, the City erected a second iron fence around the monument. Id. at 963-66. This fence was gated, and hanging
III. THE POLITICAL DIVISIVENESS ARGUMENT

Somewhat similar to the view of the Establishment Clause as a constitutional provision aimed at protecting religious or nonreligious minorities is the view that the Clause strives to shield a secular society, and perhaps a secular minority, from certain controversies and conflicts that arise in a democracy—for example, whenever a dominant religion asserts itself or its beliefs in the public arena. This view reflects a fear that the failure to keep religious and political spheres separate will lead to social strife along religious lines and fragmentation of the political community. In their Zelman v. Simmons-Harris dissents, Justices Stevens and Breyer argued that public aid to religion would foster political discord and tear the social fabric underlying American democracy. Drawing on experiences from the Balkans, Northern Ireland, and the Middle East, Justice Stevens wrote: “Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife

on it was a sign that read: “THIS PROPERTY IS NOT OWNED OR MAINTAINED BY THE CITY OF LA CROSSE, NOR DOES THE CITY ENDORSE THE RELIGIOUS EXPRESSIONS THEREON.” Id. at 965-66. Despite all of these actions, the court held that the City had failed to cure the Establishment Clause violation and that a reasonable observer could still conclude that the City was sponsoring the monument. Id. at 975.

The court in Mercier acknowledged that the disclaimer sign might prevent a newcomer to La Crosse from perceiving any City endorsement of the religious message. Id. at 978. The problem, however, was with the long-time residents of the City. Id. According to the court, those residents would know about the City's relationship with the monument, its desire to keep the monument on city property, and its efforts to resist its removal. Id. And yet, what the court did not recognize was that these same residents would know that a federal judge had ruled the original monument to be a violation of the Establishment Clause and that the City was prohibited from endorsing the monument's religious message. Presumably, this knowledge would significantly reduce the feelings of alienation suffered by the plaintiffs who did not believe in or agree with the religious ideas conveyed by the Ten Commandments.

97. U.S. CONST. amend. I.
99. See, e.g., id. at 717-29 (Breyer, J., dissenting). Another concern includes not making a person's standing in the political community turn on his or her religion. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). As one commentator has noted, “it is plausible to conclude that today's Establishment Clause doctrine communicates at least one thing very clearly: that the intermingling of political and religious authority is categorically bad.” Rosen, supra note 57, at 685.
100. 536 U.S. 639 (2002).
101. For Justice Breyer's dissent, see id. at 617-29 (Breyer, J., dissenting), and for Justice Stevens's dissent, see id. at 684-86 (Stevens, J., dissenting).
and weaken the foundation of our democracy.\textsuperscript{102} Justice Breyer likewise noted that "the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program."\textsuperscript{103} In \textit{McCreary County v. ACLU},\textsuperscript{104} Justice Souter's opinion, striking down a Ten Commandments display in a county courthouse, stated that "nothing does a better job of roiling society" than does any perceived interaction between government and religion.\textsuperscript{105}

These views see religion as a divisive force and that it is the Court's role to quell any conflicts that might arise from the religious practices of a diverse people, even though such a position seems to run counter to the idea of free exercise.\textsuperscript{106} But this approach contradicts James Madison's view that the only way to counter social division is to encourage an even greater pluralism.\textsuperscript{107} As Madison outlined in \textit{The Federalist No. 10}, the threat of majority tyranny can be remedied by a diverse political landscape composed of many competing groups and interests.\textsuperscript{108} And the same holds true for religion. Madison argued in \textit{The Federalist No. 51} that the way to guard against the oppression of minority religions is to promote a robust religious pluralism.\textsuperscript{109}

\textsuperscript{102} \textit{Id.} at 686 (Stevens, J., dissenting).
\textsuperscript{103} \textit{Id.} at 717 (Breyer, J., dissenting).
\textsuperscript{104} 545 U.S. 844 (2005).
\textsuperscript{105} \textit{Id.} at 876. According to Justice Souter, America is "centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable." \textit{Id.} at 881.
\textsuperscript{106} The United States is one of the most religious countries in the world. See Stephen J. Stein, \textit{Religion/Religions in the United States: Changing Perspectives and Prospects}, 75 \textit{IND. L.J.} 37, 41 (2000). Yet, there is little of the sectarian strife that plagues much of the rest of the world. Rather than serving to undermine civic values, the weight of evidence indicates that religious institutions have historically served as a foundation for civic life in America. Robert D. Putnam, \textit{Bowling Alone: The Collapse and Revival of American Community} 65-69 (2000). Alan Wolfe has discovered that most Americans prefer to practice a "quiet faith"; that is, while Americans are more likely than citizens in other democratic countries to express a belief in God and to attend church regularly, they are reluctant to impose their religious views on their neighbors and are disinclined to support denominational leaders or groups that would. Alan Wolfe, \textit{One Nation, After All} 56, 39-87, 275-322 (1998).

Even if one does accept the premise that religion is divisive, that reason alone is not sufficient to single it out for more restrictive treatment, just as this reason cannot justify the censorship of highly controversial and inflammatory political speech.

\textsuperscript{108} \textit{The Federalist} No. 10, at 135-36 (James Madison) (Benjamin Wright ed., 1967).
\textsuperscript{109} \textit{The Federalist} No. 51 (James Madison), \textit{supra} note 108, at 358.
Justice Breyer more recently asserted his religion-as-politically-divisive theme in *Van Orden v. Perry*, when he contended that a Ten Commandments monument should not be removed from the Texas State Capitol grounds because, in this case, the monument was "unlikely to prove divisive." According to Justice Breyer, the purpose of the Establishment Clause is to avoid "divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." This is not a new argument. Chief Justice Warren Burger used it in *Lemon v. Kurtzman*, in which he wrote that "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." Echoing these sentiments, Justice Marshall concluded in *Wolman v. Walter* that an Ohio program that provided public assistance to schools, including religious ones, violated the Establishment Clause because the aid risked "political divisiveness on religious lines."

But this avoidance of strife argument runs exactly counter to the whole purpose behind the Free Speech and Free Exercise Clauses of the First Amendment. Moreover, the acceptance of this argument serves to effectively censor particular viewpoints from the public dialogue. It also contradicts the whole thrust of recent equal protection norms, insofar as it seeks to single out particular voices or viewpoints for discriminatory treatment. Indeed, if the fear of social divisiveness is so well founded and powerful, then why are certain controversial racial or sexual preference views not subject to regulation?

111. Id. at 704 (Breyer, J., concurring).
112. Id. at 698.
113. 403 U.S. 602 (1971).
114. Id. at 622. According to the Chief Justice, the "potential divisiveness of such conflict is a threat to the normal political process," since it "would tend to confuse and obscure other issues of great urgency." Id. at 622-23.
116. Id. at 259 (Marshall, J., concurring in part and dissenting in part) (internal quotation marks omitted).
117. U.S. CONST. amend. I.
IV. THE HISTORICAL VIEW OF RELIGION AND DEMOCRACY

A. Eighteenth Century Views on the Democratic Need for Religion

A historical examination of the constitutional period negates the view of the Establishment Clause as protecting secular society from the "politically divisive" effect of religion in the public arena. Indeed, late eighteenth century Americans saw religion not as a threat to democratic government, but as a vital element in the functioning of a democracy.

To Americans of the constitutional period, religion was an indispensable ingredient to self-government. Political writers and theorists emphasized the need for a virtuous citizenry to sustain the democratic process. John Adams believed there was "no government armed with power capable of contending with human passions unbridled by morality and religion." He wrote that "religion and virtue are the only foundations not only of republicanism and of all free government but of social felicity under all governments and in all the combinations of human society." The constitutional framers "saw clearly that religion would be a great aid in maintaining civil government on a high plane," and hence would be "a great moral asset to the nation." A

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120. U.S. CONST. amend. I.
121. Alexis de Tocqueville likewise observed that the early Americans considered religion "indispensable to the maintenance of republican institutions." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305-06 (Everyman's Library ed. 1994) (1835). He came to agree with this position, arguing that religion was desperately needed in a democratic republic. Id. at 307. Thomas Jefferson, in his Notes on Virginia, expressed the sentiment that belief in divine justice was essential to the liberties of the nation: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" THOMAS JEFFERSON, NOTES ON VIRGINIA, reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 278 (Adrienne Koch & William Peden eds., Random House 1944).
123. Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts, in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 228, 229 (Charles Francis Adams ed., 1854).
124. Letter from John Adams to Benjamin Rush (Aug. 28, 1811), in THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH 1805-1813, at 191, 192 (John A. Schutz & Douglass Adair eds., 1966). According to Benjamin Rush: "The only foundation for a useful education in a republic is to be laid in religion. Without it there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments." Brian C. Anderson, Secular Europe, Religious America, PUB. INT., Spring 2004, at 143, 152.
125. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 515 (1950).
1788 New Hampshire pamphleteer expressed the prevailing view: "[C]ivil governments can't well be supported without the assistance of religion."126

According to George Washington, religion was inseparable from good government, and "no true patriot" would attempt to weaken the political influence of religion and morality.127 As a general in the revolutionary army, Washington required church attendance by his soldiers.128 At his urging in 1777, Congress approved the purchase of twenty thousand Bibles for the troops.129 And in his farewell address to the nation at the end of his presidency, he warned that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."130

Late eighteenth century Americans generally agreed that the only solid ground for the kind of morality needed to build a virtuous citizenry was with religious observance.131 Consequently, it was expected that the state "would treat religious questions as issues of civil order," and the "courts would foster the observance of religion."132 In early America, churches were the primary institutions for the formation of

128. VITERITTI, supra note 127, at 127.
129. A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 99 (1985).
130. George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 212 (James D. Richardson ed., 1897). The framers believed, as for instance did George Washington, that religion and morality were the "indispensable supports" for democratic government. Id.
132. Id. at 45-46. Blasphemy laws, for instance, were predicated on the widespread belief that to attack the basics of Christianity was to endanger the foundation of society. Id. at 48. "Virtually no one opposed some kind of a sabbatarian law in either the colonial or early national period, and every state had such a law." Id.
democratic character and the transmission of community values. As Professors Richard Vetterli and Gary C. Bryner have explained:

There was a general consensus that Christian values provided the basis for civil society. Religious leaders had contributed to the political discourse of the Revolution, and the Bible was the most widely read and cited text. Religion, the Founders believed, fostered republicanism and was therefore central to the life of the new nation.

The notion that the First Amendment was intended to foster a strict policy of state neutrality or indifference toward religion would have been met with, to use Justice Story's words, "universal disapprobation, if not universal indignation." It was the separation of a specific church from state, not the separation of all religion from the state, that was the Framers' aim. Because law was an expression of morality, and because morality derived from religion, it was seen as both impossible and undesirable to completely separate state from religion. According to the constitutional framing generation, a "belief in religion would preserve the peace and good order of society by improving men's morals and restraining their vices."

Although the Framers rejected the idea of an established church, they did not perceive any real tension between government and religious organizations. To the contrary, the Bill of Rights was ratified in an age of close and ongoing interaction between government and religion. Congress appointed and funded chaplains who offered daily prayers, presidents proclaimed days of prayer and fasting, and the


135. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868, at 726 (Boston, Hillard, Gray & Co. 1833).

136. Id.


government paid for missionaries to the Indians. In the Northwest Ordinance, Congress even set aside land to endow schools that would teach religion and morality.

B. The Interaction Between Government and Religion

Religious beliefs found frequent expression in the acts and proceedings of early American legislative bodies. Five references to God appear in the Declaration of Independence. In setting up a government for the Northwest Territory in 1787, the Continental Congress charged it with furthering "religion, morality and knowledge" in the Territory. Early in its first session, the Continental Congress resolved to open its daily sessions with a prayer, and in 1782 it supported "the pious and laudable undertaking" of printing an American edition of the Scriptures. Indeed, the proceedings of the Continental Congress are filled with references to God and religion.

When the First Congress, which had created the Bill of Rights, reenacted the Northwest Ordinance in 1789, it declared that religion and morality were "necessary to good government." This language was taken from the Massachusetts Constitution of 1780 and later copied into the New Hampshire Constitution of 1784. Congress also consistently permitted invocations and other religious practices to be performed in public facilities. Even Thomas Jefferson, who was probably the most separationist of any of the founding generation,
supported a proposal inviting religious sects to conduct worship services at the University of Virginia, a state institution.\textsuperscript{152}

On September 26, 1789, the day after Congress adopted the final language of the First Amendment, the House and Senate, feeling a spirit of jubilation over passage of the Bill of Rights, both adopted a resolution asking the President to \textquoteleft{}recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favors of Almighty God.\textquoteright\textsuperscript{153} Thus, the First Congress obviously did not intend to render all governmental interaction with religion unconstitutional under the Establishment Clause.\textsuperscript{154}

In the years following ratification of the First Amendment, Presidents George Washington and John Adams continued to issue broad proclamations for days of national prayer.\textsuperscript{155} James Madison likewise recognized that the government could designate days of solemn observance or prayer.\textsuperscript{156} When he served in the Virginia legislature, he sponsored a bill that gave Virginia the power to appoint \textquoteleft{}days of public fasting and humiliation, or thanksgiving.\textquoteright\textsuperscript{157} Later, during his presidential administration, Madison issued at least four proclamations recommending days of national prayer and thanksgiving.\textsuperscript{158} He also oversaw federal funding of congressional and military chaplains, as well as missionaries charged with \textquoteleft{}teaching the great duties of religion and morality to the Indians.\textquoteright\textsuperscript{159}

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\textsuperscript{152} Regulations Adopted by the Board of Visitors of the University of Virginia (Oct. 4, 1824), in \textit{The Complete Jefferson} 1106, 1110 (Saul K. Padover ed., 1943).

\textsuperscript{153} 1 \textit{Annals of Cong.} 90 (Joseph Gales ed., 1834).


\textsuperscript{155} \textit{Stokes & Pfeffer}, supra note 144, at 87-88. Public religious proclamations were common in the post-constitutional period, from George Washington's first inaugural address, in which he referred to the role of divine providence in guiding the formation of the United States, to opening sessions of Congress with a prayer. \textit{Smith}, supra note 146, at 103 & n.80.

\textsuperscript{156} \textit{Dreisbach}, supra note 140, at 150.

\textsuperscript{157} Bill for Appointing Days of Public Fasting and Thanksgiving (1785-1786), in 2 \textit{The Papers of Thomas Jefferson} 556, 556 (Julian P. Boyd ed., 1950).

\textsuperscript{158} \textit{Dreisbach}, supra note 140, at 151.

\textsuperscript{159} James M. O'Neill, \textit{Nonpreferential Aid to Religion Is Not an Establishment of Religion}, 2 \textit{Buff. L. Rev.} 242, 255 (1952) (quoting George Washington, Instructions to the Commissioners for Treating with the Southern Indians (Aug. 29, 1789), in 4 \textit{American}}
According to the most eminent nineteenth century constitutional scholars, the Framers did not intend to expunge religious influence from society or even foster a climate of detached neutrality toward religion. The primary objective of the First Amendment was not to insulate society from religion but to advance the interests of religion. With the Free Exercise Clause, the Framers wanted to create an environment in which the strong moral voice of religious congregations would be free to judge the actions of the federal government and where the clergy could speak out boldly, without restraint or fear of retribution, on matters of public morality and the nation's spiritual condition. The notion that the Framers of the Constitution were afraid of religious influences over the state "is nonsense." The whole justification for the Revolution had been interwoven with claims that freedom was a God-given right.

STATE PAPERS: INDIAN AFFAIRS 65, 66 (Walter Lowrie & Matthew St. Clair Clark eds., D.C., Gales & Seaton 1832)).

160. See 3 STORY, supra note 135, § 1868, at 726. Story states that at the time of the adoption of the constitution, and of the [first] amendment to it . . . , the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.

Id. See also THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 205-06 (Boston, Little, Brown & Co. 1880). Cooley states that [i]t was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects.

Id.


162. U.S. CONST. amend I.

163. DREISBACH, supra note 140, at 84; see also ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 127, 166-67, 184, 209 (1955).


The Framers’ principal concern in drafting the Establishment Clause was to ensure equality among religions, not between religion and nonreligion.\textsuperscript{166} They did not think that the government should adopt a position of being a-religious or certainly anti-religious.\textsuperscript{167} To the contrary, they believed that government had a duty to affirmatively support religion.\textsuperscript{168}

C. The Historical Inaccuracy of the “Wall of Separation” Metaphor

Early Americans were almost universally opposed to the kind of strict separation of church and state that twentieth century separationists would later espouse because, in the eighteenth century, such separation would have been seen to hinder the free exercise of religion.\textsuperscript{169} Indeed, the strict separationist view was almost nonexistent during the constitutional period. This view, in fact, was wholly rejected by “every justice on the Marshall and Taney courts.”\textsuperscript{170} Until the mid-twentieth century, American courts consistently endorsed the importance of religion in the nation’s public life.\textsuperscript{171}

Before 1947, with its introduction in \textit{Everson v. Board of Education},\textsuperscript{172} the wall of separation metaphor had never appeared in Establishment Clause jurisprudence.\textsuperscript{173} As Justice Rehnquist later argued: “[T]he greatest injury of the ‘wall’ notion is its mischievous diversion of

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166. \textit{Witte, supra} note 145, at 47.


168. \textit{Curry, supra} note 138, at 190.

169. \textit{See id. at 108; see also 3 Story, supra} note 135, §§ 1863-1873, at 722-31. According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established at the national level. \textit{Id.}

170. \textit{JAMES McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION} 134 (1971). On the other hand, the more separationist view espoused by Jefferson “was clearly not shared by a large majority of his contemporaries.” \textit{Id.} at 136.


\end{footnotesize}
judges from the actual intentions of the drafters of the Bill of Rights."\textsuperscript{174} Although the early Americans might have believed in separation of church and state, they also believed in dividing church from state, not God from state.\textsuperscript{175} Moreover, the purpose of the separation was not to protect the state from religion but to protect religious institutions from being regulated and corrupted by the state.\textsuperscript{176}

The constitutional idea of a wall of separation between government and religion did not arise until the Supreme Court's decision in \textit{Everson.}\textsuperscript{177} In upholding the constitutionality of a program allowing parents to be reimbursed for the costs of transporting their children to and from parochial schools, the Court gave its view of the Establishment Clause: "[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"\textsuperscript{178} One year after \textit{Everson,} in \textit{McCollum v. Board of Education,}\textsuperscript{179} the Court struck down a public school program that provided for one hour of religious instruction per week by sectarian teachers in public school classrooms.\textsuperscript{180} In its decision, the Court maintained that the wall of separation articulated in \textit{Everson} "must be kept high and impregnable."\textsuperscript{181}

This metaphor continued to influence the development of First Amendment doctrine, leading to the infamous 1971 decision in \textit{Lemon v. Kurtzman.}\textsuperscript{182} In striking down two state statutes that provided public money to parochial schools,\textsuperscript{183} the Court articulated what would be known as the three-part \textit{Lemon} test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."\textsuperscript{184}

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  \item \textsuperscript{175} Carter, \textit{supra} note 164, at 295.
  \item \textsuperscript{176} \textit{Id.} at 296.
  \item \textsuperscript{177} 330 U.S. at 16.
  \item \textsuperscript{178} \textit{Id.} (quoting \textit{Reynolds,} 98 U.S. at 164).
  \item \textsuperscript{179} 333 U.S. 203 (1948).
  \item \textsuperscript{180} \textit{Id.} at 210.
  \item \textsuperscript{181} \textit{Id.} at 212.
  \item \textsuperscript{182} 403 U.S. 602 (1971).
  \item \textsuperscript{183} \textit{Id.} at 606-07. The Pennsylvania statute provided money to nonpublic schools by reimbursing the schools for expenses associated with teachers' salaries and teaching materials, including textbooks. Under the Rhode Island statute, the state made a supplemental payment of fifteen percent of a teacher's salary directly to teachers in nonpublic schools. \textit{Id.}
  \item \textsuperscript{184} \textit{Id.} at 612-13 (internal citation omitted).
\end{itemize}
Following *Lemon*, the courts began taking a separationist view of religion that was sharply contradictory to the nation's historical experience, interpreting the Establishment Clause as protecting a secular state and confining religion to the private realm. Consequently, the "net effect of the decisions that came down from the Burger Court during the 1970s was to raise the wall of separation to a height never before reached." By taking a separationist approach, the courts have communicated to the American public a "categorical opposition to the intermixing" of religion and politics. Moreover, the *Everson* legacy has distorted the constitutional meaning of separation. The constitutional intent behind separation was to protect religion, not to protect the secular state. The Framers never intended "to use the idea of separation to authorize discrimination against religion within the public sphere."

The constitutional history of the First Amendment, as well as the American historical experience with religion and the public square, contradicts the notion that the Establishment Clause reflects a suspicion of religion and an opposition to its public influence. As the Court of Appeals for the Fifth Circuit has written, the First Amendment "does not demand that the state be blind to the pervasive presence of strongly held views about religion with myriad faiths and doctrines," nor that religion and government "be ruthlessly separated." Likewise, Justice Goldberg has observed that:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Indeed, the Establishment Clause seems to reflect just the opposite type of sentiment from that reflected in the wall of separation metaphor—that religion should be free to play whatever part in civil and political society a democratic majority desires it to play.

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190. Van Orden v. Perry, 351 F.3d 173, 178 (5th Cir. 2003).
V. THE ESTABLISHMENT CLAUSE AS A MAJORITARIAN PROVISION

As currently applied, the Court's Establishment Clause doctrines primarily affect the practices and public speech rights of society's dominant religions. However, by restricting these religions from interacting with the public sector, the ability of the members of those religions to publicly advance their notions of truth is severely limited.

The Establishment Clause is not a minority rights provision; nor is it a provision aimed against the freedoms or public influence of religious denominations. It is the Free Exercise Clause that is concerned with protecting religious minorities; the Establishment Clause is focused on protecting the group aspect of religion, and this freedom is insured by keeping the government from repressing the associational freedoms of religious believers by artificially designating and supporting a selected state religion.

Over the past several decades, courts have tended to view the Free Exercise and Establishment Clauses as being "at war with each other." Whereas the Free Exercise Clause is used to protect religious beliefs, the Establishment Clause is used to place boundaries on the public expression of those beliefs. As reflected in many of the religious expression cases, the Establishment Clause has "become the enemy of the free exercise of religion." But such a result makes no

192. U.S. CONST. amend. I.
193. U.S. CONST. amend. I.
196. Those who see a tension between the two clauses generally hold to the privatization thesis—that religion is a private affair and should not play a role in public life. Frederick Mark Gedicks, Public Life and Hostility to Religion, 78 VA. L. REV. 671, 682-93 (1992). "Many view religious symbolism in public life as inherently coercive." Richard S. Myers, Comment, A Comment on the Death of Lemon, 43 CASE W. RES. L. REV. 903, 908 (1993). But the broad reading of the Establishment Clause comes more from a desire to limit the public role of religion than on any constitutional logic. Following this approach to its logical end would mean that the Free Exercise Clause could not really protect the practice of religious beliefs because the Establishment Clause could be used to strike down instances of religious expression on public property. Thomas R. McCoy, Quo Vadis: Is the Establishment Clause Undergoing Metamorphosis?, 41 BRANDEIS L.J. 547, 547-49 (2003) (suggesting that the desire to keep religion out of the public sphere is responsible for what is perceived to be irreconcilable tension between the two Clauses).
textual sense because the Free Exercise Clause is then being nullified or negated by the Establishment Clause. Textually, the Constitution provides greater protection for religious practices than for any secular belief-related activities. Therefore, it makes no sense to apply the Establishment Clause in a way that limits religion. Instead, the more logical interpretation is to view the two clauses as protecting a single liberty—religious liberty—against two different threats to that freedom: on one hand, government action that restricts the religious practices of individuals or minority sects, and on the other, government action that interferes in the institutions freely chosen and shaped by the various religious denominations.

The Free Exercise Clause protects individual freedom. It is geared toward members of minority religious sects and protects them from any kind of religious censorship or restrictions imposed by the
tended to conflict, especially when states sought to accommodate the right of religious speech in the public school systems. Lynne Rafalowski, Note, Can Public Schools Really Permit Religious Speech Without Promoting Religion? The Struggle to Accommodate but Not Establish Religion in Chandler v. James, 45 VILL. L. REV. 547, 548 (2000).

198. Neuhaus, supra note 197, at 630; George W. Dent, Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 CASE W. RES. L. REV. 707, 723 (1993). Dent states: “The Free Exercise Clause should be viewed as embracing two complementary principles. First, government should be as neutral as possible about religion in the sense of neither promoting nor hindering any particular religion or religion in general. Second, government should aim to maximize religious freedom.” Id. (footnotes omitted); see also Mary Ann Glendon & Raul F. Yanes, Structural Free Exercise, 90 MICH. L. REV. 477, 541 (1991) (“If the two religion provisions are read together in the light of an overarching purpose to protect freedom of religion, most of the tension between them disappears.”).

199. See generally Michael W. McConnell, The Problem of Singling Out Religion, 50 DEPAUL L. REV. 1 (2000). Furthermore, the Constitution’s commands regarding religion are both direct and repetitive. Id. The Free Speech Clause protects religious expression. The Free Exercise Clause protects religious practice, conduct and beliefs. Id. And freedom of association, as well as the Establishment Clause, protects the integrity and autonomy of religious groups and organizations. Id. In Boy Scouts of America v. Dale, 550 U.S. 640 (2000), the Court held that the right of expressive association is impaired if the government “affects in a significant way the group’s ability to advocate public or private viewpoints.” Id. at 648.

200. Michael W. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 GEO. WASH. L. REV. 685, 690 (1992) (stating that “the concern of the Religion Clauses is with the preservation of the autonomy of religious life”); see also Paulsen, supra note 51, at 798. Paulsen argues: “If nonestablishment and free exercise are understood as contradictory rather than contradictory principles, it is logical to read the clauses as mirror-image prohibitions on government prescription and proscription, respectively, of the same thing—religious exercise.” Id. at 808 (emphasis omitted).

201. For a discussion of how the Free Exercise Clause functions and how it differs from the Establishment Clause, see GARRY, supra note 5, at 128-40; Garry, supra note 53, at 1158-61, 1163-72.
majority. It guarantees to the individual that the state will not infringe on the practice of his or her religious beliefs and that the state can neither prescribe nor proscribe any religious practices. The Establishment Clause, on the other hand, works at the institutional level.\textsuperscript{202} It seeks to protect religious freedom by guarding against state interference in the institutional autonomy of religious organizations.\textsuperscript{203} The intent behind the enactment of the Establishment Clause was to free religious institutions from ecclesiastical coercion by the government.\textsuperscript{204}

To the Framers, “government noninvolvement in the province of the church did not mean total government separation from general religious ideas and affirmations relevant to civic life.”\textsuperscript{205} Therefore, short of the state’s imposition of a national religion, the Establishment Clause should not prevent a democratic government from being responsive to the beliefs and values of its citizens. And in a society in which over ninety percent of the citizens claim to be religious, “[t]o say that government should not be responsive to religion is to say that government should not be responsive to the opinion of the people.”\textsuperscript{206}

With the Free Exercise Clause focused on the protection of the minority, the Establishment Clause is concerned with majoritarian self-rule aspects—preserving the freedom to choose and operate religious organizations free of any minority-imposed, state-established religion.

\textsuperscript{202} Mark E. Chopko, Religious Access to Public Programs and Governmental Funding, 60 GEO. WASH. L. REV. 645, 662 (1992). Preservation of religious institutional autonomy is one way of insuring separation of church and state. \textit{Id.}

\textsuperscript{203} \textit{Id.} In Wisconsin v. Yoder, 406 U.S. 205 (1972), noting that the Clauses work together as complementary protections for religious liberty, the Court wrote that “the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government.” \textit{Id.} at 214.


\textsuperscript{205} Thomas C. Berg, The Voluntary Principle and Church Autonomy, Then and Now, 2004 BYU L. Rev. 1593, 1597 (2004). The eighteenth century notion of separation “was designed primarily to protect the vitality and independence of religious groups” and therefore “stood in marked contrast to a separationism founded on a suspicion of religion.” \textit{Id.} at 1594.

\textsuperscript{206} Neuhaus, \textit{supra} note 197, at 629. As Professor Steven Smith argues, “a principle that forbids governmental invocation of religion may have the effect of rendering us tongue-tied when it comes to explaining our most basic political commitments,” and this muffling of “the most basic matters is not a promising foundation for enduring political community.” Steven D. Smith, Nonestablishment “Under God”? The Nonsectarian Principle, 50 VILL. L. REV. 1, 11 (2005). Justice O’Connor’s endorsement test actually results in a constriction of the political process because it inhibits the workings and expressions of those political groups (religious believers) that might somehow cause other political groups or individuals (the nonreligious) to feel like social outsiders.
Thus, under the constitutional scheme, religions thrive on their numbers—on their ability to attract followers—and not on whether they can be the sect arbitrarily picked to be the preferred social religion by the state or by a minority acting through the state. The Establishment Clause says to the government: let religion do what the majority of its members and followers wish it to do.207

The Establishment Clause is a majoritarian provision because it protects both the ability of groups of individuals to form religious organizations and the freedom of each religious organization to assert a voice reflective of the size of that organization's constituency in the public arena. Essentially, the Establishment Clause allows religious majorities to act freely, without the government inhibiting or discriminating against those chosen associations and without the government imposing a state-mandated religion on society. The Establishment Clause protects the communal aspect of religious belief—the democratic freedom of religious believers to gather in whatever kind of association they desire and the freedom to publicly act in accordance with the strength of their numbers.208

With the ratification of the First Amendment, the Establishment Clause broke the church-state pattern that existed prior to 1787—namely, that the religion of the ruling monarch became the established religion of society.209 Thus, with the ratification of the First Amendment, the religion of society became that which was freely chosen by the members of society. The more members that choose a particular religion, the stronger that religion's voice is. But the strength of this voice is not because of the state, it is because of the democratic desires of the religious members of society. Thus, the Establishment Clause should not be used to prohibit dominant religious groups from carrying

207. In Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995), the Court used the Establishment Clause to analyze the propriety of a private group erecting a cross on public property. Id. at 757. But again, this should not have been decided under the Establishment Clause. The Establishment Clause does not act against religious expression, it acts as a protector of the institutional autonomy of religious organizations. And to be a violation, the government has to enter into some institutional intrusion, which has to have some type of permanent characteristic, not just a holiday display of a crèche. This was at issue in Lynch v. Donnelly, 465 U.S. 668 (1984), in which the court used the Establishment Clause to determine the constitutionality of a nativity scene on public grounds during the Christmas season. Id. at 670-71.

208. For a discussion on the meaning and purpose of the Establishment Clause regarding the institutional side of religious freedom, see GARRY, supra note 5, at 128-46.

209. NOAH FELDMAN, DIVIDED BY GOD 10 (2005).
their religious messages out into the public square or from performing the public duties required by their religion.\textsuperscript{210}

The harm caused by a state-established church is that it would stifle the diverse and democratic nature of religious affiliation in America. Democracy is a core value of the Establishment Clause, which insures to the members of society the freedom to pick a religious affiliation and the freedom of that affiliation to act in accordance with the strength of its numbers.\textsuperscript{211} Unlike a society in which a religious association is dictated from above, the society envisioned by the Establishment Clause is one in which religious groups are able to grow, based on their ability to attract followers, and assert their voice within society in relation to the size of its following.

As James Madison wrote in \textit{The Federalist No. 10}, the threat of tyranny can be eliminated through a diverse society of many competing groups and interests.\textsuperscript{212} This prescription, though obviously desiring the groups and interests to be numerous and competitive, does not fall apart if a small number of groups attain great power through large followings. What is important is not that certain private social groups—for example, religious organizations—never attain great power and influence; rather, what is important is that a free and open social dynamic always be present, such that the power and influence of social groups is always at the mercy of the democratic wishes of society.\textsuperscript{213} The Establishment Clause seeks to preserve this dynamic so that religious sects can thrive on their own accord, to gain whatever prominence and influence they achieve as a result of the democratic choices of their members. According to Madison, the dynamic of conflict among competing social groups would make the formation of ruling majorities temporary “so that the majority might be recomposed from

\begin{itemize}
\item \textsuperscript{210} As applied now, the Establishment Clause can be used as a weapon by the minority against the majority, with the suppression of religious acknowledgment acting as an effective surrender to the demands of the nonreligious minority within society.
\item \textsuperscript{211} In \textit{Lee v. Weisman}, 505 U.S. 577 (1992), Justice Scalia suggested that aside from the protection against discrimination, the Establishment Clause offered no protection to those who belong to minority religious sects and who should have to accept their minority status—determined by a free society—quietly. \textit{Id}. at 640-41 (Scalia, J., dissenting).
\item \textsuperscript{212} \textit{THE FEDERALIST NO. 10} (James Madison); Viteritti, \textit{supra} note 186, at 1167. The pluralism and diversity that James Madison discussed is elaborated on by Kevin Hasson, who argues that religious freedom requires “an authentic pluralism that allows all faiths into the public square.” KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA 130 (2005).
\item \textsuperscript{213} This dynamic can be seen within the religious trends in society. \textit{See generally} HASSON, \textit{supra} note 212, at 127-30. Several decades ago, the mainline Protestant churches were the dominant religious groups; but today, the membership of those churches has waned, while that of more evangelical churches has grown rapidly.
\end{itemize}
one issue to the next." But this obviously contemplates that the majoritarian freedoms of religious groups be protected. As Madison argued, the path to religious freedom is through the promotion of a robust religious pluralism. This is why the Establishment Clause protects the institutional autonomy of religious groups—so that they can function without government artificially trying to limit their influence.

Because the Establishment Clause has been used to minimize the public role or influence of dominant religions, it does more than just try to protect the sensibilities of minorities—it teaches that the religions of the dominant social groups are not something worthy of public recognition and are irrelevant to a society's civic life. But using the Establishment Clause to exclude dominant religions from public life is a denial of the democratic impulses behind those religions, and if anything, the Establishment Clause was designed to keep religious impulses within society free and democratically determined.

The democratic nature of the Establishment Clause is supported by the recognized existence of an American civil religion, which, according to Robert Bellah, has permeated civic and social life since the nation's founding. The American civil religion constitutes an "institutional-

214. Viteritti, supra note 186, at 1167-68.
215. Id. at 1168.
216. According to Justice Scalia, the Establishment Clause is not concerned with "the interest of [the] minority in not feeling "excluded," but with "the interest of the overwhelming majority of religious believers in being able to" express their beliefs. McCreary County v. ACLU, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting). Thus, the Establishment Clause has resolved the conflicts between the minority and majority in favor of the latter.

The Court's creation of a nationalized dissenter's right under the Establishment Clause allows relatively little freedom or flexibility to state and local governments to accommodate the religious views and practices of their residents. This judicial intrusion into the religious expressions of society is evident in a controversy taking place in San Diego. For more than fifty years, a large cross has stood in a city park atop Mount Soledad. Indeed, there has been a cross at that location since 1913, and the present cross is part of a Korean War veterans memorial. However, the park has been embroiled in litigation since 1989, when a self-described atheist and humanist sued to have the cross removed. Randal C. Archibold, High on a Hill Above San Diego, a Church-State Fight Plays Out, N.Y. TIMES, Oct. 1, 2005, at A9. Despite a decade and a half of litigation, the city remains strongly supportive of the cross. In a July 2005 referendum, nearly seventy-five percent of the voters approved a measure to preserve and maintain the cross on its present location. Id.

As the Mount Soledad cross dispute shows, "the Court's generally expansive understanding of what it means to establish religion continue[s] to breed litigation, and to hinder legislative and local experiments with creative" accommodations of religion. Mary Ann Glendon, Law, Communities, and the Religious Freedom Language of the Constitution, 60 GEO. WASH. L. REV. 672, 679 (1992).

217. Robert Bellah, Civil Religion in America, DAEDALUS, Winter 1967, at 3-4. According to Bellah, American civil religion was shaped by the founding generation. Id.
ized collection of sacred beliefs about the American nation," and reflects the idea that religion and religious organizations are vital to democracy.\textsuperscript{218} Because of this civil religion, religious ideas and associations will inevitably play a prominent role in society. Consequently, the manifestations of this civil religion must not be denied or muted by the Establishment Clause.\textsuperscript{219} In other words, the Establishment Clause cannot be used to infringe on or deny civil religion because the First Amendment basically protects the dynamics of private social expression and identity from governmental dictates.

Professor Kathleen Brady illustrates the democratic, public-role aspect of religious freedom that the Establishment Clause protects.\textsuperscript{220} As Brady argues, for religious groups to effectively transmit their doctrines and live out their convictions, they need to extend those convictions into the wider social arena.\textsuperscript{221} Because religious beliefs inherently involve the wider social network and the communal relationships of individuals, the freedom of those individuals to join and function in religious organizations is essential, as is the freedom of such organizations to assert themselves in civil society.\textsuperscript{222} According to Brady, the institutional freedom of religious organizations is vital for its members to live out their beliefs and to "effectively communicate their insights to the larger community."\textsuperscript{223} For this reason, religious organizations have to be given the freedom to fully live out their ideals in their relationships and dealings with civil society.\textsuperscript{224} Religion is fundamentally concerned with how people live, both in their individual lives and in their social lives, and religious beliefs go directly to basic ethical orientations that

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\bibitem{218} Gail Gehrig, \textit{The American Civil Religion Debate: A Source for Theory Construction}, 20 J. FOR SCI. STUDY RELIGION 51, 53 (1981). As Noah Feldman argues, only the institutions of religion and government should be kept separate, not the more general realms of religion and public life or politics. \textit{FELDMAN, supra} note 209, at 52. This institutional separation is needed because government intrusion into religious institutions burdens religious freedom. \textit{Id.} at 247.

\bibitem{219} The Supreme Court has recognized the role and existence of civil religion, stating that America is a nation of "religious people whose institutions presuppose a Supreme Being." \textit{Zorach v. Clauson}, 343 U.S. 306, 313 (1952).

\bibitem{220} Kathleen A. Brady, \textit{Religious Group Autonomy: Further Reflections About What Is at Stake}, 22 J.L. & RELIGION 153, 156-57 (2007) (arguing that religious sects cannot "maintain their convictions without the freedom to put their ideas into practice").

\bibitem{221} \textit{Id.}

\bibitem{222} \textit{Id.} at 157-58.

\bibitem{223} \textit{Id.} at 182.

\bibitem{224} \textit{See id.}

\end{thebibliography}
relate to all aspects of social life.225 "Thus, the concerns of religious communities overlap with the social, civic and political concerns of the wider community ...."226 This is the democratic nature of the Establishment Clause that is violated if the courts try to muffle the public presence of religion, particularly that of the dominant religions.227 Religious freedom has a public as well as an individual nature, a communal dimension as well as an intensely spiritual and individual dimension, and the Establishment Clause serves to protect the democratic freedom of this public side of religion.

CONCLUSION

Contrary to the lessons of constitutional history, and contrary to constitutional structure, the Establishment Clause228 has been interpreted as a protection for minority rights. This interpretation has also contradicted the entire scheme set out by the religion clauses of the First Amendment, in which the Free Exercise Clause229 is charged with guarding the rights of religious minorities. The proper interpretation of the Establishment Clause—one that reconciles the Establishment with the Free Exercise Clause and fits within the historical intent behind the

225. Id. at 190.

226. Id. Moreover, the group aspect and public role of religion needs to be protected because such aspects and role reflect an inherent nature of human beings, a universal truth about the human condition. HASSON, supra note 212, at 117, 123-24. Hasson states that the basic human truth is that people “have a conscience-driven, fundamental need for religious search and expression. It is quintessentially human. And when something quintessentially human requires freedom in order to be authentic, it's wrong to rob it of its authenticity by robbing it of its freedom.” Id. at 123-24.

227. Aside from the democratic role that religious organizations should be allowed to play under the Establishment Clause, such organizations also serve other valuable social roles. Professor Kyle Duncan examines how religious associations “provide individuals with meaning, opportunities for action and a matrix for relationships unavailable to them in isolation.” Duncan, supra note 21, at 97. Duncan also examines the ways in which religious organizations perform valuable social mediating functions. Id. at 101. According to Duncan,

the religious association is a vital center for individuals to join freely together and forge a place for constructing a common set of values and beliefs, for speaking and acting more powerfully and coherently in the surrounding society, and for creating effective buffers against corrosion by the state or other societal forces.

Id. at 102. Other scholars have likewise noted how religious organizations “are singularly important to the way people order their lives and values at the most local and concrete levels of their existence.” Richard John Neuhaus & Peter Berger, To Empower People: The Role of Mediating Structures in Public Policy, in THE ESSENTIAL NEOCONSERVATIVE READER 213, 228 (Mark Gerson ed., 1996).

228. U.S. CONST. amend. I.

229. U.S. CONST. amend. I.
First Amendment—views it as a majority rights provision, aimed at protecting the freedom of religious associations to assert themselves in the public arena in accordance with the strength of their numbers. A core value of the Establishment Clause is democratic freedom. Under the Establishment Clause, individuals in society are free to choose their own religious affiliation, to join whatever religious organizations they desire, and to carry out the social work of those organizations in whatever way they see proper. Essentially, the Establishment Clause protects the freedom of association—a freedom that includes not only the right of individuals to align themselves with religious institutions, free of any restrictions caused by a state-mandated religion, but that also includes the right of those institutions to reflect and represent their members' desires for public action and involvement. Thus, contrary to current doctrines, the Establishment Clause should neither hinder a group's ability to participate fully in public life nor limit religious citizens' speech and their input into the governmental sector. In a democracy, the determination of the common good should encompass everything, including the spiritual goals and values of the members of society. In this sense, religious associations should be free to assert their visions and pursue their ideals of the common good. Consequently, the Establishment Clause should be applied in a way that will leave as broad an opportunity as possible for the involvement of religious organizations in civil and political society.