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# From Liberty to Equality: The Transformation of the Establishment Clause

Noah Feldman†

*In this Article, Professor Feldman argues that in the last fifty years, the Supreme Court has transformed the rationale of the Establishment Clause from protecting the liberty of conscience of religious dissenters to guaranteeing the political equality of religious minorities. When it invented the modern Establishment Clause in 1947, the Court anachronistically emphasized avoidance of religious violence, but correctly identified protection of religious liberty as the central goal of the Clause. Since then, the Court gradually developed a new justification for the separation of church and state: entanglement would cause religious minorities to feel like political outsiders, and thus create political inequality. Having traced the transformation from a liberty rationale to an equality rationale through the cases, Professor Feldman evaluates the consequences by reexamining the central modern Establishment Clause question: what is so special about religion? He argues that none of the possible answers suffices to explain why the Establishment Clause should be read to protect religious minorities' political equality. Religious minorities are not uniquely vulnerable to*



† Assistant Professor of Law, New York University School of Law. A.B., Harvard University, 1992; D.Phil., Oxford University, 1994; J.D., Yale Law School, 1997. The author would like to thank Bernard Bailyn, Seth Berman, Ming Hsu Chen, Jesse Choper, Jeff Dolven, Owen Fiss, Gerald Frug, Clayton Gillette, Andrew Koppelman, Larry D. Kramer, Christopher Kutz, Thomas Lee, Daryl Levinson, Sanford Levinson, Martha Minow, Robert Nozick, Rick Pildes, Richard Primus, Lawrence Sager, Elaine Scarry, Jeannie Suk, and the members of the Junior Fellows Workshop at the Harvard University Society of Fellows.

*political inequality compared to racial, linguistic, or political minorities. The Article concludes by arguing that the political-equality approach to the Clause has distorted Establishment Clause jurisprudence. In the sphere of public manifestations of religion, it has produced tenuous distinctions between impermissible state action and permissible collective private action. In the sphere of government support of religious institutions, the political-equality approach, which set out to explain why the Constitution requires separation of church and state, could eliminate separation altogether by permitting government funding of religious institutions via formally equal, general allocations of funds.*

## INTRODUCTION

Why separate church and state? Unlike the Second Amendment, which justifies the right to bear arms with the need for a well-regulated militia,[1] the Establishment Clause does not provide its own justification.[2] Unlike the Free Speech Clause of the First Amendment, which has generated a voluminous literature on the various possible justifications for protecting expression,[3] the Establishment Clause has generated comparatively little academic writing about why (as opposed to how) church and state should be kept distinct.[4] Yet if we wish to make sense out of the

1. *See* U.S. CONST. amend. 2 ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

2. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. 1. Of course the clause does not use the words "separation of church and state," and there is a live debate about whether the language of separation is the most accurate or useful. I employ the phrase in this Article as a shorthand for nonestablishment, which is the way the phrase is still generally used.

3. Just a small taste of the many important books on this topic in the 1990s alone suggests the range and extent of the writing about justifications for free speech. Consider STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CATHARINE A. MACKINNON, ONLY WORDS (1993); STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE (1990); and CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993). A classic in the genre, and in many ways the genre's originator, was ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

4. Some notable examples of this genre include: JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133 (1988); Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233 (1997); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357 (1996); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 304 (2001); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992). Much of what has been written about rationales for separation of church and state focuses on reasons for protecting religious liberty under the Free Exercise Clause, not reasons for keeping church and state distinct under the Establishment Clause. *See* John H. Garvey, *An Anti-Liberal Argument for Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275, 286-87 (1996); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 558-68 (1998); Douglas Laycock, *Continuity and Change in the Threat to*

notoriously dissatisfying doctrines that courts use to give meaning to the Establishment Clause, the justification for separating church and state assumes the utmost importance. Only if we know why we want to separate church and state will we be able to give consistent, defensible answers to doctrinal questions about how we ought to go about separating church and state.

When the Supreme Court gave birth to the modern Establishment Clause in 1947,[5] it understood the essential importance of giving reasons for the separation of church and state. The Court therefore told a story about why the Framers enacted the Establishment Clause: the freedom-loving Framers hit upon nonestablishment as a reaction against the European phenomenon of violent religious persecution.[6] This story distorted the historical record by projecting the concerns of the post–World War II era back to the eighteenth century. Violent religious persecution did not loom large in the minds of the Framers, who intended the Establishment Clause to protect the liberty of conscience of religious dissenters against paying taxes to support religious beliefs with which they disagreed.[7] But the Court's story correctly captured the idea that the Establishment Clause was born, like many other elements of the Bill of Rights, out of a desire to protect the individual from coercion at the hands of the state.

Already in 1947, however, the idea that the Clause aimed primarily to protect religious minorities from persecution had begun to sound obsolete. In America in 1947, there were certainly religious minorities who were victims of occasional abuse,[8] but religious persecution was not perceived as

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*Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047 (1996); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

5. *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

6. *Id.* at 8-12.

7. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. (forthcoming May 2002). I argue there that, contrary to the conventional historical wisdom, the most important theory underlying the Establishment Clause was a Lockean theory of the liberty of conscience. Under this theory, which was shared by rationalist deists and evangelical Baptists alike, liberty of conscience was an unalienable right. The state was created to serve temporal civic ends. It lacked any power to coerce conscience, and it lacked the delegated power to act in the nontemporal sphere of religion. To the Framers' generation, this meant that the state would not, in theory, coerce anyone to pay taxes to support religious teachings or institutions that went against his conscience. I defend this claim at length in that Article.

8. For example, after the Court's decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), permitting a school district to require Jehovah's Witnesses to salute the flag, there was an outbreak of violence against local Witnesses. *See* PETER H. IRONS, THE COURAGE OF THEIR CONVICTIONS 15-35 (1988). For another detailed account of persecution against the Wituesses, see SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000). A thoughtful review, questioning certain aspects of the book, is Neil M. Richards, *The "Good War," the Jehovah's Witnesses, and the First Amendment*, 87 VA. L. REV. 781 (2001).

a major social problem.[9] The pervasive persecution in post-War American life existed in the realm of race, not religion. Thus, the Court's modern reinvention of the Establishment Clause could not convincingly rest on protection from persecution; such an ambitious project of reinvention called out for a justification that would seem more relevant to modern American life.

This Article shows, for the first time, how the Supreme Court transformed the Establishment Clause by gradually developing a new justification for the separation of church and state: guaranteeing the political equality of religious minorities. According to this new justification, if church and state were entwined, religious minorities would feel excluded from the polity. This feeling of exclusion would create political inequality by impeding religious minorities' equal participation in the political life of the United States. The Establishment Clause would police the symbolic content of government action, keeping church and state separate in order to ensure political equality for religious minorities. Instead of protecting religious dissenters from physical violence and coercion of conscience, the Clause would be understood to ease the potential psychological burdens of religious minority status in order to ensure political equality.

The modern journey of the Establishment Clause from protector of liberty to guarantor of equality did not take place in one day or in one case. Perhaps because of the gradual character of the doctrinal and ideological development, this remarkable process of transformation has gone essentially unnoticed in the literature on Establishment Clause doctrine. The first task of this Article, then, is to redraw the Establishment Clause map by delineating the modern justification for separation of church and state and demonstrating how it has changed from a justification grounded in liberty to one based on equality.

The Article then addresses the consequences of the transformation of the Establishment Clause from protector of liberty to guarantor of equality. Acknowledging this transformation requires reexamination of the central modern question about the Establishment Clause: what is so special about religion? If we are to have a clause in our Constitution that prohibits government from allying itself with only one intellectual, social, or cultural phenomenon, why should that phenomenon be religion? For the Framers, the Clause was understood to protect religious conscience,[10] and so the

9. Thus the classic work on the sociology of American religion at mid-twentieth century depicted relations between America's diverse religious groups as largely harmonious. *See* WILL HERBERG, PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 247-62 (1955).

10. *See, e.g.*, Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1643 (1989) ("The core value of the religion clauses is liberty of conscience in religious matters . . . ."). Liberty of conscience is often associated with the Free Exercise Clause, *see,*

answer was straightforward: religion deserved special protection from alliance with government because, more than other forms of action or belief, religion required free choice to be meaningful.[11] But if, as the Court now maintains, the Clause guarantees the political equality of religious minorities, the answer is less obvious. Why should religious minorities, as opposed to other minorities, be singled out for special guarantees of political equality? Surely all citizens, not only religious minorities, deserve to be guaranteed political equality.

There exist several possible answers to the question "what is so special about religion," but none suffices to explain why the Establishment Clause should be read to protect religious minorities' political equality. Religious minorities are not uniquely vulnerable to political inequality, and religious discrimination in the United States has not been noticeably worse than discrimination on the basis of political ideology, immigrant status, or language, let alone race. Nor does the nature of religious belief or identity render religious affiliation uniquely in need of protection from second-class status. In fact, this Article proposes, there is no better reason to protect the political equality of religious minorities than the political equality of anyone else.

Beyond its logical shortcomings, the political-equality approach to the Clause has introduced distortions into both of the two main areas of Establishment Clause jurisprudence. In the sphere of public manifestations of religion, the approach has led to extremely tenuous distinctions between impermissible state action and permissible collective private action. For example, the crowd at a high school football game may pray in unison,[12] but may not do so if the principal hands a microphone to a student to begin the prayer.[13] This asymmetrical outcome makes little sense if the goal of the Clause is really to protect political equality. Yet it follows from the

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*e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (describing liberty of conscience as the value associated with free exercise), but the Establishment Clause also grew out of ideas about liberty of conscience associated with John Locke. This view is demonstrated at length in Feldman, *supra* note 7.

11. *See, e.g.*, JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS TO THE HONORABLE THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA ¶ 1, *reprinted in* 8 THE PAPERS OF JAMES MADISON 299 (Robert A. Rutland ed., 1973) (citations to the Memorial will be given by paragraph for ease of reference). Madison wrote that:

> [W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men . . . .

*Id.* (citation omitted).

12. *See* Paul Duggan, *A Few Texas Faithful Make Stand for Prayer; Big Football Showing Fails to Happen*, WASH. POST, Sept. 2, 2000, at A1.

13. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 320 (2000).

Court's view that the Establishment Clause bars the state from endorsing religion, whereas nothing prevents the citizens who comprise the state from creating conditions of inequality by performing nominally "private" religious actions in a public forum.

In the sphere of goverument support of religious institutions, the results of applying the political-equality approach to the Establishment Clause have been, if anything, more perverse. The Court has held that direct support of religious teachings, which would certainly violate the Establishment Clause if provided to religious organizations alone, does not violate the Establishment Clause when provided to other, nonreligious recipients as well.[14] Under this equality-driven theory, government could very possibly pay the salary of every clergyman in America, so long as it also paid all the ballet teachers and philosophy professors under the rubric of a fund for "general moral and aesthetic education." Indeed, taking this theory to its logical extreme, advocates of government support for religious institutions could plausibly argue that government is under an affirmative duty to finance religious education in order to facilitate the very political equality that, according to the Court, the Establishment Clause guarantees. The transformation of the Establishment Clause to a model of political equality, which began in an attempt to explain why the Constitution requires separation of church and state, has thus generated doctrines that could well eliminate the separation of church and state altogether.

In short, this Article identifies the Establishment Clause's transformation from protector of liberty to guarantor of equality, and then criticizes the consequences of that transformation. Part I delves into the post–World War II doctrinal development of the Establishment Clause. It interprets the canonical cases anew, with an eye to revealing and criticizing the reasons they offer for separation of church and state. This Part shows how the Court began by explaining the Clause in terms of liberty, but almost immediately began to move fitfully in the direction of an equality rationale for the Clause. Part II shows how the understanding of the Clause as a guarantor of political equality reached its clearest expression in Justice O'Connor's formulation of the "endorsement test." Under the endorsement test, the Clause bars communication of the message that some citizens are favored insiders, and others disfavored outsiders, with respect to the political process. Part II then investigates the intellectual context in which the Court invented the endorsement test in order to understand the motivations that underlay the completion of the transformation.

Part III examines several possible reasons for protecting the political equality of religious minorities in particular. It first shows how the harm

14. *See* Mitchell v. Helms, 530 U.S. 793, 809 (2000); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 845-46 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993).

cognized by the endorsement test is not merely minorities' feeling of exclusion, but rather the actual reduction of their political equality as a result of reduced effectiveness in the political sphere. Part III then considers and rejects various theories as to why religious minorities might deserve unique constitutional protection from political inequality. Ultimately, Part III argues, no convincing claim justifies protecting the political equality of religious minorities more stringently than the political equality of other citizens.

Part IV demonstrates the distortions that the political-equality approach has wrought in the two most important doctrinal areas of the Establishment Clause. In the context of public manifestations of religion, the endorsement test has made a fetish of state action, with the result that some messages of exclusion are prohibited, while other even more exclusive messages remain untouched. In the context of funding of religious institutions, the political-equality justification has subverted the very notion of separation of church and state. Not only might the state support and ally itself with religious institutions so long as it did so in an egalitarian fashion, it might even be argned that political equality requires some such state support of religion.

## I

## THE INVENTION OF THE MODERN ESTABLISHMENT CLAUSE

From the framing of the Establishment Clause until just after the Second World War, many developments occurred in American history that later proved important to the development of Establishment Clause doctrine. Most notably, the mid-nineteenth century saw the growth of public schooling in the United States,[15] a process that was by all accounts infused with concern and discussion about the place of religion in those schools.[16] In 1875 and 1876, there was movement for an amendment to the federal Constitution that would have barred public support for sectarian schools.[17]

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15. CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 115-45 (1988); WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 64-77 (1995); PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 (Carl F. Kaestle ed., Eric Foner consulting ed., 1983); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE (1974); DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION (1974).

16. *See, e.g.*, STEPHEN CARTER, THE DISSENT OF THE GOVERNED 36-47 (1998); GLENN, *supra* note 15, at 146-206; NORD, *supra* note 15, at 64-77; Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968).

17. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 330 U.S. 203, 220 (1948); President Grant, Annual Message to Congress (Dec. 7, 1875), *in* 4 CONG. REC. 175 (1876); HERMAN VANDENBURG AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 277-78. In addition to the first proposal, called the Blaine Amendment, five other proposals are cited by Ames. *See* AMES, *supra*, at 277-78. The reason for the failure of these attempts seems to have been in part that "[t]he provisions of the State constitutions are in almost all

This movement, powered in part by anti-Catholic, anti-immigrant sentiment,[18] failed at the federal level, but had long-term effects on state constitutional development.[19] And of course the Reconstruction Amendments were enacted, occasioning some discussion of the Establishment Clause.[20] But notwithstanding the ongoing importance of church-and-state issues to American life, the Establishment Clause lacked the kind of jurisprudence and scholarly literature that would have constrained or guided the Supreme Court when it began to decide cases under the Clause in the post–World War II period. When in 1947 the Court turned its attention to the Establishment Clause, it acted as if it had a blank slate upon which to write.

### *A.* Everson *and the Persecution Rationale*

In 1947, the modern Establishment Clause was born with the incorporation of the Clause against the states in *Everson v. Board of Education of Ewing Township*.[21] Incorporating the Establishment Clause against the

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instances adequate on this subject, and no amendment is likely to be secured." *Id.* Blaine's proposal read:

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

4 CONG. REC. 205 (1875).

18. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 659 (1998).

19. For an extensive discussion, see Viteritti, *supra* note 18, at 661-84.

20. "John Bingham sometimes quoted both religion clauses, while at other times speaking of the 'rights of conscience.'" Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's the Bill of Rights*, 33 U. RICH. L. REV. 485, 495 n.43 (1999) (citing CONG. GLOBE, 42d Cong., 1st Sess. 85 app. (1871)).

21. 330 U.S. 1 (1947). In *Everson* and afterwards, the Court has simply assumed that the Establishment Clause can be incorporated against the states. This view has been challenged. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 227 (1998) (arguing against the appropriateness of incorporating the Establishment Clause in light of a reading of the Clause as designed to protect state establishments). Although this is not the place for an extensive engagement with Amar's treatment of the discussion of the Establishment Clause in the debates in the Reconstruction Congress, *see* Lash, *Two Movements of a Constitutional Symphony*, *supra* note 20; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (arguing for incorporation), it is worth noting that there might still be room for an originalist account of incorporation for those who favor such an approach. If, contra Amar, the Framers originally intended the Clause to protect liberty of conscience from coercion, and not to protect state establishments, and if the Framers of the Reconstruction Amendments intended to incorporate the principle of protecting conscience against the states, then its incorporation would have the same effect on the states as it originally had on the federal government. *But see* Conkle, *supra* note 4, at 1138-39 (arguing that if the Fourteenth Amendment had been understood to incorporate the Establishment Clause, then the legislative history surrounding the Blaine Amendment should show some record of this view).

states required an explanation of the purposes of the Clause.[22] Writing for the Court, Justice Black explained that the chief evil addressed by the Establishment Clause was persecution of religious minorities.[23] The Framers enacted the Establishment Clause, he claimed, to put a stop to the European practice of persecuting religious minorities that was imported to the colonies from the "old world."[24] In Europe, he said,

> [w]ith the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.[25]

Black argued that America had not avoided this European disease, which was "transplanted to and began to thrive in the soil of the new America"[26] in the form of religious establishments that required everyone "to support and attend."[27] These establishments were "accompanied by a repetition of many of the old-world practices and persecutions."[28] Dissenters were "persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated;"[29] they were also "compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."[30]

Once Justice Black had described the European origin and American transplantation of establishment and religious persecution, he faced a complicated transition point. On the one hand, he had provided a rhetorically powerful picture of religious persecution in America; on the other, he intended to contrast the exceptionalism of religious liberty in America with the violence that, by implication, he associated with Europe. To resolve the tension between colonial establishments and the American ideal of religious liberty, Justice Black utilized an argument the echoes of which can be heard in subsequent judicial discussions of the Establishment Clause's

22. Jonathan Mills, *Strict Separationism's Sacred Canopy*, 39 AM. J. JURIS. 397, 421 (1994), characterizes Black's *Everson* opinion as "non-establishment for the sake of religion." This view does not adequately capture the subtlety of the opinion's logic.

23. *Everson*, 330 U.S. at 9.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 10.

29. *Id.*

30. *Id.*

history.[31] He explained the transition from colonial continuity with European experience to radical discontinuity as a sudden gestalt shift: "These practices became so commonplace as to shock the freedom-loving colonists into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused [colonists'] indignation. It was these feelings which found expression in the First Amendment."[32] The oppression that had been a regular feature of European life grew in America to the point where it created a "shock" sufficient to produce the ideal of religious liberty. Having stated this "shock" hypothesis, Justice Black did not elaborate upon it. Instead he launched immediately into an extended discussion of the debate over establishment in Virginia, quoting liberally from Jefferson and Madison regarding freedom of conscience and the ways it might be impinged by compelled contributions to support views with which the dissenter disagreed.[33]

Justice Black's historical analysis of the supposedly sudden emergence of religious liberty on American soil was much exaggerated. As Justice Black acknowledged, the Framers' generation was indeed concerned about coercion in the form of payment of taxes to support religious views with which dissenters disagreed.[34] But the idea of liberty of conscience was born in Europe, not America;[35] it developed in the milieu of English Protestantism;[36] and it reached the colonies almost as soon as it was born.[37] The theoretical idea of liberty of conscience was familiar and widely accepted in America by the late eighteenth century.[38] And while it seemed to many in America at the time of the Framing that preferential establishment and liberty of conscience were incompatible, the view was

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31. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 869 (1995); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 502 (1982); Comm. for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 777 (1973).

32. *Everson*, 330 U.S. at 11.

33. *Id.* at 11-13.

34. *See id.* at 11.

35. *See id.* Liberty of conscience seems first to have emerged as a concept in the writings of Martin Luther and Jean Calvin in the early sixteenth century. On Luther, see MICHAEL G. BAYLOR, ACTION AND PERSON: CONSCIENCE AND SCHOLASTICISM AND THE YOUNG LUTHER 1-6, 255-72 (1997). For Calvin, see JOHN CALVIN, INSTITUTION OF THE CHRISTIAN RELIGION 176-226 (Ford Lewis Battles ed., 1975). For an extended treatment of both, see Feldman, *supra* note 7.

36. *See Everson*, 330 U.S. at 11.

37. Roger Williams and John Cotton were discussing the matter in writing by the 1640s. *See* JOHN COTTON, THE BLOUDY TENENT, WASHED AND MADE WHITE IN THE BLOUD OF THE LAMBE (1647); ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE (1644); ROGER WILLIAMS, THE BLOODY TENENT YET MORE BLOODY (1652). William Perkins, who taught at Cambridge and influenced a generation of American Puritans, used the phrase "liberty of conscience" in English only in the last decade of the sixteenth century. *See* WILLIAM PERKINS, A DISCOURSE OF CONSCIENCE, *reprinted in* WILLIAM PERKINS 1558-1602: ENGLISH PURITANIST 5 (Thomas F. Merill ed., 1966); *see also* Feldman, *supra* note 7.

38. Feldman, *supra* note 7.

not widespread enough to bring about the end of state support for religion in freedom-loving New England for another forty-some years.[39] There was therefore no "shock" effect leading to the emergence of an ideal of liberty of conscience, except perhaps to the very limited extent that emergent arguments for liberty from taxation without representation strengthened and underscored minority arguments against religious taxation.[40]

Nor was violence a major concern for advocates of disestablishment in eighteenth-century America;[41] most disestablishmentarians were concerned primarily with government support of churches by means of funds gathered from dissenters.[42] Although advocates of disestablishment, such as Madison, sometimes mentioned the violence associated with religious persecution in "the old world," they intended it rhetorically, and did not believe religious violence to be imminent in America.[43] Justice Black's concern with violent religious persecution, then, was probably more a product of the distinctive circumstances of the immediate post-War era than a reflection of the realities or concerns at the Founding.[44]

Notwithstanding its historical imprecision, however, Justice Black's description of the sudden emergence of religious liberty in America was theoretically very significant because it worked a striking reversal in the explanatory relationship between liberty of conscience and religious persecution. Justice Black did leave the reader with the sense that liberty of conscience played a significant role in the purpose of the Establishment Clause; in this sense, *Everson* did not articulate a new explanation for the Clause. But the eighteenth-century idea of liberty of conscience held that it was wrong to persecute religious dissenters on the basis of their beliefs because to do so would violate their sacred liberty of conscience.[45] In contrast, by emphasizing the violent persecution of religious minorities as the catalyst for the emergence of liberty of conscience, Justice Black subtly

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39. The final repeal of the New England Way came only in 1833. *See* 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 1259 (1971).

40. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 246-71 (1967).

41. Isaac Backus and other Baptists did not claim that violence against them was occurring in New England, except to the extent that they might be jailed for failure to pay taxes. *See generally* ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754-1789 (William G. McLoughlin ed., 1968).

42. *See id.*

43. In his famous Memorial and Remonstrance, Madison said that as a result of lack of toleration, "Torrents of blood have been spilt in the old world." MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 11, ¶ 11. But Madison did not attempt to argue that violence was likely to break out in Virginia. *See id.*

44. In 1947, the full extent of the destruction that the Nazi Holocaust had wrought against European Jewry was just beginning to be realized in full. *See* PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE (1999).

45. *See* Feldman, *supra* note 7.

suggested that the reason to have liberty of conscience was to prevent religious persecution. This turned the eighteenth-century view neatly on its head. What troubled the eighteenth-century mind was the freedom of the conscience itself; persecution was bad because it infringed on conscience. What troubled the twentieth-century mind was religious persecution; liberty of conscience was good because it provided a rationale for avoiding such persecution.

This reversal, with its focus on violent persecution, ultimately had an important effect on the rationale for the Establishment Clause: it oriented focus away from the individual dissenter and toward the entire community of religious dissenters understood as a minority group. By his emphasis on group identity and persecution, Justice Black laid the foundation for thinking of the community of religious dissenters as a minority group, comparable to the discrete and insular minorities with whom the Court was to become increasingly concerned in the decades that followed.[46] In *Everson* itself this shift did not yet have obvious practical consequences. In the cases that followed *Everson*, however, the post-War paradigm of the racial minority was to enter into and affect the Establishment Clause model.[47]

### *B. Minority Consciousness and Children's Education*

The interest in the particular experience of religious minorities implicit in *Everson* became the central focus of a theory of the Establishment Clause in Justice Frankfurter's concurrence in *McCollum v. Board of Education*,[48] decided just one year later. In *McCollum*, Justice Frankfurter articulated the core claim of what would later become the endorsement theory of the Establishment Clause: the Clause protected religious minorities against the feeling of exclusion or separation from the polity.[49]

*McCollum* involved the constitutionality of a "release time" program that let school children attend religious classes in their public schools during certain hours of the day, while those not released remained in their secular classes.[50] The Court held that the program violated the Establishment Clause.[51] In his concurrence, Justice Frankfurter intimated that the public schools were meant to be a secular forum for expressing

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

47. It is worth noticing that in eighteenth-century parlance, one spoke of religious "dissenters" in line with the liberal vision of individual conscience generating religious belief. By contrast, the term "dissenter" sounds slightly dissonant in the early twenty-first century, when we are far more likely to speak of religious "minorities." This change is itself a product of the shift from liberty to equality in our thinking about establishment. A dissenter needs liberty to dissent, but a minority needs equal treatment.

48. Illinois *ex rel.* McCollum v. Bd. of Edue., 333 U.S. 203 (1948).

49. *Id.* at 227-28 (Frankfurter, J., concurring).

50. *See id.* at 226-29 (Frankfurter, J., concurring).

51. *Id.* at 212.

general, nonsectarian democratic values.[52] With this vision, he focused on the subjective experience of children whose religious groups did not participate in providing release time religious classes:

> The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.... The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents.[53]

Justice Frankfurter's argument depended initially on the assumed tendency of children to feel influenced by the actions of their peers. Once this premise was introduced, one of two possible outcomes of the release time classes followed. Either minority students would experience "a feeling of separatism" in a context intended to instill "habits of community," or else, if they were to give in to peer pressure, they would be subjected to religious education that deviated from the beliefs of their parents. The second of these possibilities can be recognized as an archetypal violation of liberty of conscience—the subjection of dissenters to religious teachings against their wills, or at least the will of those responsible for them. On its own, it would have sufficed to explain why release time violated the Establishment Clause.[54]

Justice Frankfurter, however, clearly wanted to say more than just that release time violated liberty of conscience; he wanted to protect his vision of public schools. In his view, public schools were, or should be, places for instilling communal American values. He therefore objected to state action that would produce in children a feeling of distinctness in a sphere that ought to be devoted to cultivating membership in the political community: "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools...."[55] In this model, the school stands for the aspiration of full participation in the public, political sphere. When the school deviates from this aspiration, it actively violates the values that inform the Establishment Clause itself.[56]

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52. *Id.* at 214, 217.

53. *Id.* at 227-28.

54. *See* Edwards v. Aguillard, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.") (citing Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in judgment)).

55. *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring).

56. The position of the school as a place for the expression of political values is particularly significant, because in later expressions of the endorsement model the entire public sphere becomes the

Justice Frankfurter followed his description of the two possibilities facing the minority children with a description of the consequences of their choice:

> As a result, the public school system . . . actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.[57]

By juxtaposing his concern for the subjective experience of religious minorities with the "history" of "destructive religious conflicts," Justice Frankfurter connected the problem of divisive identity with *Everson*'s focus on religious persecution. The implicit suggestion seems to be that "sharpen[ing] the consciousness of religious differences" contributes to religious persecution.[58]

In this invocation of religious persecution, it is possible to discern the effects of *Everson*. *Everson* suggested that the primary purpose of the Establishment Clause was to avoid religious persecution.[59] Preservation of liberty of conscience, *Everson* hinted in its clever reversal, served the goal of avoiding religious persecution.[60] In *McCollum*, Justice Frankfurter suggested that the creation of feelings of separatism could contribute to religious persecution.[61] If preventing religious persecution was the true goal of the Establishment Clause, it appeared to follow that the Clause also commanded the avoidance of feelings of separatism, just as it commanded liberty of conscience. In an important and nonobvious way, then, *Everson*'s refocusing of the purpose of the Establishment Clause away from the protection of conscience to the protection of religious minorities opened the way for the emergence of *McCollum*'s focus on the subjective experience of religious minorities.

The novelty of the idea that the Establishment Clause might prohibit the state from creating a subjective experience of exclusion or separation did not go entirely unnoticed in *McCollum*. Justice Jackson filed a concurring opinion in order to express several reservations, one of which expressly articulated the difference between protection of conscience from

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situs for the message of complete and equal participation. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989).

57. *McCollum*, 333 U.S. at 228 (Frankfurter, J., concurring).

58. *Id.* at 227.

59. *See supra* text accompanying notes 23-30.

60. *See supra* text accompanying note 45.

61. *See supra* text accompanying notes 57-58.

specific coercion and protection against subjective experiences of exclusion:

> When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement . . . [w]e may then set him free or enjoin his prosecution. . . . But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.[62]

In asking whether the Constitution protected a dissenter[63] against the embarrassment attendant on nonconformity, Justice Jackson neglected Justice Frankfurter's point that what was troubling was the creation of a feeling of separatism in a context that ought to promote "habits of community." Nevertheless, Justice Jackson's objection seems to indicate the crucial recognition that Justice Frankfurter was moving the Court away from the traditional conception of the liberty of conscience and on to subjective experience. By focusing on the experience of children who could resist peer pressure, but would feel excluded when they resisted, Justice Frankfurter changed the rationale for the Establishment Clause significantly.

### C. *The Establishment Clause Unmoored from Liberty of Conscience*

In *Engel v. Vitale*,[64] the first major school prayer decision, the Court opened the door for the expansion of Justice Frankfurter's reasoning in *McCollum* by further dissociating the Clause from its historical roots. The Court, in an opinion written by Justice Black, held that school prayer violated the Establishment Clause even if it was not coercive: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[65]

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62. *McCollum*, 333 U.S. at 232-33 (Jackson, J., concurring).

63. Note Jackson's use of the word "dissenter," consonant more with the liberty view than with the nascent equality view.

64. 370 U.S. 421 (1962).

65. *Id.* at 430. In passing, Justice Black did invoke a version of Justice Frankfurter's argument about the subjective experience of the religious dissenter in suggesting that there was some sort of coercion involved in a school prayer: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 431.

Justice Black's statement was the first explicit statement of the view that the Establishment Clause prohibited certain noncoercive actions by the state. This development mattered because it began a subtle (but hardly necessary) dissociation of the Clause from the idea that its purpose was to protect the liberty of conscience. This crucial dissociation opened the door to new arguments about the purpose of the Clause. If liberty of conscience was the value at the Clause's core, then it seemed likely that any argument for what violated the Clause would have to point at least to the potential violation of the liberty of some specific person. If, by contrast, the Clause protected something other than individual liberty, then the Clause could be invoked whenever someone could argue that its invocation would enhance or underscore whatever other values it was intended to promote.

To argue that the Clause applied even in the absence of coercion, Justice Black needed a purposive theory of the Establishment Clause that would explain what the Clause was intended to protect. Justice Black now produced two theories of the Clause's purpose. The first differed markedly from the one he had expressed some fifteen years earlier in *Everson*. In *Everson*, Justice Black had associated the purpose of the Clause with liberty of conscience, reversing the rationale of the eighteenth century by suggesting that liberty of conscience served the interests of preventing persecution.[66] Now he said that the "first and most immediate purpose" of the Clause

> rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.[67]

This rationale had little in common with that of *Everson*. Most importantly, it entirely ignored liberty of conscience, which might inconveniently have raised the issue of whether some potential compulsion would be necessary to invoke the protection of the Clause. In its place Black substituted two assertions about the consequences of established religion, neither of which figured significantly in the writings of the Framers whom he had invoked so extensively in *Everson*.

The first notion, that establishment was harmful because it led dissenters to disrespect government, was a novel reinterpretation of a comparatively minor point of Madison's. In a footnote, Justice Black cited

66. *See supra* Part I.A.
67. *Engel*, 370 U.S. at 431.

Madison's suggestion in three sentences of his famous Memorial and Remonstrance that enforcing unpopular laws undercut governmental authority.[68] Yet Madison did not assert that endorsement of just one denomination would cause contempt for government. His argument, rather, was simply that the proposed bill for nonpreferential, mandatory support of the religion of the taxpayer's choice would probably not be enforced even if it became the law. This, in turn, would lead the general public to think less of the rule of law.[69]

The second idea, that "many people" came to disrespect any religion that relied on government, was also implausible as a justification for the Establishment Clause. Roger Williams, the seventeenth-century theorist of religious liberty and founder of Rhode Island, could perhaps be said to have objected to governmental support for religion on the grounds that religious purity would thereby be sullied.[70] But Williams's view was never adopted by "many people," even among eighteenth-century New England dissenters, who almost never invoked it at the time of the Framing.[71] There was never, in New England certainly, any evidence that "many" had "lost respect" for state-supported Congregationalism just because it was state-supported.[72] And while Madison, whom Justice Black cited in a footnote,[73] did argue that state support of religion had produced lazy clergy and a "servile" laity,[74] he never suggested the existence of a popular view that a religion that relied on government support did not deserve respect.[75] He merely made the rhetorical point that support of religion might lead supporters and detractors alike to wonder if the religion could stand on its own merits.[76] Thus, both of Justice Black's arguments seem to have owed something to selective use of historical evidence.

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68. *Id.* at 431 n.13 (citing MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 11, ¶ 13).

69. Madison argued that because

> [a]ttempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

*See id.* (quoting MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 11, ¶ 13).

70. *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5-7 (1965). Justice Black seems to have had something like this argument in mind, because he also said that the Clause was an "expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel*, 370 U.S at 432.

71. *See generally* ISAAC BACKUS, *supra* note 41. In Backus's collected disestablishmentarian pamphlets, the argument from purity of religion does not appear. *Id.*

72. *See generally* MCLOUGHLIN, *supra* note 39. This major history of New England's establishment debates describes no such phenomenon. *Id.*

73. *Engel*, 370 U.S at 431 n.14.

74. MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 11, ¶ 7.

75. *See generally* MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 11.

76. *Id.* ¶ 6.

In what followed, however, Justice Black showed that he had not entirely abandoned his *Everson* reasoning. He reintroduced the idea that the Establishment Clause was intended to counteract religious persecution:

> Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions .... And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.[77]

Here, while Justice Black was on slightly stronger historical ground, he still hinted that liberty of conscience was intended to serve the end of avoiding persecution, not vice versa. But the fact remains that Black relegated his *Everson* justification to third place after the two other novel justifications.

When one considers Justice Black's argument rhetorically, the reason for this downplaying is apparent. The persecution argument, even in its inverted form, suggested that religious compulsion lay near the heart of the Clause's purpose. It invoked the English example of compulsory religious uniformity as its archetypal establishment. But Justice Black sought in *Engel* to argue that compulsion was unnecessary to an Establishment Clause violation. A rationale that relied on an historical example of religious compulsion would not have served his argument as well as one that did not. What emerges from *Engel*, then, is a rationale for the Establishment Clause that, in the fifteen years since *Everson*, had become largely disconnected from its historical roots in the protection of the liberty of conscience. In the years that followed, this disconnection provided space for the expansion of the theory of the Clause that Justice Frankfurter articulated in *McCollum*.

77. *Engel*, 370 U.S. at 432-33.

### D. From Children's Experiences to the Political Sphere

With respect to the development of ideas about the purpose of the Establishment Clause, it is no exaggeration to say that little of consequence occurred between *Engel* and *Lemon v. Kurtzman*,[78] decided more than a decade later.[79] But in *Lemon*, something important did happen: the Court developed the argument that the Clause aimed to avoid the divisive effects of religion in the public sphere, outside the classroom. *Lemon* involved state aid to parochial schools, which the Court declared unconstitutional. The *Lemon* Court formalized a three-part test to determine if state action violated the Establishment Clause. All three prongs had been announced earlier: the law must have a secular purpose; its primary effect must neither advance nor inhibit religion; and it must not create "excessive" government entanglement with religion.[80] A law could violate the Establishment Clause if it failed any one of three prongs.

In *Lemon*, the Court went further than it had done before in attempting to delineate what might make a given entanglement excessive. In an opinion by Chief Justice Burger, the Court spoke of the likelihood of government "surveillance" and "control" as elements of entanglement.[81] More importantly, however, the Court said that "the divisive political potential" of state aid to parochial schools created a possibility of entanglement.[82] The connection between divisiveness and entanglement lay in an "inevitabl[e]" political conflict between supporters of parochial schools

78. 403 U.S. 602 (1971).

79. The intervening Establishment Clause case of *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), brought little development to theoretical concepts already enunciated in earlier cases. The case involved Bible reading in public schools, which the Court held to violate the Establishment Clause. The Court held the Clause required governmental "neutrality" toward religion, and framed the test for neutrality in terms of the purpose and primary effect of the challenged law. *Id.* at 222. In announcing this test, the Court cited *Everson* for the proposition that the state must "'be a neutral in its relations with groups of religious believers and non-believers.'" *Id.* at 218. The Court then reiterated the distinction from *Engel* that "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.* at 223. Finally, the Court relied on the declaration in *Engel* that the "purpose" of the Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Id.* at 221. Beyond this assertion, the Court declined to explain how the requirement of governmental neutrality derived from the Clause's purpose. Neutrality became an essential doctrinal touchstone after *Abington*, but the requirement of neutrality did not index with any one account of why church and state ought to be kept separate.

In a concurrence in *Abington*, Justice Brennan argued for a broad purpose of the Clause. Relying on Justice Frankfurter's argument in *McGowan v. Maryland*, 366 U.S. 420, 465-66 (1961), he claimed that the Clause was "designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief." *Abington*, 374 U.S at 234 (Brennan, J., concurring). This intriguing and potentially influential argument seems to have played little or no positive role in the development of the endorsement theory.

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

81. *Id.* at 621.

82. *Id.* at 622.

and opponents of state aid to religious institutions.[83] The conflict would follow religious lines, said the Court.[84] The Court seemed to have meant to argue that debate over parochial school funding would entail entanglement between church and state, and that this entanglement was unconstitutional because it produced divisive effects. The constitutional problem associated with divisiveness, the Court declared, was that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[85] The basis for this claim was a single citation to a sentence from an article by Paul Freund in the Harvard Law Review.[86]

Why would the Constitution have sought to avoid political division along religious lines? The Court had no clear answer. In a somewhat disjointed paragraph, the Court went on to say that political discussion of religion would "divert attention" from "other issues of great urgency."[87] It then suggested that religious influence on politics might lead to political influence on religion, and concluded that "[t]he history of many countries attests to the hazards of religion's intruding into the political arena."[88]

The claim that the Clause seeks to avoid religious divisiveness might be understood, in the slightly banal sense in which the Court qualified it, in a number of different ways. It could mean that religious debates in particular waste time. Or it could be seen as a somewhat tortuous extension of the concern that the state not impinge upon religious liberty. But there is a further way to understand the Court's inchoate sense that political divisiveness on religious lines amounted to a constitutional harm. In this concern for the divisive potential of public, political debate over religion, it is possible to hear an echo of Justice Frankfurter's concern in *McCollum* that release time led to an increased consciousness of religious difference among schoolchildren.[89] "Political division along religious lines" might be understood as one result of allowing children to experience religious difference in a sphere of civic education. On this reading, there is some

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83. *See id.*

84. *See id.*

85. *Id.*

86. *See id.* (citing Paul Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691-92 (1969)). Freund was not articulating a broad theory of the Clause. His claim was as much ipse dixit as the Court's. The cited line, in context, read:

> Ordinarily I am disposed, in grey-area cases of constitutional law, to let the political process function. . . . The religious guarantees, however, are of a different order. While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.

Freund, *supra*, at 1691-92.

87. *Lemon*, 403 U.S. at 623.

88. *Id.*

89. *See McCollum*, 333 U.S. at 228; *supra* Part I.B.

continuity between Justice Frankfurter's view in *McCollum* and the Court's suggestion here.

Nevertheless, Chief Justice Burger's claim that a principal purpose of the Clause was to avoid political divisiveness associated with religion, understood in its unqualified sense, marks a significant development beyond Justice Frankfurter's position in *McCollum*. Justice Frankfurter limited his argument about the deleterious effects of consciousness of religious difference to the context of the public schools, which were in his view intended to inculcate inclusive, not exclusive, lessons.[90] But *Lemon* involved state aid to religious schools, not manifestations of religion in the classroom.[91] For Chief Justice Burger in *Lemon*, the concern about the political divisiveness of religion did not relate to the experiences of schoolchildren, but to the broader public sphere. He argued that if the general public were to have to deal with matters of religion in a political way, this might produce divisiveness. It was thus his conclusion in *Lemon* that disagreements about religious matters might be particularly troublesome.

*Lemon* has never been overruled. Nonetheless, by common consensus, the *Lemon* test today is essentially moribund.[92] Perhaps the perceived inadequacy of *Lemon* has something to do with the relatively thin connection between the three-pronged test and an expressly articulated theory of the purposes of the Establishment Clause. Nonetheless, *Lemon* brought the court a step closer to the view that the Clause aims to guarantee the equality of religious minorities, not to protect the liberty of religious dissenters. By associating the Establishment Clause with the avoidance of political divisiveness in the public sphere, the Court had opened the door for a more thoroughgoing theory of the relationship between the Establishment Clause and equality.

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90. *See McCollum*, 333 U.S. at 231; *supra* Part I.B.

91. *See Lemon*, 403 U.S. at 606-10.

92. *See* Paula Savage Cohen, Comment, *Psycho-Coercion, A New Establishment Clause Test:* Lee v. Weisman *and Its Initial Effect*, 73 B.U. L. REV. 501, 501 (1993); Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 51 n.6 (1999); William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 543 (1998); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 512-13 & nn.57-58 (1999) (noting that *Lemon* has not served to overturn a law "in ten years, and at least five members of the Court think it should be replaced" and citing *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 399-400 (1993) (Scalia, J., concurring)).

## II

## EQUALITY TRIUMPHANT: THE ENDORSEMENT TEST AND ITS MOTIVATIONS

### A. *Lynch: Birth of a Theory*

Justice O'Connor first developed the endorsement test in her concurrence in *Lynch v. Donnelly*,[93] a 1984 case involving public manifestation of religion in the form of a Christmas display. She began with a bold statement of the purpose of the Establishment Clause: "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[94] She made no attempt to associate this claim with the Founders or their intentions. Instead, she presented the assertion as a method for making sense of the Court's Establishment Clause doctrine.[95]

Justice O'Connor made it clear that she intended to describe a new category of violation of the Clause, one hinted in, but not captured by, the language of earlier tests:

> The . . . more direct infringement [of the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[96]

Justice O'Connor proposed this theory as a strong rereading of the purpose and effect prongs of the *Lemon* test, which required that a challenged law have a secular purpose and primary effects that neither helped nor hindered religion.[97] According to *Lemon*, a state action must have a

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93. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

94. *Id.*

95. *Id.* O'Connor explained that there were "two principal ways" in which government might violate the purpose of the Clause. *Id.* The first she identified as "excessive entanglement" between government and religious institutions, "which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines." *Id.* at 687-88. The second way was by communicating endorsement or disapproval of religion. *Id.* at 691.

Justice O'Connor's invocation of the possible "creation of political constituencies defined along religious lines" resembled the notion of political divisiveness first described by Chief Justice Burger in *Lemon*. *Id.* at 688. But Justice O'Connor expressly rejected the idea that the creation of political divisiveness should be considered an independent test in Establishment Clause analysis. *Id.* at 689. Her reason for doing so was that such a measure was indeterminate: "Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise." *Id.* She granted, however, that "[p]olitical divisiveness is admittedly an evil addressed by the Establishment Clause." *Id.* But she saw preventing divisiveness only as an incident of the Clause's true purpose, not as a purpose in itself. "Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." *Id.* In other words, political divisiveness was simply a leading indicator of the presence of either of the "two principal ways" that the Clause might be violated.

96. *Id.* at 688.

97. *Id.*

secular purpose; according to Justice O'Connor, the way to understand this prong was to ask "whether the government intends to convey a message of endorsement or disapproval of religion."[98] *Lemon* also required a secular effect; the way to discover this, said Justice O'Connor, was to ask "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[99] Thus the endorsement test called for enquiry into both the subjective intention of the governmental "speaker" and the "'objective' meaning of the statement in the community."[100] If either endorsed religion, the Clause was violated.

In effect, then, Justice O'Connor proposed a purposive theory of the Establishment Clause that accounted for all three doctrinal pieces of *Lemon*. The purpose of the Clause was to make religion irrelevant to standing in the political community. This could be violated either by endorsement of religion (the *Lemon* purpose and effect prongs) or by excessive entanglement (the third *Lemon* prong). Justice O'Connor herself restated this theory with vigor in her *Allegheny County* concurrence, where she said that

> As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message "that religion or a particular religious belief is favored or preferred."[101]

### *B. Endorsement and the Post-War Development of the Clause's Purposes*

Justice O'Connor's view of the "essential command of the Establishment Clause"[102] belongs in the context of post-War developments in the theory of the Clause in three senses. First, the endorsement view of the Clause disconnected the Clause from the idea of liberty of conscience more than any other view of the Clause that had emerged since *Everson*. While political divisiveness concerned Justice Frankfurter in *McCollum*, so did the coercion of the consciences of the young.[103] *Engel*, on which *Lemon* relied, took the view that coercion was not necessary for an Establishment Clause violation, but nonetheless harked back to the history of religious persecution and invoked liberty of conscience in that context.[104] In contrast, the endorsement test in no way turned on, related back to, or invoked any

98. *Id.* at 691.
99. *Id.* at 690.
100. *Id.*
101. County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring).
102. *Id.*
103. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 227-28 (1948) (Frankfurter, J., concurring); *supra* text accompanying notes 53-54.
104. *See* Engel v. Vitale, 370 U.S. 421, 430-32 (1962); *supra* text accompanying note 77.

concern for liberty of conscience. Thus, if *Everson* began the turn away from liberty of conscience by subordinating concern with conscience to concern with persecution, and if *Engel* and *Lemon* further attenuated the importance of liberty of conscience by disconnecting the Clause from coercion, the endorsement test completed the process by severing the Establishment Clause completely from its connection to liberty of conscience. The endorsement theory can thus be understood as continuous with a tendency in the post-War years to distance nonestablishment from the eighteenth-century idea that was so crucial to its birth.

Second, the endorsement theory built upon a shift in focus in the post-War cases from the religious aspect of the dissenter's conscience to the political aspect of the minority's experience. While the eighteenth-century liberty of conscience theory of the Establishment Clause looked to the effect of establishment on the freedom of the dissenter to maintain his religious beliefs,[105] under the endorsement test the Clause prevented the religious beliefs of religious minorities from affecting their equal political standing. The primary concern of the endorsement theory was therefore not the religious content of the dissenters' experience, but rather the political content of minorities' experience.

One can see the beginnings of this shift from a focus on dissenters' religious conscience to minorities' political experience in both *McCollum* and *Lemon*. In *McCollum*, Justice Frankfurter expressed concern with the divisiveness that religious minority schoolchildren would experience.[106] The divisiveness seemed particularly troubling because it occurred in public schools, which Frankfurter saw as a venue aimed at cultivating membership in the political community.[107] In other words, the lesson of divisiveness that Justice Frankfurter thought minority children should not learn related to their political status: in an environment devoted, in part, to educating students to participate in the political community, an emphasis on religious difference and exclusion might lead, in the long run, to a feeling of political difference and exclusion as well. From this perspective, one problem with the release time was that it might bring religious difference to bear on subjective political experience, not vice versa.

The endorsement test extended this concern with subjective political experience to adults by noticing that it need not be limited to the formative years in the classroom, but could be directly relevant in the public square as well. If the political sphere generally were thought to be an environment for the inculcation of inclusiveness, then it would be dangerous to emphasize religious difference in that sphere, because this might contribute to a feeling of political exclusion. In this sense, the endorsement theory stems

105. *See* Feldman, *supra* note 7.

106. *See McCollum*, 333 U.S. at 228; *supra* Part I.B.

107. *See McCollum*, 333 U.S. at 231; *supra* text accompanying note 55.

from a concern very similar to that suggested in *McCollum*.[108] Government must avoid endorsing religion because to do so would affect the political experience, not the religious experience, of religious minorities.

Similarly, the endorsement test built upon Chief Justice Burger's concern in *Lemon* that the state should not encourage the relationship between political identity and religious identity.[109] In *Lemon*, Chief Justice Burger expressed at least a passing concern for divisiveness in the general political realm, and suggested that religious differences should not be the determinants of political difference.[110] Such a concern resurfaces in O'Connor's concurrence in *Lynch*. Although Justice O'Connor did not go so far as to say that it was per se wrong for religious difference to map to political difference, she did argue that the state should not be in the position of telling dissenters that there was some association between belief and political standing.[111]

Third, and most importantly, the endorsement theory completed a sea change from a liberty-based view of the Establishment Clause to an equality-based view. By focusing on the subjective experience of religious-minority children in *McCollum*,[112] Justice Frankfurter opened the door to the equality issue. His concern for divisiveness reflected the possibility that children in the minority might be made to feel unequal. While *Lemon* did not significantly expand the equality view, it did move the concern about divisiveness into the public sphere. Once the public sphere became the locus of the debate, Justice O'Connor could develop the view that the very purpose of the Clause was to guarantee that religious minorities would not feel like disfavored political outsiders.

Although Justice O'Connor did not directly use the word "equality" in formulating the endorsement test, the ideal of equality fundamentally underlies her view that the Clause bars the state from making religion "relevant to political standing." Sending a message of favoritism or preference is wrong precisely because it detracts from the experience of equal political participation by minority and majority alike. Insider and outsider status are wrong because they are differentially distributed. In a good political society, everyone feels equally like an insider. Thus to the question,

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108. *See McCollum*, 333 U.S. at 231; *supra* text accompanying note 55.

109. The endorsement test, of course, leaves open an escape hatch: if individuals wish to make religion relevant to their own political identities, nothing in the Establishment Clause bars them from doing so. The Establishment Clause only says that the state must not create this association. But the *Lemon* view of the danger of political divisiveness on religious questions permits this same free-association escape hatch. What is more, neither view would make very much sense if one thought that it was likely or desirable that religions dissenters would frequently make their religious views the basis for their political views. If it were so, then it would be pointless to stop the state from drawing attention to this phenomenon.

110. *See Lemon*, 403 U.S. at 621-22; *supra* text accompanying notes 82-85.

111. *See Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

112. *See McCollum*, 333 U.S. at 227-28 (Frankfurter, J., concurring).

why separate church and state, the endorsement test offered an equality-based answer: Alliances between church and state create different, unequal classes of political citizenship, favored insider and disfavored outsider.

### C. *Endorsement Triumphant*

The ideal of equality proposed by Justice O'Connor proved attractive; in the years that followed, it became the most important mode of Establishment Clause analysis. Five years after Justice O'Connor developed the endorsement test, the Court, in *County of Allegheny v. American Civil Liberties Union*,[113] adopted a version of the endorsement test.[114] Justice Kennedy, however, in a separate opinion joined by Chief Justice Rehnquist and Justices Scalia and White,[115] rejected the endorsement test. He argued that coercion must be the touchstone of Establishment Clause analysis,[116] and he defined coercion broadly enough to include symbolic displays so blatant as to constitute "an obvious effort to proselytize on behalf of a particular religion."[117]

Notwithstanding the *Allegheny County* dissenters' rejection of the endorsement test in 1989, it appears today that every member of the Court has now accepted the test. In *Santa Fe Independent School District v. Doe*,[118] an opinion studded with references to endorsement, the Court struck down the practice of having a student-led prayer before Texas high school football games.[119] Justice Kennedy joined the Court's opinion,[120] and even Chief Justice Rehnquist's dissent, joined by Justice Scalia and Justice Thomas, did not argue that endorsement was an inappropriate test. Instead, Rehnquist claimed that the prayer in question did not amount to an endorsement of religion.[121] The pervasive references to endorsement by both majority and dissent in *Santa Fe* strongly suggest that the Court has now fully adopted the endorsement test as a measure of constitutionality under the Establishment Clause.[122]

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113. 492 U.S. 573 (1989).

114. *See id.* at 593-94 ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'")

115. *Id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

116. *See id.* at 659-63.

117. *Id.* at 661 (citations omitted).

118. 530 U.S. 290 (2000).

119. *See id.* at 316 ("Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."); *id.* at 308.

120. *See id.* at 290.

121. *See id.* at 318, 322, 323 n.4, 324 (Rehnquist, C.J., dissenting).

122. An earlier case in which all the opinions—plurality, concurrence, and dissent—applied the endorsement test was *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). Justice Scalia's opinion, which discussed endorsement, was for a plurality of the Court; Chief Justice Rehnquist and Justices Kennedy and Thomas joined. *See id.* at 763-70 (plurality); *id.* at 772-83

Although the endorsement test developed in the branch of Establishment Clause jurisprudence that dealt with public manifestations of religion, the Court has expanded the test beyond such situations. The Court has also used the endorsement test to decide a series of cases that relate to state support of religious activities and institutions. The first of these cases was *Lamb's Chapel v. Center Moriches Union Free School District*,[123] which involved the use of school facilities by a religious organization.[124]

The Court in *Lamb's Chapel* had to decide the constitutionality of a school district's policy of opening its facilities to a range of secular activities, but not to religious activities.[125] The school district argued that permitting the religious activities might violate the Establishment Clause.[126] Although the Court purported to apply the *Lemon* test to the Establishment Clause issue,[127] it framed the issue in terms of endorsement, holding that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed."[128] Justice Kennedy concurred separately to draw attention to this use of the endorsement test and to express his continuing view that the endorsement test "cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence."[129]

In *Rosenberger v. Rector and Visitors of University of Virginia*,[130] decided two years after *Lamb's Chapel*, the Court again applied the endorsement test, this time in the course of holding that the Establishment Clause was not violated by the use of a state university's student activities fund to support the speech of a proselytizing religious student organization.[131] With Justice Kennedy writing, the Court split the difference between the

(O'Connor, J., concurring in part and concurring in the judgment); *id.* at 797-815 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting).

123. 508 U.S. 384 (1993).

124. *See id.* at 387-89.

125. *Id.* at 387 n.2, 392 n.5.

126. *Id.* at 394.

127. *Id.* at 395 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

128. *Id.* The Court in *Lamb's Chapel* analogized the case to the earlier, pre-endorsement-test case of *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court had held that a state university had to permit religious organizations to make use of its facilities once the university had made those facilities generally available to student groups. *See Lamb's Chapel*, 508 U.S. at 384, 387-89 (citing *Widmar*, 454 U.S. at 271). To reach this conclusion, the *Widmar* Court had applied the then-prevalent *Lemon* test. *Widmar*, 454 U.S. at 271-73. It reasoned that making school facilities generally available had a secular purpose and did not create entanglement with religion. *Id.* at 271-72. The Court also concluded that making the facilities available to religious groups alongside others would not have the primary effect of advancing religion: There was no government "imprimatur" when the religious groups would use the facilities alongside every other student group, and the existence of a broad spectrum of groups proved "secular effect." *Id.* at 274, 277.

129. *Id.* at 397 (Kennedy, J., concurring in part and concurring in the judgment) (citing County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

130. 515 U.S. 819 (1995).

131. *Id.* at 841-42.

endorsement test and Justice Kennedy's preferred coercion test, stating that "there is no real likelihood that the speech in question is being either endorsed or coerced by the State."[132] Justice O'Connor concurred to insist that the funding in question did not amount to an endorsement of religion, but merely represented a policy of "neutrality" toward religion.[133]

Most recently, in *Good News Club v. Milford Central School*,[134] yet another case involving use of public school facilities for religious purposes, the Court once more adverted to the endorsement test in holding that there was no Establishment Clause violation.[135] But this time the Court went even further than before. The Court acknowledged that there was some chance that students might perceive use of the facilities as an impermissible endorsement of religion.[136] But the Court did not think that the risk "that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the [religious] Club were excluded from the public forum."[137] Thus, for the first time the Court saw the need to balance the danger of perceived endorsement against the danger of perceived hostility.

The Court's balancing of endorsement of and hostility to religion in *Good News Club* represents a fascinating development because it shows how political equality has grown into the paramount Establishment Clause value. Hostility towards religion would, presumably, convey a message of exclusion to religious persons that might violate their political equality. The *Good News Club* Court took the position that, since political equality is the goal of the Clause, it would make no sense to find that the Clause prohibits use of government facilities in a situation where this prohibition would itself create perceptions of political inequality.[138] This original argument represents yet another step toward the dominance of the political-equality theory of the Establishment Clause.

As the *Lamb's Chapel* line of cases illustrates, the shift from liberty to equality is now essentially complete. By the early 1990s, the endorsement test had become "the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community."[139]

132. *Id.*
133. *Id.* at 846, 850, 852 (O'Connor, J., concurring).
134. 121 S. Ct. 2093 (2001).
135. *Id.* at 2106.
136. *See id.*
137. *Id.*
138. *See id.*
139. Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring).

### D. Why Endorsement?

If the endorsement theory in fact supplanted the liberty of conscience theory, it would be worthwhile to know why. Three questions lead the way to an answer: Why did the liberty of conscience theory decline? What historical conditions make political equality especially attractive now? What theoretical features of the political-equality approach are particularly appealing to the contemporary Court?

First, is there any obvious explanation for the decline of liberty of conscience in the context of the Establishment Clause? The answer may lie in the fact that liberty of conscience remains a vital basis for the Free Exercise Clause.[140] One possible explanation for the diminished role of liberty of conscience in Establishment Clause doctrine is that the Free Exercise Clause has essentially occupied the field.[141] As free exercise has come to be understood both to permit individuals to pursue their religious actions unmolested, and to protect them from coercion that would require them to perform other religious actions, the concept of free exercise has crowded out the concept of nonestablishment by taking over its original function.[142] Today, any case involving coercion of conscience could probably be brought under the Free Exercise Clause.[143] If the Free Exercise Clause covers all the cases of liberty of conscience, this suggests to the lawyerly mind that the Establishment Clause must do something else so as to avoid redundancy; the purpose of the Establishment Clause must lie in whatever that something else is.[144] The turn away from liberty of conscience can thus be explained in part by the Free Exercise Clause swallowing liberty of conscience.[145]

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140. *See* McConnell, *supra* note 10, at 1480.

141. Indeed, this is the express view of STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1994), who maintains that all the individual liberty rights conferred by the religion clauses derive solely from the Free Exercise Clause. This leaves the Establishment Clause free to mean something else: for Carter, the protection of states from federal intervention. For a detailed historical refutation of this view, see Feldman, *supra* note 7.

142. At least since *Engel*, the Court has stated that a Free Exercise Clause violation requires coercion, but that an Establishment Clause violation does not. Engel v. Vitale, 370 U.S. 421, 430 (1962). Because liberty of conscience is a right one holds against state coercion, the natural effect of this argument might be to dissociate the Establishment Clause from liberty of conscience altogether.

143. *Cf.* Scott J. Ward, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739 (1989) (noting tendency to collapse Establishment Clause into Free Exercise Clause and proposing that the former is a collective version of the latter).

144. The "something else" is typically thought to be structure, or the protection of the rights of the states. *See* AMAR, *supra* note 21, at 227-35.

145. Notice that the idea of liberty of conscience has never disappeared from the jurisprudence of the Free Exercise Clause, but to a great extent faded from the jurisprudence of the Establishment Clause. The latter phenomenon deserves its own explanation and analysis precisely because this significant change in constitutional ideas occurred alongside the Free Exercise Clause, which provides a model of relative continuity in constitutional thought. This Article focuses on the Establishment Clause largely in isolation from the Free Exercise Clause because the transformation occurred in one regime, but not the other.

Second, is there any explanation for the shift of the Establishment Clause towards a focus on the experience of equal political citizenship, rather than the protection of religious conscience? Here several possible causes seem to have interacted.

The first and most basic factor in the rise of political equality in the Establishment Clause context must surely be the emergence of equality as a dominant constitutional value in the post-War years.[146] The core reason for the rise of equality over liberty is certainly the prominence of racial inequality as the single most important challenge to the American constitutional order since World War II. In the endorsement theory, concern with the particular position and experience of minorities transferred from the context of race to that of religion. Endorsement of religion, on this analogy, resembles government endorsement of whiteness.

One central theme of *Brown v. Board of Education*[147] was that governmentally imposed segregation violated equal protection because it conveyed a message of White superiority and Black inferiority.[148] The Court in *Brown* even suggested, in a much-discussed footnote, that this message had affected the self-perception of African American children.[149] The core of this theme was, then, that equal protection was violated not only by practical distinctions between treatment of Whites and Blacks, but by the symbolic content of discrimination in conveying a message of political inequality.[150] Segregation, in this view, conveyed the message to African Americans that they were not full and equal members of American society. *Brown* could be reread to mean that the state must not tell Blacks that they are "outsiders, not full members of the political community, and an accompanying message to . . . [Whites] that they are insiders, favored members of the political community."[151]

There can be little doubt that this argument about why the Constitution prohibited segregation influenced the development of the endorsement theory by providing a paradigm of the kind of exclusionary messages that had negative effects in the political sphere. If it was unconstitutional for the state to endorse, in a sense, the majority race, it was plausible to argue that the state also violated the Constitution when it endorsed the majority religion.[152] Of course, the historical bases for the two claims

146. *See* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1104 (1996).

147. 347 U.S. 483 (1954).

148. *Id.* at 493-94.

149. *Id.* at 494 n.11.

150. *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976).

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

152. Kenneth Karst has explicitly associated racial exclusion with religious endorsement. *See* Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 512 (1992).

were rather different. The Equal Protection Clause had been aimed at pre-existing racial inequality.[153] It was part of a set of Reconstruction Amendments explicitly intended to rectify the political exclusion of African Americans and to permit them to act as full political participants.[154] The Establishment Clause, however, lacked a prominent historical relationship to equality or political exclusion.[155] What it had in common with the Equal Protection Clause was only that it protected religious dissenters, and, to this degree, protected minorities. By shifting the focus from the protection of religious dissenters' religious liberty to protection of religious minorities' political participation, the endorsement theory transmuted the concerns of the Establishment Clause into a form much more easily recognizable to post-War constitutional discourse.

The paradigm of race, then, likely provides the best explanation for the rise of equality as an explanation for the Establishment Clause. But why political equality in particular? Racial discrimination made African Americans into second-class citizens both politically and socially. The racial paradigm would extend to all sorts of exclusion and inequality, not merely political inequality. Yet the line of thinking about the Establishment Clause, from *McCollum* to *Lemon* to *Lynch*, consistently tended to emphasize the political dimensions of inequality or divisiveness in the content of religion.

The second factor in the rise of political equality in the Establishment Clause context explains this focus on the political aspect of religious equality: the endorsement theory corresponded to the political process constitutional theories that were born following World War II. Constitutional theories after the War interpreted the goals of the Constitution as facilitating the political process. John Hart Ely's theory of constitutional rights,[156] which developed and sought to justify post-War attempts to give life to *Carolene Products* footnote four,[157] exemplifies this tendency. Ely's theory grounded purposive analyses of constitutional provisions in the argument

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> In the generation of lawyers that has so decisively repudiated Jim Crow, two lessons are clear.... First, governmental expression has a considerable capacity to alienate outsiders. Second[,]... this form of alienation is, in itself, a harm of major proportion. When government sponsors the symbols of religion, the spoils... are mainly psychic.

*Id.*

153. *See* Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2004-07 (1999).

154. *See id.*

155. Philip Hamburger has shown that the Framers were indeed concerned that the rights of conscience be protected "equally." *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295 (1992). But the Framers' concern for equality of conscience expressed itself primarily in the Religious Tests Clause of the Constitution, not in the Establishment Clause. *See* Feldman, *supra* note 7.

156. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

157. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 156, at 75-77.

that the Constitution was best understood as a mechanism for allowing the different participants in American political life to express their preferences in an environment as neutral as possible with respect to their particular values.[158] The Constitution could be understood, in this view, to have only one central procedural value: facilitating the expression of substantive value-choices through discussion and democratic choice. Liberal limitations on the power of the majority, enforced by the Supreme Court, were justifiable to the extent that they protected full political participation.[159]

One can understand the concentration on political equality that culminated in the endorsement theory as the product of similar impulses.[160] The question in Establishment Clause cases can nearly always be posed as: On what basis should the courts strike down a democratic enactment? To this countermajoritarian formulation[161] of the archetypal Establishment Clause case, the endorsement theory offers an answer: Courts should overrule democratic enactments concerning religion when they would have the effect of disadvantaging citizens in their political participation by rendering their religious affiliation relevant to their political standing. The endorsement theory thus fits comfortably into an Ely-style resolution of the difficulty and the justifiability of countermajoritarian judicial intervention.

This observation leads to a third factor involved in the emergence of an equality-based view of the Clause, a factor that combines the gravitational pull of race with the theoretical power of political-process arguments. The equality-based argument about the purposes of the Establishment Clause played into the post-War concern with the political status and subjective experience of minorities in the political sphere. The endorsement theory seems to presume that what is particularly exclusive about the message of endorsement is that it reminds dissenters that they are in the minority with respect to religion.[162] One can understand, then, that a

158. ELY, *supra* note 156, at 89-104.

159. Harry Kalven's theory of free speech may be taken similarly. For Kalven, the value of free speech lies in facilitating democratic discourse necessary for political action. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988).

160. *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (arguing that Free Exercise Clause proteetion is best understood in terms of protecting vulnerable groups rather than privileging particular acts or beliefs).

161. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

162. To see how this is so, imagine that the government of California issued a statement endorsing just one minority religion, say Tibetan Buddhism, or funded an address by the Dalai Lama on expressly religious themes without funding similar addresses by representatives of other religions. Would this endorsement convey "a message to nonadherents of Tibetan Buddhism 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?" It is difficult to see how the great majority of Californian Christians would, in this circumstance, have the experience of feeling that religion had been made relevant to their standing in the political community. The feeling that one's religion is relevant to

contemporary writer could declare that "[t]he purpose of the... Establishment Clause specifically, is to protect minorities from raw majoritarian impulses."[163]

Ely's emphasis on political participation was not at all a necessary interpretation of the exclusion rationale of *Brown v. Board of Education*. *Brown* might have been read to say that segregation is unconstitutional simply because it makes African Americans feel they are an oppressed minority, not because it makes them feel excluded politically.[164] But Ely expressly rejected this reading of *Brown*,[165] because one important aspiration of his theory of constitutional rights was to justify *Brown* against the charge that it was insufficiently grounded in neutral principles.[166] The introduction of the political process into the calculus enabled Ely to argue that the desegregation decision actually served the interest of the democratic process even as it overturned specific democratically chosen enactments.

This same move may be identified in Justice O'Connor's formulation of the endorsement theory. Justice O'Connor could have argued that the Establishment Clause protects religious minorities simply from feeling that they are oppressed. But this argument would likely have met the objection that the purpose of the Clause could not have been merely to protect feelings.[167] By introducing minorities' equal political standing into her test, Justice O'Connor invoked a clear constitutional purpose that had more grandeur and justifiability than the simple protection of dissenters from being reminded that they were, in fact, minorities.

The final question that must be answered to fully understand the rise of the endorsement test is: Why did endorsement replace the *Lemon* test? The great advantage of the endorsement over the *Lemon* test is surely that the endorsement test turns on a coherent theory of what the Establishment Clause is meant to do.[168] The endorsement test at once explains and replaces the purpose and effect prongs of the *Lemon* test, which do not, on their own, provide a theoretical justification for the Clause as a whole. Without a theory attached, the *Lemon* purpose and effect prongs simply

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one's political standing seems to derive from the situation in which the state reflects the preferences of the majority in endorsing one religion or religion generally.

163. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171 (1996).

164. *See* ELY, *supra* note 156, at 150.

165. *Id.* at 150-51.

166. The most influential version of this critique was Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Charles L. Black, Jr., *Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

167. *Cf.* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 220, 232-33 (1948) (Jackson, J., concurring).

168. The endorsement test also has the added benefit of compatibility with process-oriented constitutional thought and with a rise in concern for the subject position of minorities.

state the requirements for secularism, without explaining why secularism is desirable. Indeed, Justice O'Connor presented the endorsement test as an interpretation of the purpose and effect prongs of *Lemon*.[169]

## III

## DOES POLITICAL EQUALITY WORK FOR THE ESTABLISHMENT CLAUSE?

Parts I and II of this Article showed how, over the space of half a century, the Court came to regard a provision of the Constitution designed and understood to protect religious liberty as a guarantor of equality. This Article now evaluates the consequences of the transformation. Put simply, is the transformation of the Establishment Clause desirable or not? Does the political-equality justification for the Establishment Clause satisfy the goals that it sets for itself? Can guaranteeing political equality to religious dissenters function usefully to produce coherent, defensible judgments about the range of constitutional questions arising under the Establishment Clause?

To these questions, this Article answers no. The reliance on political equality to answer Establishment Clause questions is not justified. Proving this position requires several steps. The first step is to figure out what, exactly, is the harm associated with the endorsement test. Identifying and delineating the nature of the harm that the endorsement test seeks to prevent will enable an analysis of whether that harm is especially deserving of protection. In Part III.A, I argue that the harm consists not solely in the mere feeling of exclusion associated with the state's endorsement of religious beliefs other than one's own, but, rather, in the actual, practical consequences of diminishing the equal exercise of political self-determination. In Part III.B, I distinguish two kinds of exclusion that might lead to a diminution in political equality: substantive exclusion and identity exclusion. I argue that, according to the endorsement theory, the Establishment Clause protects against identity exclusion, not substantive exclusion.

The second step in evaluating the political-equality justification for the Establishment Clause lies in answering the question, "why religion?" Is there anything special about religion that merits the constitutional requirement of political equality? The Establishment Clause, unlike the Equal Protection Clause, never refers to equality. The endorsement test nonetheless seeks to introduce an equality justification for the Establishment Clause. It follows that the theory associated with the endorsement test should be able to explain the connection between political equality and religious minorities. Parts III.C-D consider and reject several arguments about why religious minorities in particular require protection along the axis of political equality.

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169. *See supra* text accompanying notes 96-100.

### A. Actual Political-Equality Harm and the Feeling of Exclusion

The first step in assessing the usefulness of political equality as a touchstone of Establishment Clause analysis is to discern the harm suffered by members of religious minorities when the state "endorses" religion. What harm occurs when government communicates the message that one religious group is favored and another disfavored? I argue that the harm must be not simply a feeling of exclusion, but rather an actual reduction in political equality. To begin with, the harm, it would appear, has something to do with citizens' perceptions and subjective experiences. The trouble with endorsement is that it "sends a message"[170] to the favored and the disfavored groups alike.[171] Thus the harm to equality that the Clause seeks to avoid must be some harm that emerges from citizens' interpretation of the meaning of state action. Once the citizens have interpreted the state's message, the endorsement theory assumes that their interpretation will affect their perceptions of their relationship to the polity. They will feel like "favored insiders"[172] or disfavored "outsiders."[173] They will feel, that is, like first-class citizens or second-class citizens.[174]

To specify the content of feeling like a first-class or second-class citizen, imagine a case where government intentionally endorses the majority religion. Suppose the California legislature votes to hang a permanent and opulently expensive sign on the state-house door declaring that "All Good Californians are Christians."[175] If this is not endorsement, nothing is. What is the harm to, say, Californian Muslims?[176]

To begin with, Californian Muslims themselves almost certainly reject the idea that they cannot be both good Californians and Muslims. If the sign causes them harm, it must be because the state is telling them otherwise. Why should it matter that the state is telling Muslims that they cannot be good Californians? Perhaps it is because we think the State of California has something special to say about what makes a good Californian. Another possibility is that the state has no special status in this regard;

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170. Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

171. For a thorough and subtle treatment of the complex issues surrounding the ideas of the state as a collective agent and expressive harm, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503, 1520-31 (2000). They discuss the endorsement test at 1545-51.

172. *Id.*

173. *Id.*

174. *Cf.* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1389 (2000) (discussing endorsement in terms of second-class citizenship).

175. *Cf.* Friedman v. Bd. of County Comm'rs of Bernalillo County, 781 F.2d 777 (10th Cir. 1985) (Latin cross on official county seal); ACLU of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) (cross erected in publie park); Lowe v. Eugene, 451 P.2d 117 (Or. 1969) (same).

176. Eisgruber & Sager, *supra* note 160, at 1282-1314 (1994), adopts a similar thought experiment, but draws different conclusions.

rather, we ideally would like no one to utter such statements, and it so happens that we can only control the utterances of the state. Under either view, the core of the harm is that the state is creating conditions under which people seeking to realize their lives as Muslims and as Californians will face messages saying that it cannot be done.

Notice that the message, taken alone, has no effect; the sign itself does not directly stop anyone from being both a Muslim and a good Californian. The sign will disturb us only if we think it has some actual effect in the world.[177] That effect could be direct. For example, the sign might make the Muslim feel that there are serious attitudinal obstacles that he must overcome to be a full Californian.[178] The effect could also be indirect. The Muslim might laugh at the sign, but if Californian Christians see the sign and get the message that they are favored insiders, they may ignore Muslims in political debate or mistreat them in other ways that have political effects.

The crucial point is that the harm associated with the sign is its contribution to or creation of background conditions that impede Muslims' equal capacity to realize political lives as Muslims and Californians.[179] To say

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177. Thus, if we believed that the mere fact of government endorsement would not lead to reduced political equality, this would be a reason not to consider endorsement constitutionally troubling. *Cf.* Adler, *supra* note 174, at 1447. Adler observes:

> [T]he semantics of some governmental utterance are not equivalent to its status (or more broadly its cultural) impact. Government endorses religion when it invokes a particular linguistic convention; it changes a person's status when it changes the prevalent beliefs about his inferiority or equality, or the prevalent treatment of him motivated by beliefs about his inferiority or equality, or the beliefs or treatment that are appropriate pursuant to existing social practices. The two are as different as, in general, law and social norms are. A governmental action with the linguistic meaning constitutive of endorsement is neither necessary nor sufficient to cause status harm to the nonbeliever—to damage his standing as a full member of the political community.

*Id. See also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 306 (1987) ("[A] law diminishing or elevating the political standing of citizens on religious grounds *might* also endorse or disapprove of religion, and vice versa. But those consequences of such a law are practically and analytically distinct.").

178. The problem will be intensified if the Muslim also feels that the state has violated the Clause in posting the sign. This, in fact, is a very popular demotic understanding of the endorsement theory and the Clause. Some Jews, for example, might feel excluded by a Christmas tree, not because they themselves experience the tree as religious, but because they think that the display flouts the Establishment Clause. It is the constitutional violation, they might say, that makes them feel excluded. Of course this puts the cart before the horse: on the endorsement theory, the violation arises because exclusion occurs, not vice versa. But this problem of reeursivity is not present in Justice O'Connor's formulation of the theory.

179. *Cf.* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 374 (endorsement test aims "to avoid feelings of exclusion and dominance"); Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 469 (1993) (endorsement test "prohibits the federal and state governments from subverting a citizen's status in the political community because of his or her creed or lack of religious commitment"); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1051, 1069 (1986) (arguing that the

that the Establishment Clause prohibits this harm is to say that the Clause aims to stop the state from creating conditions that would impede the equal ability of religious dissenters to realize their political lives.

Inequality, on this model, is more than just feeling. The sign causes harm precisely because it creates a hierarchy of political citizenship where none existed before. This newly created political hierarchy places new obstacles in the way of the Californian Muslim. The harm is not that the Muslim is made to feel bad about being a member of a religious minority.[180] Rather, the experience of political exclusion on the basis of one's religious identity constitutes a real harm because it has practical consequences for democratic participation.[181]

The ultimate goal of preventing endorsement, then, must be to permit minorities to act freely in the political sphere, without facing the burden of feeling specially excluded. Minorities should be able to realize their political membership without facing the barrier of feeling excluded from the political process. The feeling of political exclusion is real and powerful even if there are no formal legal barriers to political participation in place, because it makes the minorities feel like nominal members of a governmental regime to which they do not fully belong. By eliminating endorsement, the Establishment Clause facilitates minorities' participation as active subjects of democratic action.

### *B. Substantive Exclusion and Identity Exclusion*

According to the endorsement test's theory, then, the Establishment Clause forbids government from endorsing religion because such endorsement will impede the political self-realization of religious minorities. Later in this Part, I argne against the endorsement test, by claiming that political self-realization does not require special protection. To do so, I first need to refine our understanding of this harm, by distingnishing between two different types of exclusion.

There are at least two types of exclusion that one might feel when government endorses someone else's religion. The first type goes to the substance of the religious minority's views. If I am a Catholic and the state

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endorsement test "is well suited to preventing successful government attempts, whether subtle or overt, to impose a 'badge of inferiority' on our religious minorities").

180. Members of religious minorities frequently do not feel bad about the simple fact of minority status. In fact, minority status can be a point of pride. *Cf. Deuteronomy* 7:7 ("The Lord did not set his love upon you, nor choose you, because ye were more in number than any people; for ye were the fewest people of all people . . . .").

181. This interpretation of the endorsement test offers an answer to the claim that harms of endorsement can only exist where other, nonexpressive constitutional harms exist. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 150-51 (1992). The harm of endorsement is not purely expressive in the seuse of being purely psychic harm. Rather, the harm of endorsement is the actual reduction in political equality that results from the psychological impact of the endorsement message on favored and disfavored citizens alike.

endorses evangelical Protestantism, I may, for example, feel marginalized because I suspect that my Catholic belief that capital punishment is wrong will lose to some general evangelical Protestant preference for capital punishment. Similarly, a Jew living in a town that has embraced Catholicism may worry that when the life of a mother and her fetus are at odds, the polity will follow the Catholic teaching of favoring the fetus' life over the mother's, contrary to the Jewish tradition. The religious minority, in this model, feels excluded because the endorsement of religion signals a judgment that, in general, government will likely favor the substantive views of the religious majority. Call this type of exclusion "substantive exclusion."

The second type of exclusion that a member of a religious minority might feel goes not to the substance of his religious views, but to his identity. The Catholic in a Protestant town may feel excluded because endorsement sends him the message that Protestants are the "insiders"[182]: they will be elected to office, their voices will count for more in public debate, and they will generally do what they can to dominate the power structure. Similarly, the Jew in the Catholic town may feel that his minority status has been made an issue in the political sphere, and that this either presages or instantiates Catholic domination of the political apparatus. This may have the incidental effect of leading to a greater implementation of Catholics' views, but this is a secondary effect of their domination, and not what primarily excludes the minority. Call this type of exclusion "identity exclusion."

The endorsement theory is only concerned with preventing identity exclusion, not substantive exclusion. It provides no protection against a feeling of marginalization associated with the likelihood of substantive political defeat. To see why this is so, compare the first sort of marginalization, related to substantive beliefs, with the experience of anyone who holds strong views on a range of subjects and discovers that he is in the minority with regard to those subjects. The civil libertarian living in a law-and-order town may see the sign over city hall announcing "A law-and-order kind of place"; this will lead him to conclude that he is going to lose many battles over the scope of civil liberties there. His voice will be marginalized along the lines of the substance of his views. But this substantive exclusion, we recognize immediately, is part of the inevitable structure of democratic politics. The state sometimes expresses substantive views by endorsing them, and this tells dissenters they are at the margins politically. Yet this is not the sort of exclusion with which we are generally concerned. To be a regular loser in the political sphere is different from being a second-class citizen.

The civil libertarian's exclusion in the law-and-order town differs, however from identity exclusion. The civil libertarian knows he is a

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

citizen, just like the law-and-order folks. He will not feel excluded as a member of a group in the same way as the Catholic in the Protestant town or the Jew in the Catholic town. Their exclusion is based on their membership in a particular religious group, or more precisely, their nonmembership in the religious group that has been endorsed. This exclusion has a different character than the common run of political exclusion of those whose views differ from the majority. The reason inheres in the structure of democracy, which the endorsement theory presumably does not mean to disturb: substantive minorities lose elections and do not get special protections. Identity minorities, on the other hand, may be legally or constitutionally protected against group-based exclusion. It is to this second, group-based exclusion that the endorsement theory must mean to direct itself.

Thus, the Clause cannot protect the religious minority against the feeling of exclusion occasioned by the recognition that a religious majority, to which he does not belong, wields political power. In such a situation, where political parties have been organized along religious lines, the minority member's position as a religious minority may place him in the position of being a political minority, as well. But this recognition of minority status cannot be the harm the Clause seeks to avoid, because it is inevitable in any majoritarian democratic regime. The purpose of the Clause is surely not to shield the minority from the mere fact that he is a member of a minority group. Reminding someone of a demographic fact should not be understood to affect that person's political standing. A census report, based on data gathered by the state, that reports the percentage of Muslims in California should not be understood to convey to Muslims a sense of political exclusion. This is true even though, as a matter of political reality, the census results may well lead the Muslim to a deeper awareness of exclusion from political power.

Put differently, under the endorsement test, the Establishment Clause specifically protects the minority against a symbolic diminution of his political equality. The Clause does not protect the minority from all situations in which belonging to a religious minority means that one will experience a certain degree of exclusion. So long as the religious majority does not use government to endorse its religion (for example, by formally allying its religious institutions with the state), the majority may generally, under the endorsement test, deploy its political power in accordance with its religiously-specified political preferences.

Similarly, the Clause will not prevent members of the majority from using their control of the state to serve ends that reflect their values. Because the religious dissenter may not share these ends, he may see the religious majority appropriating the wealth and power of the state. Seeing this happen may make him feel excluded. Imagine that the religious

majority believes that charity to the poor is a religious good, and so enacts a law through which the state promotes charity. The religious minority (who, let us imagine, thinks that charity has no religious value unless it is given voluntarily) will know perfectly well that the religious majority has mobilized to use the state to serve its particular religious end. The minority may even feel, correctly, that he has lost this battle because of his religious views. But this loss has not in any direct way made the minority's religion "relevant to [his] standing in the political community,"[183] and under the endorsement test, the Establishment Clause has not been violated. It is perfectly common for religious majorities to use substantive values to inform their political choices, and the endorsement test provides no protection against such an outcome.

In each of these situations, the exclusion sensed by the religious minority will be no different than that of anyone who loses a political fight because the majority accepted an ideology different than hers. It is true that the ideology in question is, by hypothesis, a religious ideology. But unless we conclude, along with certain secularist liberals,[184] that religious arguments ought not enter the public sphere, this consequence of losing a religiously informed fight will be a common occurrence for religious minorities. Even if the Establishment Clause aims to guarantee political equality to religious minorities, it can and will do nothing about such defeats.

### C. *What Is So Special About Religion?*

Once we have seen that the endorsement test protects political equality against identity exclusion, we can ask the most basic question in evaluating the political-equality approach to the Clause: What is so special about religion? Why bother to protect religious dissenters in particular against political inequality? We can safely assume that violations of political equality are always undesirable—we do not wish to have first-class and second-class citizens—but we have an Equal Protection Clause that guarantees equal protection of the laws. Why do we also need the Establishment Clause to prohibit the state from endorsing religion in ways that may create political inequality?

The answers to these questions matter because the political-equality approach must provide not just a convincing philosophical answer to the question, "why protect religion," but also a logical explanation of why the Establishment Clause in particular should be interpreted to protect equality. The Equal Protection Clause should doubtless be read to protect equality

183. *Id.* at 687.

184. *See* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); JOHN RAWLS, THE LAW OF PEOPLES (1999); JOHN RAWLS, POLITICAL LIBERALISM (1996); *see also* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 49-84 (1988).

because it expressly makes equality its purpose.[185] The Establishment Clause does no such thing; it speaks only of religion and says nothing about making equality the basis of nonestablishment. A theory that reads the Clause as directed towards political equality must be able to explain the connection between political equality and religion. After all, the endorsement theory is just one of several competing theories about how to interpret the Establishment Clause. To win the day, it needs to convince us that it offers a more appealing theoretical or practical approach to the Establishment Clause than its competitors.

The background assumption here is that in general, the state may constitutionally choose to endorse or ally itself with all sorts of political or cultural or ideological positions. Federal, state, and local governments constantly take substantive positions on issues, and thus promulgate certain values. These forms of endorsement inevitably send messages of exclusion to some citizens whose deepest beliefs and identities are implicitly devalued. Government endorsement operates both on the level of symbolism and on the level of practical alliance. Is Veterans' Day to be celebrated? This may send a message of identity exclusion to pacifists. Labor Day? Exclusion of homemakers (or perhaps capitalists). Columbus Day? Native peoples.[186] Many governments require the teaching of evolution in biology courses, an alliance with secularist ideology that excludes those who adhere to biblical literalism in matters of creation. All these forms of endorsement go to identity exclusion, not just substantive exclusion. If government may endorse all these diverse ideologies, regardless of the potential costs to political equality, why should government be prohibited from endorsing religion?

One possible answer to this question is that religion is, in fact, not special at all. This answer seems very implausible, however, because it amounts to a call for government neutrality with respect to any substantive value choices that might lead to feelings of identity exclusion. If the state must always maintain substantive value neutrality, then it cannot, for example, teach its children either to forgive those who harm them or to avenge wrongs. Each of these is a value choice. Indeed, neutrality itself may be seen as a value choice. It is, in short, difficult to imagine a government that avoids endorsing or embracing certain values. At a minimum, public monuments and holidays would have to go. Taken further, lots of laws that are associated with particular values could turn out to effect identity exclusion. Since many government actions might be said to exclude

185. The text is clear in extending to all persons; whose equality the Equal Protection Clause should protect, and how much, is another matter.

186. *See* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998) (arguing that state-sponsored symbols inevitably embrace certain political stances over others).

some persons or groups, the result would be a government essentially paralyzed by the requirement that it exclude no one. This is not a recipe for successful democratic government.

A second possible answer to the question is that religious minorities require protection more than other potentially excluded groups because religious minorities are peculiarly vulnerable to manifestations of political inequality.[187] At first blush, the contingent facts of history would seem to form the strongest basis for this argument. After all, the Supreme Court itself has said both that we in the United States are "a Christian people"[188] and that we are "a religious people whose institutions presuppose a Supreme Being."[189] Such declarations might seem to constitute precisely the types of endorsement against which the Clause aims to protect dissenters. Surely these statements convey a message of political inequality to non-Christians and to nonreligious persons, who are also among the religious minorities protected by the Establishment Clause under the endorsement test. But on closer examination, these statements, found in Supreme Court opinions that are all but inaccessible to most of the public, do not look much different than any other endorsement of substantive values by the judicial, executive, or legislative branches. This is not to say that these statements do not have the effect of endorsement; they surely do. It is only to question whether such statements have any greater effect than does, say, the federally sanctioned Thanksgiving holiday (taken in its contemporary cultural context) in conveying the message that Americans are the spiritual descendants of Pilgrims, not of those people who were already here when the Pilgrims arrived at Plymouth.

Nor does the history of religious discrimination in America render religious minorities uniquely in need of protection from political exclusion. There has been, for example, significant anti-Catholic discrimination in American history,[190] but there has also been significant anti-Communist discrimination, some of it enacted into statute.[191] Anti-immigrant discrimination, independent of religion, has been one of the most powerful forces

187. Writing in the somewhat different context of justifying exemptions from generally applicable laws, Professors Eisgruber and Sager have argued that religious believers are uniquely vulnerable to having their interests ignored or misunderstood by legislative bodies because religious believers proceed from idiosyncratic and often inaccessible epistemological assumptions that legislatures tend to ignore. *See* Eisgruber and Sager, *supra* note 160. Yet this view, even if it were correct, would not lead one to believe that religious believers are especially vulnerable to being subjected to political inequality.

188. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892); *see also* Oklahoma v. Williamson, 347 P.2d 204, 207 (Okla. 1959) (repeating the *Holy Trinity* formulation in the post-*Everson* era).

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

190. For a discussion of anti-Catholic discrimination in the context of the Establishment Clause, see Viteritti, *supra* note 18, *passim*.

191. Consider, for example, the Alien Registration (Smith) Act, ch. 439, § 20, 54 Stat. 670 (1940).

in American political history, and remains powerful today.[192] It, too, has taken the form of statutory law.[193] Linguistic discrimination also has played a major part in our history, and still does.[194] And of course, race remains the archetypal American axis of discrimination and political exclusion.

As a general matter, however, there is no constitutional provision outside the Equal Protection Clause that would protect Communists or immigrants or linguistic minorities from the kind of political inequality that results from symbolic government endorsement of anti-Communism or nativism or English-only aspirations. Unless the Equal Protection Clause were held to be violated by such symbolic provisions—always a possibility, but far from a legal certainty[195]—these groups would have no constitutional protection from symbolic harms that create political inequality. If Communists or immigrants or non-English speakers are made to feel like second-class citizens by government endorsement of identities that exclude them, we tend to perceive this as part of the political process. Yet under the endorsement-test view of the Establishment Clause, the Constitution guarantees religious minorities that their political equality will not be impaired by government endorsement that might lead them to feel like second-class citizens.

In light of the various forms of discrimination in American history, it becomes difficult to argue convincingly that religious minorities are uniquely vulnerable to political harms associated with identity exclusion. It follows that the endorsement-test approach to the Establishment Clause suffers from a serious problem of either underinclusiveness or overinclusiveness. If one believes that other minorities should be protected from symbolic harms associated with political inequality,[196] then the Clause does not do enough, and unjustifiably protects only religious minorities. If, on the other hand, one believes that the Constitution need not protect every potentially vulnerable American from the subjective experience of identity exclusion,[197] then there is no reason to extend such protection to religious minorities. Either way, political equality does not serve as a satisfactory

192. *See generally* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

193. *See, e.g.*, The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) (suspending any immigration of "Chinese laborers to the United States").

194. *See generally* Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001).

195. *See generally* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996). *Cf.* Adler, *supra* note 174, at 1371 ("There appears to be widespread agreement among constitutional scholars that race discrimination is both meaningful and wrongful in virtue of what it means—in short, that an expressive theory is at least one component of a complete theory of the Equal Protection Clause."). Of course, scholarly consensus is a far cry from constitutional doctrine.

196. *Cf.* KOPPELMAN, *supra* note 195.

197. For such a skeptical view, see generally Adler, *supra* note 174.

explanation for the Establishment Clause. In short, when it comes to political equality, there is nothing very special about religion.

### D. *Is Religious Exclusion Unique?*

Although religious minorities are not uniquely vulnerable to harms against their political equality, there still might be other lines of argument that justify the view that the Establishment Clause protects religious minorities against symbolic harms to this equality. Perhaps the subjective experience of feeling excluded on the basis of religion differs in its consequences from other types of identity exclusion.

One might begin by claiming that religion is more basic and essential to selfhood than are many other forms of identity, because it goes to one's deepest beliefs.[198] From here one could proceed in either of two divergent directions. One could claim that, by virtue of the profundity and foundational character of religion, religious identity is more difficult to change than most other types of identity. As a result, if one were to experience political exclusion on the basis of religion, one would feel fundamentally unable to do anything about this excluded status. The non-English speaker can learn English; the immigrant can become naturalized (unless barred by law). But the religious leopard cannot change his spots any more than the person of color can change his skin. Consequently, it might be said, political exclusion on the basis of religious identity is the worst sort of exclusion, comparable to race and perhaps sexual identity but to little else.[199]

Alternatively, one might argue that because a person in fact has some control over his religious beliefs, the danger exists that one who suffers identity exclusion because of religion will change his religion and assimilate his identity into that of the religious majority.[200] On this view, political exclusion based on religion is particularly pernicious not because it will render the religious minority helpless, but because it may induce him to change or abandon his most deeply held convictions. One who cannot change his race or national origin needs less protection, because he could not easily abandon his position even if he wanted to do so. Religious minorities, on the other hand, need special protection because their identities are simultaneously important and structurally vulnerable.

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198. For an effort to distinguish the idea of religion as identity from the idea of religion as a set of ideas, see William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385 (1996).

199. Such an argument would draw on a broad range of literature about the immutability or mutability of various identity characteristics. For an overview, see Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 679-90 (2001).

200. *Cf.* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 518-21 (1998) (arguing that protecting only groups with visible identities encourages others to "assimilate" and hide or alter their identities).

Neither of these two approaches successfully differentiates religion from some other very basic, yet simultaneously changeable phenomena. A person's culture, for example, has been described as basic to her experience of encountering the world, and so fundamental as to give shape to personhood itself.[201] If this is so, then why not stop the state from endorsing any one culture, lest adherents of other cultures experience themselves as disfavored outsiders? The answer seems obvious enough: government implicitly endorses certain cultures all the time, and could hardly do otherwise. To give just one example, almost every word spoken in a classroom both presumes and endorses some set of cultural values and ideas. Once again, one is left with the conclusion that the endorsement-test approach to the Establishment Clause is either overinclusive or underinclusive.

A slightly different line of argument might emphasize the crucial role that religion plays in the formation of political identity. Perhaps religion plays a unique role in the formation of political ideas, so that political exclusion has especially devastating consequences for religious minorities, as opposed to others. It would certainly be reasonable to claim that for many Americans, foundational values derive from religious sources. George W. Bush said as much in his presidential campaign when he described Jesus Christ as the philosopher who had influenced him most,[202] and Senator Joseph Lieberman in the same campaign claimed to derive a remarkably wide variety of political positions from religious predicates.[203]

If religion plays a distinctively important role in forming political beliefs, then it might follow that political exclusion on the basis of religion would impede the excluded person from entering the political conversation. If others perceive the minority member's perspective as invalid because government has endorsed another perspective, then surely this would place the minority member at a unique disadvantage. The problem with this theory is simply that many people form political beliefs on the basis of foundational ideas that do not derive from the religious sphere. There are humanists and atheists, socialists and capitalists, Aristotelians, Freudians, Darwiniens, Derrideans, Foucauldians, and Randians who mold nonreligious principles into the foundational bases of their deeply-held views. There is no reason not to defend these, too, against political exclusion. If the state endorses identities and views that exclude these people, it would seem that they, too, would experience identity exclusion. Once more, the political-equality approach to the Establishment Clause appears to be either overinclusive or underinclusive.

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201. *See generally* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1993).

202. *See* James Carroll, *Which Christ Is Bush's Model?*, BOSTON GLOBE, Dec. 21, 1999, at A31.

203. *See generally* JOSEPH I. LIEBERMAN, IN PRAISE OF PUBLIC LIFE 139-51 (2000) (discussing the role of religion in American public life); *see also* Calvin Woodward, *Lieberman's Use of Religion Begins to Raise Eyebrows*, THE STAR-LEDGER, Aug. 30, 2000, at 6 ("Lieberman pitched a Medicare prescription drug plan as something that serves the spirit of the Fifth Commandment.").

### E. *The Upshot: Failings of Political Equality*

The political-equality approach to the Clause cannot provide a compelling answer to the question "what is special about religion?" As a result, the political-equality explanation of the Clause can justify neither special protection for the political equality of religious minorities, nor a prohibition on government endorsement of religious ideas and teachings.

This conclusion about political equality may prove disquieting to some readers who have themselves experienced identity exclusion on the axis of religion. (Indeed, several readers of earlier drafts expressed dissatisfaction with this argument by saying that the logical argument still failed to capture the possibility that religious identity exclusion was just plain terrible, and should therefore be barred under the Establishment Clause.) But the argument advanced in this Part does not mean to minimize the harm associated with such exclusion. This Part argues, rather, that such harms are no worse than harms associated with other sorts of second-class citizenship and identity exclusion. It may well be that all such harms should somehow be protected; or it may be that such symbolic, experiential harms should be resolved through the political process. This Article takes no position on that question. But this Article argues that the political-equality justification of the Clause should be subjected to critical scrutiny for its failure to explain why the Clause protects only religious minorities from political exclusion, and not others.[204]

Does this failing of the political-equality theory mean that the political-equality approach to the Establishment Clause ought to be abandoned? The answer is a qualified yes. A constitutional theory ought to be able to explain its purpose in defensible terms; so long as it cannot, the theory cannot produce coherent constitutional doctrine. In Part IV, this Article turns to the practical consequences that the political-equality justification has had on Establishment Clause jurisprudence. It shows how the political-equality theory has produced distorted, counterintuitive outcomes in the Establishment Clause context.

## IV

## POLITICAL EQUALITY AND ESTABLISHMENT IN CONSTITUTIONAL ACTION: A STRANGE STORY

"By their fruits ye shall know them."[205] If Parts I and II correctly showed how explanations of the Establishment Clause's purpose shifted in the post–World War II years from liberty to equality, and if Part III convincingly showed that this shift cannot be justified in terms of any

204. Again, the reason for this scrutiny is that the Establishment Clause does not say it is about equality. A theory that explains the Clause in these terms needs to say why religious minorities' political exclusion is in special need of constitutional protection. *See supra* note 185.

205. *Matthew* 7:20.

distinctive feature of religion, then it ought to follow that the cases decided under the Establishment Clause both reflect the transformation of Establishment Clause theory, and reflect the misguided nature of this undertaking. This Part undertakes to connect the "liberty-to-equality" transformation to particular decisions in the Establishment Clause context. In so doing, this Part will show how the political-equality model of the Clause has led to perverse results, and to distortions in the doctrine that reflect the theory's failure to make sense of why church and state ought to be separated.

### *A. Public Manifestations of Religion: The Asymmetry of State Action*

A central problem present in endorsement analysis is the possible disjuncture between appearances and institutional reality. Sometimes it appears that government has endorsed religion, when in fact government has done nothing at all. The classic case is the crèche erected with private funds on public property.[206] Should this count as endorsement? We might try to answer the question by distinguishing different configurations of religious symbols. But this has the effect of introducing to the endorsement theory a measure of technicality that de-emphasizes the feature that is really driving all the concern about perception: the nature of the communicative aspect of state action.

The question of state action becomes central because very often, government is said to "endorse" religion where citizens have used government to coordinate their private efforts to achieve some religious goal. Private citizens could join together to erect a crèche on public land, but, to save transaction costs, the interested citizens instead ask government to erect the crèche for them. Often, although certainly not always, these citizens attach no special importance to government involvement; the crèche looks identical to the one they would put up themselves, and they have simply saved on transaction costs.[207] In the eyes of the endorsement test, however, government's action of coordination transforms the crèche from a permissible private action to an impermissible endorsement, because state action is unquestionably present.

The asymmetry between a religious minority's perceptions and the result under the endorsement test turns on the meaning of the state's involvement. Yet very often, if government has been barred from performing

206. *County of Allegheny v. ACLU*, 492 U.S. 573, 600 (1989), was such a case. In *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984), the crèche was erected by the town government.

207. It would be different if the express intention of the citizens were to show that the state embraces religion, but this situation seems to be rare in the United States. Generally, religious citizens want the state to facilitate a religious action that they see as a good in itself, not as a good because the state has undertaken to perform it. This was apparently so in *County of Allegheny*, where the crèche was accompanied by a sign declaring its ownership by a private religious organization. *See County of Allegheny*, 492 U.S. at 600.

a coordination function, citizens will simply take up the job themselves. Once they do so, the public manifestation of religion will look the same, or nearly the same, as it did before. Now, however, the action will, according to the endorsement test, not constitute an unconstitutional endorsement because there is no state involvement.

The problem of asymmetry arises because the endorsement test attaches political-equality consequences to government communication. Because the citizens themselves actually make up democratic government, it seems odd to argue that communication transmitted via government creates political inequality, while identical communication transmitted directly does not. This is especially true where the political entity in question is small and its connection to the citizens close. If the very same citizens who lobbied for the crèche find they cannot use the town to coordinate their efforts, and then privately erect the very same crèche in the very same place, the communicative outcome looks very similar.

The striking example of the strangeness of focusing on the communicative effects of state action arose in *Santa Fe Independent School District v. Doe*.[208] There, the Court held that a student-led prayer that was broadcast over a loudspeaker before high school football games was unconstitutional on straightforward endorsement grounds: "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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.'"[209] In the aftermath of the decision, however, a new practice is apparently emerging at Texas high school football games: before play, students rise in their seats and in unison, begin to recite the Lord's Prayer.[210]

It is difficult to imagine that a quasi-spontaneous group prayer, effectuated without the involvement of the school, could be said to violate the Establishment Clause. The school, and hence the government, has no role whatever in the process. Thus it would be exceedingly difficult to argue that the government has sent a message of exclusion. Yet surely whatever message the formally sponsored prayer sent to religious minorities is sent with as much force or more by the informal one. Indeed, the post–*Santa Fe* act of prayer has political meaning absent from the earlier form because the students are praying at least in part to signal their disagreement with the Court's decision. Before the decision, the prayer may have meant, "We are a Christian town and we pray before football games." After the Court's

208. 530 U.S. 290 (2000).

209. *Id.* at 315 (quoting *Lynch*, 465 U. S. at 688).

210. Paul Duggan, *A Few Texas Faithful Make Stand for Prayer; Big Football Showing Fails to Happen*, WASH. POST, Sept. 2, 2000, at A1.

decision, the prayer probably means, "We are a Christian town, and we will pray before football games no matter who the Supreme Court says is excluded by it." The post–*Santa Fe* prayer arguably has the effect of communicating intentionally, rather than just incidentally, the message that those who pray are insiders in this particular polity.

The formalism that permits these disparate results ignores the fundamental fact that the students and spectators themselves constitute the school and the relevant political community. The fact that the principal remains uninvolved, and that no individual student is designated to lead the prayer, surely says almost nothing about the message that the community intends to send. The endorsement test thus leads to the position that the message of exclusion from the political community is pernicious when directed through the state, but harmless when conveyed through unmediated collective action.

The asymmetrical result looks strange because, according to the political-equality view of the Establishment Clause, the diminution of political equality is itself an inherent harm, and yet the law does nothing to prevent that evil when it occurs through non-state means. Notice that the same problem of asymmetry with regard to state action generally does not arise if the purpose of the Establishment Clause is understood to be the protection of dissenters against coercion.[211] Here religious coercion is understood to be the central harm. The Establishment Clause, on this view, prevents the state from coercing me to attend church with the threat of force. Local or state law symmetrically protects me from my fellow citizens who might want to coerce me to attend church by the threat of force. There is thus typically no problem of asymmetry, because I am protected from both public and private religious coercion.[212] By contrast, if political inequality forms the basis for the Establishment Clause, then no local or state law symmetrically protects me from experiencing political inequality created privately by my fellow citizens. Indeed, rights of free speech, free

211. The same is typically true with respect to other spheres of constitutional law in which state action arises. The Equal Protection Clause protects me against discrimination by the state; local and federal civil rights laws symmetrically protect me against discrimination by private individuals. Although there may arise anomalous situations in which the local or federal civil rights laws fail to protect me from private discrimination because of the free speech or association rights of would-be discriminators, these situations register as hard cases. *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding that free association rights of Boy Scouts trump state antidiscrimination law). The normal state of affairs is symmetrical protection.

212. Asymmetry is also absent where the coercion in question is the more subtle coercion of pressure on school children created by prayer in public schools. *See* Engel v. Vitale, 370 U.S. 421 (1962). The child is protected against coercion by the state in that the state may not require her to pray, and the child is also protected against the quasi-private coercion of peer pressure exerted by the other students even in a situation where the child has, in theory, the right not to pray. What if students prayed spontaneously at their desks, in unison, every day? The answer is probably that the controlled school environment turns every such act into an act of the school itself, and thus a form of coercion of the first sort. Either way, there is no asymmetrically unprotected space in which coercion may occur.

association, and free exercise typically will protect my fellow citizens' right to convey to me the feeling that I am an outsider in their political community.

The above discussion highlights another problem with the endorsement theory of the Establishment Clause: who counts as the state? This question arises in another sphere of public manifestation of religion, namely the public statements of political leaders. Previously this Article discussed the hypothetical situation in which government in its official capacity passes legislation that endorses religion, through a sign or other public means. But what of the public official who, in the course of his duties, openly endorses religion as a feature of membership in the political community? Senator Lieberman is only the most recent and most visible elected official to have argued for the centrality of religion in American political thought.[213]

Although almost no one in the academy or in politics seems to be saying so, there is reason to think that the endorsement theory might consider such statements not merely undesirable, but actually unconstitutional. The public official speaks for himself, of course, but also, in some sense, as an elected agent of the polity. Surely no one doubts that, according to the endorsement theory, the sign saying that all good Californians are Christians would be unconstitutional even if it were raised by the governor without formal legislative action or approval, and without the disbursement of funds. Why is a statement to the same effect by an elected official any different? No doubt the message of exclusion from the political community can be communicated as effectively in speech as by any legislative means. This problem demonstrates how the notion of "state action" starts to look implausible where our central concern is communicative effect, not discrimination itself.[214]

There is, in short, something strange going on here. The political-equality model of the Establishment Clause focuses on the communicative aspect of state action, which requires that state action become the central element in the analysis. As a result, the case law must make implausible distinctions between exclusion by the state and exclusion by those who make up the state. A constitutional test that produces such strange results is probably not worth preserving.

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213. *See* Woodard, *supra* note 203.

214. This problem of the elected official's endorsement of religion raises, of course, the question of free speech, doubtless the reason the issue of endorsement rarely arises with respect to the discourse surrounding public talk of religion. Who wants to be the one to say that an elected official must be restricted in what she says about religious faith? The most obvious answer to the speech problem is to distinguish official from private capacities, and to say that the public official may be restricted in what she can say when she speaks in an official capacity. But distinguishing public from private utterances will not solve the problem. The public religious speech in which government officials engage surely lies at the very core of First Amendment protection of speech.

### B. *State Support for Religion: Political Equality and the Subversion of Separation*

As Part II.C of this Article showed, the endorsement test originated in cases involving public manifestations of religion, but now reaches to cases involving state support for religious organizations and activities. In the line of cases running from *Lamb's Chapel* to *Rosenberger* to *Good News Club*, the Court in the last decade has repeatedly held that where a designated public forum exists for purposes of the Free Speech Clause, government support of religious institutions is permissible under the endorsement test so long as the support is available to all participants in the forum.

A closely related theme in these cases describes government "neutrality towards religion"[215] as a crucial element in determining whether state support violates the Establishment Clause. The notion of neutrality, long present in Establishment Clause doctrine,[216] has become very closely associated with equality and endorsement.[217] In *Mitchell v. Helms*,[218] a landmark 2000 case that involved goverument support of religious schools, a plurality of the Court held, for the first time, that even direct aid to religious institutions could be constitutional so long as it was available "neutrally" to religious and nonreligious schools alike.[219] In dissent, Justice Souter traced three distinct uses of the term neutrality in the Court's cases. Neutrality had been used, at various times, "to describe the requisite state of government equipoise between the forbidden encouragement and discouragement of religion; to characterize a benefit or aid as secular; and to indicate evenhandedness in distributing it."[220] Justice Souter's account of the various uses of neutrality showed that the last use, where "neutrality" meant that religious and nonreligious institutions alike received benefits from government, arose only in the 1980s.[221] Justice Souter argued that this sort of neutrality alone had never before sufficed to find that a given aid program was constitutional under the Establishment Clause.[222]

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215. Good News Club v. Milford Central Sch., 121 S. Ct. 2093, 2104 (2001) (citing Mitchell v. Helms, 530 U.S. 793, 809 (2000); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995)).

216. *See Mitchell*, 530 U.S. at 878 (Souter, J., dissenting).

217. *See, e.g.*, Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 182 (1987) ("The essential core of liberal neutrality as applied to the religion clauses . . . should be the principle that government may not endorse one set of religious beliefs over another, endorse religion over irreligion, or irreligion over religion.").

218. 530 U.S. 793 (2000).

219. *See id.*

220. *Id.* at 878 (Souter, J., dissenting).

221. *See id.* at 881.

222. *See id.* at 883-88.

The plurality, however, disagreed. So long as government provides aid to all recipients, religious and nonreligious, on an equal basis, the Establishment Clause has not been violated:

> If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.[223]

This formulation uses the idea of equality to intermix neutrality and endorsement. First, it argues that there can be no constitutional violation if it is unknown what government "established," in other words, which denomination government has endorsed. Second, the Court's formulation raises the specter of "hostility" to those who choose to educate their children in religious institutions. Hostility can be said to exist if the state were barred by the Establishment Clause from supporting religious institutions on an equal basis with nonreligious institutions.

The plurality's language in *Mitchell* encapsulates the direction that the ideal of equality has taken Establishment Clause doctrine with respect to state support of religious institutions. The Court had already held in *Rosenberger* that the Establishment Clause was not violated when state funds were used to support religious ideas.[224] The endorsement test was not violated because the funds were made available equally.[225] But in *Rosenberger*, the Free Speech Clause of the First Amendment had provided some of the impetus for this holding: the Court held that because the student activities fund at issue had been used to fund a variety of types of speech, the Free Speech Clause required availability on an equal basis to all qualified comers.[226] In *Mitchell*, however, the Free Speech Clause played no role at all; only the Establishment Clause applied.[227] Yet the plurality was still able to use equality as the touchstone for the case. The plurality found that no endorsement existed because the funds were equally available to all, and hence there was no message of exclusion. Beyond the absence of endorsement, the Court used the ideal of equality to suggest that it would be an act of "hostility" to interpret the Clause as treating religious schools differently from other schools.

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223. *Id.* at 827.
224. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 839 (1995).
225. *Id.* at 840.
226. *Id.* at 841-46.
227. Mitchell v. Helms, 530 U.S. 793, 825 (2000).

The surface logic of the *Mitchell* plurality's use of equality does not mask the really shocking result in that case. Recall that equality emerged as a value in Establishment Clause doctrine in order to answer the question with which this Article began: Why separate church and state? The political-equality answer suggested that church and state ought to be separated in order to guarantee political equality for religious minorities. But by the time of *Mitchell*, this logic had been subtly rearranged. Following *Lamb's Chapel* and *Rosenberger*, the *Mitchell* plurality was using the ideal of equality for religious minorities to explain why the state could support religion, not to explain why church and state should be kept separate. A theory originally developed to answer the question "why separate church and state" had transmuted itself to the point where it could answer the original question by saying, "why bother?"

The possible doctrinal implications of this development deserve our attention. If *Mitchell* is the law, then it is possible that government could decide to fund, say, general moral and aesthetic education, to the inclusion of religious teachers and clergy, so long as the funding was provided on an equal basis. There is probably no reason government could not similarly fund the construction of churches, mosques, and synagogues, so long as it also funded construction of community centers, theaters, and concert halls. The endorsement test, coupled with the *Mitchell* plurality's theory of neutrality-as-equality, has paved the way for these possibilities by enshrining equality as the paramount value in Establishment Clause analysis.

This result could not be farther from the famous holding of *Everson*, according to which "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions" and which barred government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."[228] If *Everson* represented a starting point in the post-War reinvention of the Establishment Clause, then perhaps the equality theory has overturned *Everson* and put an end to the reinvention of establishment. Equality has not merely supplemented liberty as the touchstone of Establishment Clause analysis: equality has actually supplanted liberty.

Beyond this departure from *Everson*, however, there is another, equally troubling aspect to the line of doctrine that seems to follow from the equality model of *Mitchell*. If government were to fund moral education generally, it would surely do so with full recognition that much or most of that funding would go to support religious teaching by clergy. To use the terms of the *Lemon* test, which the endorsement test has all but superseded, such a law would have the "primary effect" of advancing religion.[229] Although it could be said that the purpose of the law was to

228. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).
229. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

promote moral education, the law might also be said to lack "a secular legislative purpose."[230] Yet the law might not violate the political equality of religious dissenters. After all, by hypothesis, such a law would support any moral education, including that favored by secularists or minority religions. Under the *Mitchell* reasoning and the logic of the endorsement test as explained in the *Lamb's Chapel* line of cases, there would be no endorsement, and hence no violation of the Establishment Clause, so long as the funding were available equally.

Can it seriously be maintained that a law, passed with the full understanding that it would create broad-based, direct government funding of religion, would not constitute a law "respecting an establishment of religion"? The academic school of so-called "nonpreferentialists" would say yes. Nonpreferentialists have been arguing intermittently since the 1940s that as a matter of original intent, the Establishment Clause permits government to support and promote religion, so long as it does so without preferring one sect or denomination to another.[231] But this argument, hotly disputed by other academics[232] and never embraced by the Court,[233] has always been advanced as a matter of history and original intent,[234] not as a matter of political theory. The political-equality theory of the Establishment Clause would appear to provide a philosophical argument that corresponds to the historical claim of the nonpreferentialists. The theory turns fifty years of Establishment Clause doctrine on its head, and allows the outcome favored by originalist non-preferentialism to enter the doctrine through the back door.

In other words, the core criticism offered in this section is that the political-equality approach to the Establishment Clause, taken to its logical doctrinal conclusion, subverts the purposes it was initially designed to achieve, the separation of church and state. From Justice Frankfurter's concern about exclusion of children to Justice O'Connor's endorsement test, the political-equality approach to the Clause set out to offer a new and compelling answer to the question, "why separate church and state." The goal was to explain why the Constitution required such a separation, not to reach the conclusion that the Constitution in fact does not require separation. Yet the political-equality justification for the Clause grew beyond its purposes, and began to make political equality the only touchstone

230. *Id.*

231. *See, e.g.*, GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); Edward S. Corwin, *The Supreme Court as National SchoolBoard*, 14 L. & CONTEMP. PROBS. 3 (1949).

232. *See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1994) (rejecting nonpreferentialist thesis).

233. *Cf.* Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

234. *See, e.g., id.* at 113 ("The true meaning of the Establishment Clause can only be seen in its history.").

of Establishment Clause analysis. Once this happened, it seemed to follow that there could be no violation of the Clause absent a violation of political equality. From here it would be but a short step to the conclusion that equal distribution of funds to support religion directly does not fall afoul of the Establishment Clause.

This latter view is of course a possible one. Nonpreferentialists have long believed there is nothing incompatible between the Establishment Clause and support of religion. What is perverse is for this originalist, nonpreferentialist view to find support from the quarter of political equality. The political-equality line of doctrine began by attempting to explain separation of church and state, and now appears poised to end by burying it.

### C. *The Affirmative Equality Argument for State Support*

There is a final, fascinating twist to the theory of equality: the argument that political equality actually places the state under an affirmative obligation to support religion. The *Mitchell* plurality alluded obliquely to such an argument, first by describing a prohibition on state aid to religion as "hostility,"[235] and second by describing the prohibition as based on "bigotry."[236]

To see how such an argument might run, consider an influential theory articulated in recent years about the political equality of cultural minorities. According to this argument, associated most prominently with Will Kymlicka,[237] culture is a primary good that all individuals need to express their life goals.[238] Minority cultures[239] are at risk for erosion, in part

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235. *Mitchell*, 530 U.S. at 827-28.

236. *Id.* at 829.

237. *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989). For another example of his argument, see THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995), and its bibliography.

238. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 237, at 82-84. This first step of the argument depends on a claim associated with Charles Taylor. "[M]y discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others.... My own identity crucially depends on my dialogical relations with others." Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25, 34 (Amy Gutmann ed., 1992).

239. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 237, at 108-14. Kymlicka himself defines culture in terms that are much more sweeping than those that might be applied to most religious groups in America today. For him, "a culture" is "synonymous with 'a nation' or 'a people'—that is,... an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history." *Id.* at 18. This definition has been criticized for its breadth and imprecision. *See* Robert Justin Lipkin, *Can Liberalism Justify Multiculturalism?*, 5 BUFF. L. REV. 1, 13-14 & un.54-55 (1997). Because Kymlicka's notion of a "culture" probably would not fit most American religious groups (although it might fit some, such as Mormons or the Amish), the intent here is not to rely on Kymlicka's formulations to pose the argument for cultural self-expression. Instead, Kymlicka's approach serves as a grounding for a more inclusive approach to the value of self-realization for minority religious groups. *Cf.* Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 56-57 (1996) (discussing Kiryas Joel in terms

because they lack the same resources and economies of scale as do larger, majority cultures.[240] Where one's culture is weak, one will have trouble expressing one's life choices, including political choices.[241] Minorities therefore face an extra disadvantage in seeking, for example, political expression.[242] Not only do they, by definition, have less voting power than majorities, but the very means of their expression, their culture, is at risk.[243]

In Kymlicka's view, the state should grant minority cultures extra resources and special privileges in order to enhance and preserve their cultural inheritance.[244] Funding minority culture enables minorities to compete on an equal playing field with majorities. The funding of education is one important way to facilitate this sort of political self-realization,[245] because the connection between education and political expression is a direct one.[246]

The political-equality approach ascendant in *Mitchell* suggests an affirmative connection between the funding of religion and the political equality of religious minorities.[247] If, as the *Mitchell* plurality suggested, failing to fund religion sends an exclusionary message, then it is possible

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of Kymlicka's notion of the extension of rights to minority cultures); Scott H. Angstreich, Book Note, 9 HARV. HUM. RTS. J. 339, 341 (1996) (reviewing KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 237) (same, more briefly).

240. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 237, at 109; *Cf.* Lawrence Rosenn, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 YALE L.J. 227, 234 (1997) (book review) ("[F]ailure to attend to . . . [cultural minorities'] claims in more recent years, says Kymlicka, has left 'cultural minorities vulnerable to significant injustice,' particularly with respect to the preservation of their cultures through language, education, and the exercise of some degree of communal power.") (quoting KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 237, at 5).

241. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 237, at 109.

242. *Id.*

243. *Id.*

244. *See id.* at 131-51. Kymlicka has in mind much more than money: He discusses group representation in the electoral system, and other special privileges in areas like language. But state aid would be a minimum. Kymlicka takes seriously the idea that the state may have an affirmative duty to provide such resources. This argument is beyond the scope of the analysis here, and is indeed unnecessary to make the point that funding for minority religions or cultures may be experienced as inclusive, rather than exclusive.

245. *See* Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, *in* THEORIZING CITIZENSHIP 283, 298-300 (Ronald Beiner ed., 1995). Kymlicka often speaks of schools that teach in a minority language as an example of this sort of cultural expression. *See, e.g.*, Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310, 319 (1998) (discussing Kymlicka and observing that "[i]t is quite conceivable . . . that the shared interest people have in the maintenance of their language may ground duties on the wider society to provide government funding for minority language schools"). This is probably because "Kymlicka's starting point . . . is almost always his native Canada . . . . The question of Quebec thus forms his central example." Rosenn, *supra* note 240, at 236.

246. *See generally* MEIRA LEVINSON, THE DEMANDS OF A LIBERAL EDUCATION (1999). *Cf.* Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (describing public schools as "vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'") (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

247. For a view that tentatively associates religious pluralism with multiculturalism, see Ruti G. Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 B.Y.U. L. REV. 97, 106 (1993).

that affirmatively funding religious minorities may actually be necessary to ensure political equality. Funding the religious institutions of minorities will enable them to educate themselves and their children with a set of ideals that will allow them to participate as full and equal citizens. One might object that state support of various religious institutions would encourage political division along religious lines, but to this objection the *Mitchell* plurality had a ready answer: concerns about "political divisiveness . . . once occupied the Court," but more recent cases "have rightly disregarded" the concern as unfounded.[248]

This multiculturalist-style argument for an affirmative duty to promote political equality may sound fanciful in its purest form. But it boasts a respectable intellectual pedigree, and it parallels a line of argument that is implicit in *Mitchell* and has been made more explicit as a policy argument in favor of school vouchers for private, religious education.[249] Most importantly, the argument shows an increasingly imaginable direction for equality as an Establishment Clause value: equality is being used not to justify the separation of church and state, but to subvert it.

Does the fact that equality can be used to swallow, rather than justify, the separation of church and state count as an argument against using equality to explain the Establishment Clause? Obviously, there are those, including a plurality of the Supreme Court, who appear to welcome the substantive results that the equality argument has helped justify.[250] They would probably argue that political equality is exactly the right value for understanding the Establishment Clause because it explains why government may not support just one religion; if government supported one religion, it would lead to political inequality for adherents of other religions. They may, indeed, now turn back to the originalist nonpreferentialism that they have heretofore been unable to make into binding doctrine.

But this section advances the claim that the equality approach has produced doctrine that justifies the effective elimination of the separation of church and state, in favor of what amounts to an egalitarian establishment of religion.[251] An egalitarian establishment may be perfectly attractive as a matter of political theory or philosophy; it is certainly compatible with, and perhaps even demanded by, a plausible argument about political equality. It is even conceivable that an egalitarian establishment is compatible

248. Mitchell v. Helms, 530 U.S. 793, 825 (2000).

249. *See* Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 123 (1991) ("The education best suited to the American republic . . . is based on the principle of diversity and choice.").

250. *See Mitchell*, 530 U.S. at 793.

251. *Cf.* Adler, *supra* note 174, at 1440 (objecting to the endorsement test on the ground that there are many "establishment[s] of religion" that are nonetheless not endorsements of religion).

with some version of original intent, although this argument is almost certainly incorrect.[252] But it is extremely difficult to argue that an egalitarian establishment constitutes a form of separation of church and state.

So if one believes that the Establishment Clause calls for some sort of separation of church and state, and it is of course possible to think otherwise, then the political-equality approach is a failure. The cases in which the Court has used the equality approach to undercut the separation of church and state indicate how the approach is sorely lacking as a theory to explain the separation. In the context of state support of religious institutions, the cases reveal that, too often, the equality approach just gives up the ghost and admits that there is no particular reason why church and state should remain separate, so long as conditions of equality are maintained.

## CONCLUSION

The purpose of this Article has been to reveal and criticize a remarkable constitutional change: the transformation of the Establishment Clause from protector of liberty to guarantor of equality. The idea of "transformation" implies an organic process. What goes in at the beginning of the process must actually become something different by the end. If the final product just replaces the initial one, then there has been no transformation, only substitution.

To show that a real transformation took place, Part I engaged in a detailed rereading of the key post–World War II Establishment Clause cases. It argued that, while *Everson* may have misrepresented the details of the early history of the Establishment Clause, the case did correctly identify religious liberty and the protection of dissenters as the original motivation for separation of church and state. Soon after *Everson*, however, in his *McCollum* concurrence, Justice Frankfurter began the slow move towards the equality ideal of the Clause by associating the Clause with the goal of protecting schoolchildren from experiencing divisiveness due to religion. The gradual process of transformation continued, in *Engel*, with the unmooring of the Establishment Clause from liberty of conscience. If no coercion was necessary for a violation of the Clause, then there was reason to look for a non-liberty explanation for the separation of church and state. The process continued in *Lemon*, where the Court broadened Justice Frankfurter's concern with divisiveness in the schoolhouse to the sphere of adult politics.

The process of transformation was not complete, however, until the birth and eventual triumph of the endorsement test, which measures constitutionality by asking whether government has made religion relevant

252. For a detailed historical refutation of this view, see Feldman, *supra* note 7.

to political standing. Part II showed how Justice O'Connor invented the endorsement test in *Lynch*, and how the test came to be adopted by the Court in *Allegheny County*. Part II also showed how the endorsement test has exerted its influence in cases of public manifestation of religion, such as the *Santa Fe School District*, and also in cases like *Lamb's Chapel*, *Rosenberger*, and the recent *Good News Club*, that involve state support for religious institutions and activities. Last, Part II explained historically why the transformation from liberty to equality occurred.

This Article set out not only to make an original contribution to our descriptive understanding of Establishment Clause doctrine, but also to make a normative contribution by offering a critique of the transformation to equality. The second half of the Article adopted two distinct means to argue that the transformation of the Establishment Clause was misguided. Part III provided a theoretical account of the reasoning underlying the equality justification in determining what answer the equality justification would give to the question, "Why separate church and state?" Ultimately, Part III concluded that the equality justification could offer no convincing theoretical answer to this question, because it could not explain why religion was special. Religious affiliation does not differ enough from other forms of affiliation, either in its history or its essence, to justify protecting the political equality of religious dissenters more than that of other minority groups. The political-equality justification for the Establishment Clause is either underinclusive, protecting too few minorities, or else overinclusive, unnecessarily protecting religious minorities from harms that do not rise to a constitutional level.

Part IV offered a more directed, case-oriented critique of the equality justification for the Establishment Clause. In the sphere of public manifestations of religion, it argued that the equality justification has led to perverse outcomes, because it focuses on the communicative aspects of state action in a way that obscures the underlying realities of political exclusion. A theory cannot be convincing if it leads to absurd results, and it certainly looks very strange to argue that political equality is violated when the state provides the microphone for an exclusionary public prayer, but not when the audience recites the same prayer in unison. In the area of state support of religion, Part IV offered a more basic criticism: the equality approach has contributed to the breakdown of separation of church and state and has created the possibility of egalitarian establishment. Put simply, political equality is as happy (or possibly happier) with a multiple, equal establishment as it is with the separation of church and state. The political-equality theory, developed to explain and justify separation, has become an engine to undermine it. The Establishment Clause of today is not the Establishment Clause of 1947. It has been transformed.