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ARTICLES

THE SUPREME COURT AND THE PRIVATIZATION OF RELIGION

*Richard S. Myers**

The nomination of Judge Clarence Thomas to succeed Justice Thurgood Marshall generated a great deal of controversy. Surprisingly, much of the early debate focused on Judge Thomas' religion. As is typical with recent Supreme Court nominees with Catholic backgrounds,¹ some critics questioned whether the nominee would promise that his "religious" views would not affect his discharge of justice.² Virginia Governor Douglas Wilder graphically framed the issue by stating: "The question is, 'How much allegiance is there to the Pope?'"³ Although Governor Wilder quickly apologized amid a storm of criticism, Senator Orrin Hatch thought Wilder had

* Associate Professor of Law, Case Western Reserve University School of Law. The author would like to thank Gerry Bradley, George Dent, Mel Durchslag, Jon Entin, Peter Gerhart, Fred Gedicks, Erik Jensen, Hal Krent, Bill Marshall, Kevin McMunigal, Mollie Murphy, and Mike Solimine for reading earlier drafts and offering helpful comments and suggestions. The author would also like to thank Tom Fullmer for research assistance.

1. See generally Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990) (focusing on the public discussion associated with the appointments of Roman Catholic Justices to the Supreme Court). Although Thomas was raised as a Catholic, he now attends an Episcopal church. *Wilder Apologizes on Thomas Remark*, N.Y. TIMES, July 5, 1991, at A9, C7 [hereinafter *Wilder Apologizes*].

2. See Levinson, *supra* note 1, at 1062-65 (discussing the confirmation hearings of Justices Brennan, Scalia, and Kennedy). During the confirmation hearings for his position on the United States Court of Appeals for the District of Columbia Circuit, Judge Thomas was asked about a comment he had made that appeared to endorse school prayer. Judge Thomas responded:

I, in a policy context, indicated my personal views on the issue of religious values. Those were my personal views. As a circuit court judge or a lower court judge, I am duty bound to apply Supreme Court precedence [sic] on this and other issues and certainly it is my full intent to do so, and my personal views are inconsequential in that process.

Confirmation Hearing on Clarence Thomas to be a Judge on the U.S. Court of Appeals for the District of Columbia: Hearing Before the Senate Judiciary Committee, 101st Cong., 2d Sess. 56 (1990).

3. David S. Broder, *Wilder Urges Scrutiny of Thomas on Abortion, Religion Impels Questioning*, *Governor Says*, WASH. POST, July 3, 1991, at A14.

raised an appropriate subject⁴ and another politician stated that Wilder had raised an issue that was "probably on the minds of a lot of people."⁵

Another area in which religion has become the center of controversy is child care, which has become a contentious political issue in the last few years. Major philosophical disagreements have developed regarding the most desirable forms of public assistance for child care. The question of whether religiously affiliated child care facilities should be eligible for government funding has become one of the most vigorously debated issues. Some people argue that these facilities should be excluded from all federally funded programs or that their participation ought to be contingent upon elimination of the religious dimensions of their programs.⁶

The Roman Catholic hierarchy has been increasingly vigilant about instructing Catholic political candidates and officials about their religious obligations regarding abortion. In response to one such effort—Bishop Maher's denial of Communion to a pro-abortion political candidate—a New York Times editorial warned, "[T]o force religious discipline on public officials risks destroying the fragile accommodations that Americans of all faiths and no faith have built with the bricks of the Constitution and the mortar of

4. Donald P. Baker & David S. Broder, *Wilder in Hot Water*, WASH. POST, July 4, 1991, at C1.

5. *Wilder Apologizes*, *supra* note 1, at A9, C7 (quoting a comment made by Virginia State Senator Emilie F. Miller).

6. See generally Lee Boothby, *The Establishment and Free Exercise Clauses of the First Amendment and Their Impact on National Child Care Legislation*, 26 HARV. J. ON LEGIS. 549 (1989); John A. Liekweg, *Participation of Religious Providers in Federal Child Care Legislation: Unrestricted Vouchers are a Constitutional Alternative*, 26 HARV. J. ON LEGIS. 565 (1989); John W. Whitehead, *Accommodation and Equal Treatment of Religion: Federal Funding of Religiously-Affiliated Child Care Facilities*, 26 HARV. J. ON LEGIS. 573 (1989). Congress enacted the Child Care and Development Block Grant Act as part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 5081-5082, 104 Stat. 1388, 2017. The Act provides two forms of financial assistance—direct grants to child care providers and certificates given to parents for use as payment for child care services. Section 658M(a) of the Act provides that "[n]o financial assistance provided under this subchapter . . . shall be expended for any sectarian purpose or activity, including sectarian worship or instruction." The Senate report interpreted this provision as requiring that any child care provider receiving financial assistance eliminate all religious aspects of its program. S. REP. NO. 17, 101st Cong., 1st Sess. 48-49 (1989). As noted by the Minority Views of Senators Coats, Cochran, and Thurmond, this interpretation would prohibit prayer before meals, religious symbols and displays, and even Christmas or Hanukkah programs. See *id.* at 71. On June 6, 1991, the Department of Health and Human Services issued an interim final rule that departed substantially from the approach set forth in the Senate report. Child Care and Development Block Grant, 56 Fed. Reg. 26,194 (1991). According to the interim final rule, § 658M(a) only prohibits using direct grants for sectarian activities; "[t]his prohibition does not apply to certificates and providers may carry out any sectarian activities without restricting their eligibility for certificates under the Block Grant program." 56 Fed. Reg. at 26, 212.

tolerance.”⁷ A commentary in the *Philadelphia Inquirer* was even more direct. In response to the decision by Catholic bishops to discipline Catholic public officials who dissent from Church teachings, the commentary warned about the concern that such pressure would “reawaken[] all the old religious prejudices and fears that once inflamed American politics.”⁸ The commentary continued with this blunt message: “The Roman Catholic Church, it needs to be remembered, is quite literally an *un-American* institution.”⁹ The appropriate balance between church and state can be maintained only if the bishops “refrain from using their spiritual authority in the political arena.”¹⁰

These seemingly disparate events reflect a common theme: Religion is a private affair that should not play a role in public life. This theme, the privatization of religion, is common in our legal discourse. As Professor Greenawalt has stated, “My [religious] convictions tell me that no aspect of life should be wholly untouched by the transcendent reality in which I believe, yet a basic premise of common legal argument is that any reference to such a perspective is out of bounds.”¹¹ The religious exclusion exists, at least in part, because many participants in these debates “display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience.”¹² The privatization thesis has not gone unchallenged. For example, Richard John Neuhaus argues against the view “that would exclude religion and religiously grounded values from the conduct of public business.”¹³ Yet, despite such challenges, our legal culture reinforces the Supreme Court’s conclusion that “[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice.”¹⁴

7. *The Bishop and the Truce of Tolerance*, N.Y. TIMES, Nov. 26, 1989, § 4, at 12. For a critical commentary on this view, see Richard J. Neuhaus, *Those Turbulent Bishops*, NAT’L REV., Dec. 31, 1989, at 32-33.

8. David R. Boldt, *The Bishops Return to a Darker Era of U.S. Politics*, PHIL. INQUIRER, July 1, 1990, at D7.

9. *Id.*

10. *Id.*

11. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 5 (1988).

12. *Id.* at 6; see Frederick M. Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J. L. ETHICS & PUB. POL’Y 419, 423-25 (1990) (making the same point and citing other authorities).

13. RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* vii (1984).

14. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). See generally LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE* (1990). Friedman discusses how religion has been affected by the republic of choice: “religion is an *individual* choice, a private not a public matter.” *Id.* at 165. In addition, Friedman notes that “church-state law, the tangle of First Amendment

It is not surprising, therefore, that the privatization thesis has played an important role in constitutional law in areas that involve the evolving relationship between religion and the legal order. There has not, however, been much explicit attention to this phenomenon by legal scholars. The most important work has been done by Professor Gerard Bradley. Bradley argues that, in the context of the religion clauses, "[t]he Court is now clearly committed to articulating and enforcing a normative scheme of 'private' religion . . ."¹⁵ This Article shall demonstrate that Bradley's argument overstates the success of the privatization thesis in influencing First Amendment doctrine.

Moreover, most of the remaining work in this area focuses too narrowly on cases involving the religion clauses.¹⁶ This focus ignores substantive due process cases, which more clearly reveal the Justices' understanding of the relationship between religion and the legal order. There have been important discussions concerning the relationship between religious convictions and lawmaking, and these discussions have focused on the issues raised by the substantive due process cases.¹⁷ Yet most of this work is philosophical and disclaims any linkage to constitutional doctrine.¹⁸ In short, there is no comprehensive analysis of the success of the privatization thesis in influencing constitutional doctrine involving the interaction of religion and the legal order.

This Article seeks to fill this gap. It examines the privatization thesis through a discussion of the Establishment Clause¹⁹ and of substantive due process.²⁰ In both contexts, religion is typically involved in an explicitly

cases, for all their difficulties and asymmetries, follow the contours of the general legal culture." *Id.* at 168; see also Gedicks, *supra* note 12, at 423-25.

15. Gerard V. Bradley, *Dogmatomachy—A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 276-77 (1986) [hereinafter Bradley, *Dogmatomachy*]; see also Gerard Bradley, *Tribe's "Jurisprudence of the Religion Clauses,"* 4 BENCHMARK 137, 150 (1990) [hereinafter Bradley, *Tribe's Jurisprudence*]; cf. Gerard Bradley, *Caesar's Religion*, 15 HUM. LIFE REV. 52 (1989) (making a similar point in the substantive due process context).

16. See Michael E. Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83. This extremely valuable article discusses the Justices' views of religion but ignores completely the substantive due process cases.

17. See GREENAWALT, *supra* note 11, at 87-97, 120-43 (discussing government prohibitions of consensual sexual acts and abortion).

18. Professor Garvey, in a critique of one of Professor Greenawalt's articles, see Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985), noted that "we're not talking about constitutional law." John H. Garvey, *A Comment on Religious Convictions and Lawmaking*, 84 MICH. L. REV. 1288, 1292 n.13 (1986). But see GREENAWALT, *supra* note 11, at 244-60 (discussing constitutional issues in a summary matter).

19. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

20. For an extended discussion of substantive due process doctrine, see Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557 (1988).

public role. For example, many Establishment Clause issues involve aid to religious institutions. The constitutional debate in these cases often turns on whether it is permissible for the religious institution to play an active role in performing a "public" task, such as education or child care. The privatization thesis requires that institutions retaining their religious character be denied direct government support. Similarly, in the context of substantive due process it is important to determine the appropriate role of religiously influenced moral principles in public decisionmaking on such issues as abortion and homosexual conduct. Here, the privatization thesis works in two ways. First, religiously influenced moral judgments are not taken into account in support of the constitutionality of legislation because such judgments do not constitute "secular" interests that the government may advance. Second, religiously influenced moral judgments are viewed as dispositive of the case against the constitutionality of legislation because it violates the Establishment Clause for "religious" views to be embodied in secular legislation.

This Article largely excludes free exercise cases.²¹ This is not because these cases are unimportant;²² in fact, the free exercise cases tell us a great deal about how the Supreme Court Justices view their responsibility to protect the rights of religious minorities and, more broadly, how they conceive of their judicial role.²³ The Article excludes these cases because free exercise issues typically do not involve religion in a "public role." Rather, the free exercise claimant is typically seeking an exemption from some expression of "public order." *Employment Division, Department of Human Resources v. Smith*,²⁴ where the Court considered whether the Free Exercise Clause required that the religious use of peyote be exempted from the criminal prohibitions on the use of that drug, is a good example.²⁵

In fact, the free exercise cases reveal that the Justices who support the privatization thesis are not hostile to religion. These Justices are quite willing to support free exercise claimants. The privatization thesis simply rejects a public role for religion. The thesis is not hostile to religion in general; rather, it is hostile to a particular type of religion.

21. *But see infra* Section II.B (discussing the free exercise issue).

22. Professor McConnell has stated that "[t]he free exercise clause may well be the most philosophically interesting and distinctive feature of the American Constitution." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1513 (1990).

23. *See generally* James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

24. 494 U.S. 872 (1990).

25. *Id.* at 875.

This Article argues that in order to best understand the doctrinal debates surrounding the Establishment Clause and substantive due process, it is necessary to focus on the Justices' understanding of the role of religion²⁶ in public life. The sharp divisions on the Supreme Court in these two areas reflect in part the Justices' different conceptions as to the proper role of religion in public life. A narrow focus on the legal doctrine risks obscuring this more fundamental, theoretical issue.

The Article does not suggest that the Justices' views of the role of religion in public life explain every decision concerning the Establishment Clause or substantive due process. This Article is not intended to take a reductionist view or to fail to acknowledge the complexities of the cases. Other factors, such as precedent or a Justice's view of the deference owed to the democratically-elected branches, also play a prominent role. Nonetheless, the Justices' opinions of the privatization thesis provide a useful perspective on the case law.

The Article examines both the Establishment Clause and the substantive due process doctrine. Recently there has been a welcome shift away from the view that religion should be privatized. The legal doctrine has shifted towards the view that religion, broadly conceived, has a valuable role to play in the public realm.

This Article argues that this change is salutary. Accepting a public role for religion is most faithful to this country's tradition of religious activism in public life. In addition, accepting a public role for religion enables religious institutions to contribute significant resources and insights regarding moral issues. Moreover, accepting a public role for religion preserves the strength of a key mediating institution, which plays an essential role in maintaining the health and freedom of society.

The Article also suggests how the current doctrine should be reformulated to allow religion to play a more active public role. The Article explains that the Supreme Court should modify the way it treats cases involving the public funding of religious institutions. Although the Court is increasingly sympathetic to including religious institutions in publicly funded programs, current

26. The phrase "role of religion," refers to religious institutions, religious individuals, and religiously-influenced moral principles. By "religiously-influenced moral principles" the Article adopts what Professor Bradley refers to as the notion of "religious consciousness," that is, "the conviction that religion contains objectively true insights into human social existence." Bradley, *Dogmatomachy*, *supra* note 15, at 277. Put another way, a "religiously-influenced moral principle" is simply one type of moral knowledge, a type of moral knowledge that is in some sense traced to or influenced by the religious beliefs of the individual or church in question. See Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 943-44 (1989) (arguing that we should not distinguish between different types of moral knowledge).

Establishment Clause doctrine still discourages these institutions from maintaining a strong religious identity. Finally, this Article contends that Establishment Clause doctrine should be modified to eliminate this latter tendency. Religious institutions, if they choose to be, ought to be full participants in public programs such as education or child care. Allowing these institutions to preserve their religious identities is particularly important as the government continues to increase its role in areas that traditionally have been the province of mediating institutions.

I. THE RELIGION CLAUSES

This section of the Article discusses the influence of the privatization thesis on both Establishment Clause and free exercise doctrine. Part A discusses the three areas in which the privatization thesis has influenced Establishment Clause doctrine. First, courts frequently find Establishment Clause violations when the government assists religious institutions, on the theory that the government may not take actions having the primary effect of advancing religion. The problem has arisen predominantly in the context of government funding to religious schools. The judicial decisions evidence a hostility to religious institutions playing an active role in performing a "public" task, such as education. In effect, this has "encouraged" religious institutions to abandon their distinctive, religious identities and penalized the individuals who attend schools that have retained such distinctive identities. Second, courts sometimes find Establishment Clause violations when religious symbols are displayed on public property. The concern here is to insulate government from religious symbols and practices so that it adheres to "the constitutional command of secular government."²⁷ Third, the Court occasionally holds statutes unconstitutional because they lack a "secular purpose." That is, a law that is otherwise valid is struck down if enacted with the purpose of advancing religion. In each of these three areas, the Article explores the deficiencies of the privatization thesis and suggests how Establishment Clause doctrine should be modified to eliminate the influence of the privatization thesis.

In Part B of this section, the Article briefly discusses free exercise doctrine. This discussion supports the view that most of the Justices have a consistent understanding of the role of religion in public life that is manifested across doctrinal lines. The sharp divisions among the Justices on free exercise issues reflect different understandings of the role of religion in public life.

27. *County of Allegheny v. ACLU*, 492 U.S. 573, 611 (1989).

In free exercise cases, religion is not involved in a public role; the free exercise claimant is typically seeking an exemption from some expression of public order. Thus, it is not an anomaly that the Justices who support the privatization thesis are quite willing to support free exercise claimants. These "pro-religion" votes illustrate that the liberal Justices are not anti-religious. These Justices are, instead, hostile to a particular type of religion, namely, public religion. For the liberal members of the Court, votes in support of free exercise claims reflect an individualistic conception of religion which similarly influences their positions on Establishment Clause and substantive due process issues.

A. The Establishment Clause

1. Public Funding Of Religious Institutions

Ever since *Everson v. Board of Education*,²⁸ the issue of public funding of religious schools has dominated Establishment Clause litigation. The Court never accepted the extreme position that the Establishment Clause barred all public assistance to religious schools.²⁹ It has allowed some forms of assistance, such as bus transportation and textbooks.³⁰ The dominant view on the Court, however, prohibits significant direct assistance to religious schools. This position in part reflects the separationist emphasis of the test developed in *Lemon v. Kurtzman*,³¹ although separationist theories are not necessarily hostile to a public role for religion.³² The principal justification for the

28. 330 U.S. 1 (1947).

29. Justice Rutledge's dissent in *Everson* would have prohibited virtually all public aid to religious schools. *Id.* at 28 (Rutledge, J., dissenting). For a discussion and defense of Justice Rutledge's position, see G. Sidney Buchanan, *Governmental Aid to Religious Entities: The Total Subsidy Position Prevails*, 58 FORDHAM L. REVIEW 53, 71-73 (1989); G. Sidney Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 Hous. L. REV. 783, 827-38 (1978).

30. For a discussion of the public funding cases, see John Garvey, *Another Way of Looking at School Aid*, 1985 SUP. CT. REV. 61; Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 443-49 (1986) [hereinafter Laycock, *Religious Liberty*]; Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405; Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses: A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1675-703 (1987).

31. 403 U.S. 602 (1971).

32. See Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989); Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 KY. L.J. 61 (1988) [hereinafter Myers, *Nativity Scenes*]. Since 1971, the Supreme Court has used the *Lemon* test to analyze Establishment Clause issues. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). According to the *Lemon* test, a statute must pass three requirements in order to withstand an Establishment Clause challenge: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute

Court's approach has been that the government may not take actions that have the primary effect of advancing religion.

The privatization thesis has played an important role in this context. Nevertheless, despite the thesis' importance, it does not perfectly elucidate the ambiguities in the case law on public funding of religious institutions.³³ In fact, one might argue that the predominant influence in this area has been the country's long opposition to government support of religion with tax dollars,³⁴ and that this opposition does not reflect a desire to privatize religion. In contrast, the view that the government should not provide direct financial assistance to religion has been historically associated with strong proponents of religious liberty, who argue that the aid may corrupt the church.³⁵ Under this view, there is no objection to religious institutions playing an active public role, they are simply required to pay their own way.³⁶

must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citation omitted) (quoting *Walz v. Tax Comm.* 397 U.S. 664, 674 (1970)). The status of *Lemon* is precarious. Although the Court continues to formally adhere to the *Lemon* test in resolving Establishment Clause cases, *see Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2370-73 (1990) (plurality opinion); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 & n.44 (1989), it has increasingly used the "endorsement" concept advocated by Justice O'Connor. *See id.* at 593-94. As the separate opinions in *County of Allegheny* indicate, however, the Justices who support the endorsement test do not agree on what it means. In recent years, the *Lemon* test has come under increasing attack from certain members of the Court. *See, e.g., id.* at 655-63 (Kennedy, J., concurring in part and dissenting in part) (noting criticisms of *Lemon* and proposing a test that focuses more on coercion). In *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), the Court will consider whether to scrap *Lemon*. *See Linda Greenhouse, Supreme Court to Take Fresh Look at Disputed Church-State Boundary*, N.Y. TIMES, Mar. 19, 1991, at A16.

33. *See Laycock, Religious Liberty*, *supra* note 30, at 443. Professor Laycock stated that: Government aid to religious schools has been on the Supreme Court's docket almost continuously since 1968. The Court has been unwilling either to ban all such aid or to permit all such aid. Instead, it has groped for a compromise formulation that would permit some aid but not too much. At least six inconsistent theories have been endorsed by one or more justices. The majority has switched from one theory to another more than once. At least four of these theories are plausible. The result has been a series of inconsistent and almost inexplicable decisions.

Id.

34. *See Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 916-17 (1986) [hereinafter, Laycock, *Nonpreferential Aid*] (discussing resistance to tax support for churches).

35. Oliver S. Thomas, *Comments on Papers by Milner Ball and Frederick Gedicks*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 455 (1990). This view is usually traced to Roger Williams. *See Myers, supra* note 32, at 113 & n.242 (discussing this point with respect to the display of religious symbols on public property and citing authorities).

36. Laycock, *Nonpreferential Aid*, *supra* note 34, at 923 ("With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere.").

Although the latter view has played a role in the public funding cases, it would be a mistake to ignore the impact of the privatization thesis on certain Justices. For example, although citations to Madison's *Memorial and Remonstrance* abound in the public funding cases,³⁷ it is anachronistic to apply the prohibition against financial aid to religion in a context such as public funding of religious schools. In light of the importance of government spending on education, religious schools' requests for financial aid are more properly regarded as efforts to obtain equal treatment than as a special pleading for subsidies.

The Justices who have most consistently opposed government funding of religious schools have in other contexts been the most sensitive to the impact of government funding on the exercise of constitutional rights. For example, Justice Brennan's dissents in the abortion funding cases were quite sensitive to the government's choice to fund one option (childbirth) over another (abortion).³⁸ It is hard to avoid thinking that his response to the government's failure to fund either religious education or abortion reflects his sympathy to the underlying rights.³⁹

37. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 app. (1947) (Rutledge, J., dissenting). For other references to *Memorial and Remonstrance*, see Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 770 n.28 (1973) and *Lemon v. Kurtzmann*, 403 U.S. 602, 633-34 (1971) (Douglas, J., concurring).

38. See *Harris v. McRae*, 448 U.S. 297, 329 (1980) (Brennan, J., dissenting); *Maier v. Roe*, 432 U.S. 464, 482 (1977) (Brennan, J., dissenting).

39. The author does not suggest that Justice Brennan is the only Supreme Court Justice who treats the selective funding problem inconsistently. As Professor McConnell noted:

[V]irtually everyone who supports funding of abortions opposes funding of religious schools, and virtually everyone who supports funding of religious schools opposes funding of abortions. It is difficult to resist the conclusion that, for most people, these positions are driven more by relative enthusiasm for or hostility to the underlying rights than by a principled understanding of the relation between these rights and government funding.

Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 991 (1991). In addition, it is difficult to believe that Justice Brennan's views on the public funding cases are explained by his deference to the original understanding of the Establishment Clause, which it is argued, is best explained by reference to Madison. As Justice Brennan has explained, he does not consider himself bound by the original understanding. He reads the Constitution "as [a] Twentieth Century American[]." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 43 NAT'L LAW. GUILD PRAC. 1, 7 (1986). This approach incorporates the Justice's own normative views. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 219-21 (1990) (discussing Justice Brennan's judicial philosophy). This all suggests that Justice Brennan thinks that the privatization thesis is a good idea. See *Nyquist*, 413 U.S. at 820 (White, J., dissenting) ("[T]he courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.").

The cases demonstrate that the privatization thesis helps to understand why certain Justices reject government funding of religious education. Many judicial opinions on the subject evidence hostility to religious institutions playing an active role in performing a "public" task, namely, education.⁴⁰ These decisions encourage religious schools to abandon their distinctive, religious identities and in effect penalize the religious individuals who attend schools that have retained their distinctive identities. While the doctrine has improved over the years, it still needs substantial modification.

Many of the school aid cases reflect a negative assessment of religious schools, as demonstrated by the opinions' persistent references to the schools' purpose of religious indoctrination and inculcation.⁴¹ To the liberal, secular mindset that figures so prominently in these cases, the "authoritarian" character of these schools is hardly attractive. Although there may be some simple anti-Catholicism reflected in certain opinions,⁴² the Court's view of religious schools is probably more a reflection of a general antipathy to the supposedly "irrational,"⁴³ freedom-restraining, undemocratic⁴⁴ character of traditional religion. Because *Pierce v. Society of Sisters*⁴⁵ has not

40. See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

41. See, e.g., *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 388 (1985); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Lemon*, 403 U.S. at 616; *id.* at 631, 635 (Douglas, J., concurring).

42. See Smith, *supra* note 16, at 105; James Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3, 9-10 (Spring 1981).

43. See Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1427 (1989) ("[S]uch things as divine revelation and biblical literalism are irrational superstitious nonsense."). Professor Levinson suggests that Sherry's comment is "a more old-fashioned, though one suspects not completely atypical" example "of the Enlightenment-based animus within the intellectual community to religion." Levinson, *supra* note 1, at 1078 n.90. See generally 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, 176 (1990) ("[R]eligion is an alternative system of nonrational and unprovable beliefs. As such, religion is fundamentally incompatible with the critical rationality on which democracy depends.").

44. See *Abington Township v. Schempp*, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) ("The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own."); see also *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 215-17, 231 (1948) (Frankfurter, J. concurring).

45. 268 U.S. 510 (1925) (holding that the State could not require all children to be educated only in public schools). Although the courts have preserved the rights of parents to opt out of the public schools, the courts have otherwise not been sympathetic to the rights of parents to control the education of their children. See generally Richard S. Myers, *Curriculum in the Public Schools: The Need for an Emphasis on Parental Control*, 24 VAL. U. L. REV. 431 (1990) [hereinafter Myers, *Curriculum*].

been overturned, religious schools must be tolerated.⁴⁶ The Court would not, however, sanction significant, direct assistance to these schools. On the other hand, in the higher education cases the Court was much more willing to allow substantial, direct aid to religiously affiliated colleges and universities. Because these schools were viewed as essentially secular,⁴⁷ they did not present the dangers of organized religion.⁴⁸

Another aspect of the early school aid cases also reflects the privatization thesis. In *Lemon*, for example, the Court expressed concern that the Rhode Island and Pennsylvania programs of assistance to private schools might lead to "[p]olitical fragmentation and divisiveness on religious lines."⁴⁹ Those who sought state assistance for parochial schools were inappropriately "intruding into the political arena."⁵⁰ This involvement in the political process was an example of religion not respecting its proper, private place. In fact, this involvement in the democratic process was undemocratic.⁵¹

46. "Tolerance", in the sense of a grudging concession to a practice of which one disapproves, see Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 306 (1990), is the way to describe the attitude of certain Justices towards religious schools. Justice Brennan's comparison of public and private schools in *Schempp* is interesting.

It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

374 U.S. at 241-42 (Brennan, J., concurring) (citation omitted). The Court's enthusiasm for government indoctrination and distrust for religious indoctrination is instructive. It now seems generally recognized that the public schools are not religiously neutral. See Myers, *Curriculum*, *supra* note 45, at 432 & n.6. Some explicitly defend the role of the public schools in indoctrination, see Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 298 (1989); William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 367-73 (1991), even when there are religious objections to government indoctrination. See Myers, *Curriculum*, *supra* note 45, at 436-39 (criticizing this conclusion). Justice Brennan is not always so solicitous of public school's pedagogical message. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting).

47. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973); *Tilton v. Richardson*, 403 U.S. 672, 687 (1971); see Joseph R. Preville, *Catholic Colleges and the Supreme Court: The Case of Tilton v. Richardson*, 30 J. CHURCH & ST. 291, 306-07 (1988) (discussing how the four colleges involved in *Tilton* were secularized during the course of the lawsuit). In *Tilton*, the Court also noted "that college students are less impressionable and less susceptible to religious indoctrination" than students in elementary and secondary schools. 403 U.S. at 686. The Court seems to be concerned that the religious mission of parochial schools might actually influence younger students.

48. Of course, some Justices objected to all direct aid to religious institutions. See *Tilton*, 403 U.S. at 689-93 (Douglas, J., dissenting in part).

49. *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

50. *Id.*

51. In *Lemon*, Justice Burger wrote:

The Court maintained that although religion can be valuable, it must be confined to its proper realm—the private sphere.⁵² Religious groups' efforts to influence the political agenda are viewed as distortions of the democratic process and in certain instances are regarded as violations of the Establishment Clause.⁵³

Thus, two factors suggest that the privatization thesis has influenced certain Justices. First, certain opinions indicate grave reservations about the character of the schools. Although parochial schools were to be tolerated, their undemocratic character suggested that they should be regarded with some suspicion, at least when it came to distributing public resources. Second, the influence of the political divisiveness test, which is most often invoked in public funding cases,⁵⁴ indicates that certain Justices are not favorably disposed to religious activism in politics. This suggests, again, that certain Justices are not sympathetic to the underlying rights being asserted.⁵⁵

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

403 U.S. at 622 (citation omitted). Chief Justice Burger seemed to be less enamored with the political divisiveness test in subsequent years. *See, e.g.,* *Meek v. Pittenger*, 421 U.S. 349, 385-86 (1975) (Burger, C.J., concurring in part and dissenting in part); *Lynch v. Donnelly*, 465 U.S. 668, 664-85 (1984).

52. *Lemon*, 403 U.S. at 625.

53. For a discussion of the divisiveness doctrine, see GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 4-9 (1987); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1275-84 (2d ed. 1988); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1192-97 (4th ed. 1991); Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 528-29 (1990); Edward McGlynn Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

54. *But see* *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 571 (1989) (Stevens, J., concurring in part and dissenting in part) (invoking the divisiveness doctrine in the abortion context).

55. The abortion rights situation presents an illuminating contrast. In that setting, the Court is typically unconcerned about the bitter disputes engendered by the vindication of abortion rights. *See* *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). Yet, efforts to vindicate the religious liberty of parents who have a religious obligation to send their children to parochial schools are viewed as dangerous incursions into the normal political process. *See* *Wolman v. Walter*, 433 U.S. 229, 256 (1977) (Brennan, J., concurring in part and dissenting in part); *id.* at 258-59 (Marshall, J., concurring in part and dissenting in part); *Meek*, 421 U.S. at 374-85 (1975) (Brennan, J., concurring in part and dissenting in part).

Although the Court's direction appeared to change somewhat in the early 1980s,⁵⁶ the 1984 Term brought "a return to separationist doctrine."⁵⁷ Two school aid cases, *School District of Grand Rapids v. Ball*⁵⁸ and *Aguilar v. Felton*,⁵⁹ were major victories for the privatization thesis. In *Aguilar*, the Court's holding that it is unconstitutional for public school professionals to provide remedial education to needy children on the premises of private religious schools severely disadvantaged needy inner-city families.⁶⁰ *Aguilar* penalized poor families who decided to educate their children in religious schools; parents who sent their children to religious schools were required to forfeit their statutory entitlement to the remedial services that would have been available to their children had they attended public schools.

Again, the 1985 school aid cases reflect the Court's view that religion should not play an active role in public life. Justice Brennan's opinion in *Grand Rapids* clearly reflected the view that religion should be confined to the private, spiritual realm. He stated:

[J]ust as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs

56. See Myers, *Nativity Scenes*, *supra* note 32, at 91 & n.153.

57. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 2.

58. 473 U.S. 373 (1985). In *Grand Rapids*, the Court held that two programs, the Shared Time and Community Education programs, violated the establishment clause. "These programs . . . provide[d] classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools." 473 U.S. at 375. Forty of the forty-one nonpublic schools involved in the program were religious schools.

59. 473 U.S. 402 (1985). *Aguilar* involved a federal program that "distribute[s] financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families." 473 U.S. at 404. *Aguilar* turned on the City of New York's administration of the program. Of the low-income students eligible to benefit by the program, 13.2% attended private schools, most of which were religious in character. New York provided instructional services, such as remedial reading and math, by public school employees to parochial school students on the premises of the parochial schools.

60. See generally THOMAS VITULLO-MARTIN & BRUCE COOPER, *SEPARATION OF CHURCH AND CHILD: THE CONSTITUTION AND FEDERAL AID TO RELIGIOUS SCHOOLS* (1987) (providing a detailed discussion of *Aguilar*'s impact); Patricia Lines, *The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?*, 17 J.L. & EDUC. 1, 26-30 (1988). To comply with the Court's ruling, the government substituted programs that were more expensive and less effective. The programs typically required that the children be transported to other locations, thus diverting federal funds from education to payments for transportation and portable classrooms. After *Aguilar*, the federal program served far fewer private school children. There has also been continued litigation about the constitutionality of the post-*Aguilar* programs. Compare Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1991) (rejecting Establishment Clause challenge to providing remedial services in mobile units outside the parochial school even though some units were located on the property of the parochial school) with Walker v. San Francisco Unified Sch. Dist., 761 F. Supp. 1463 (N.D. Cal. 1991) (concluding that the Establishment Clause prohibited parking mobile units on the property of the parochial school).

are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.⁶¹

While Justice Brennan noted that religious schools have contributed to society, he reaffirmed that substantial public support for these institutions could not be sanctioned because "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."⁶² In support of his ruling, Justice Brennan also cited the potential for political divisiveness,⁶³ a factor also emphasized in Justice Powell's separate opinion.⁶⁴

The Establishment Clause decisions involving aid to religious institutions since 1985 have begun to move away from the privatization thesis. For example, in *Witters v. Washington Department of Services for the Blind*,⁶⁵ the Court unanimously concluded that it did not violate the Establishment Clause for the state of Washington to extend financial aid under a state vocational rehabilitation program to a blind man who was studying at a Christian college to prepare himself for a career as a pastor, missionary, or youth director. Because the aid went to the individual, "the decision to support religious education is made by the individual, not by the State."⁶⁶ The assistance was made available without regard to religion, only a small amount of aid supported religious education, and the assistance "create[d] no financial incentive for students to undertake sectarian education."⁶⁷

61. *Grand Rapids*, 473 U.S. at 382; see also Bradley, *Dogmatomachy*, *supra* note 15, at 296.

62. *Grand Rapids*, 473 U.S. at 398 (alteration in original) (quoting *Lemon*, 403 U.S. at 625).

63. *Aguilar*, 473 U.S. at 414.

64. *Id.* at 416-17 (Powell, J., concurring).

65. 474 U.S. 481 (1986).

66. *Id.* at 488.

67. *Id.* *Witters* does not, however, indicate that all of the Justices reject the privatization thesis. Although the Court was unanimous, the liberal wing of the Court, meaning those Justices who were in the majority in *Grand Rapids* and *Aguilar*, strained to emphasize the limited nature of its ruling. First, Justice Marshall, writing for the majority, noted the tentative character of the ruling. He indicated that the record presented was quite limited and that there were several issues that would need to be addressed on remand. *Id.* at 486 n.3, 489 & n.5. Second, the majority emphasized that "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education." *Id.* at 486. Apparently, Witters was the only person who had ever attempted to use the vocational rehabilitation assistance for religious education. *Id.* at 488. The Court emphasized that its ruling did not suggest approval of significant aid to parochial schools. *Id.* In fact, for certain Justices, the marginal nature of

The Court's 1988 decision in *Bowen v. Kendrick*⁶⁸ has been the most important indication that the Court is more receptive to an active role for religious organizations. The decision, however, illustrates the inadequacies of the Court's current approach. The Adolescent Family Life Act (AFLA)⁶⁹ authorizes grants to public and private organizations for services and research on premarital adolescent sexual relations and pregnancy. One of the AFLA's goals is to promote chastity. Because it recognized the complexity of the problem and the inadequacy of relying solely on government solutions, Congress specifically required the involvement of religious and other private organizations in the program. In fact, AFLA grants were distributed to religious organizations.

The Court first rejected the conclusion that AFLA was inherently religious, even though it did promote chastity and adoption as an alternative to abortion. The Court concluded that AFLA's approach to adolescent sexuality and pregnancy "is not inherently religious, although it may coincide with the approach taken by certain religions."⁷⁰

The Court then rejected the view that requiring the inclusion of religious groups in a program involving sensitive issues that may have important religious implications violated the Establishment Clause. In particular, the Court stated:

the entire program was crucial because they were unwilling to endorse a significant public role for religious education. In other words, the Justices who are generally supportive of the privatization thesis are willing to tolerate exceptions, as long as they are innocuous. This supports Professor Laycock's view that the Court seems to believe "that a little bit of aid to religious schools is permissible, but it must be structured in a way that keeps it from becoming too much." Laycock, *Religious Liberty*, *supra* note 30, at 446.

Third, as the separate opinions noted, Justice Marshall carefully avoided any approval of the Court's ruling in *Mueller v. Allen*, 463 U.S. 388 (1983), in which the Court, by a 5-4 vote, sustained a tax deduction for certain educational expenses even though a high percentage of beneficiaries were parents of children attending religious schools. The omission of favorable references to *Mueller* suggests that Justice Marshall, who wrote the dissent in *Mueller*, did not intend his opinion in *Witters* to be a rejection of his longstanding view that the establishment clause prohibits significant assistance to religious schools. Fourth, the subsequent history of the *Witters* litigation (which is usually ignored) suggests that the Supreme Court opinion in *Witters* does not indicate that the Justices reject the privatization thesis.

On remand, the Washington Supreme Court held that the Washington constitution prohibited extending the aid for Witters's religious education and that the denial of aid did not violate the free exercise clause. *Witters v. State Comm' for the Blind*, 771 P.2d 1119 (Wash.), *cert denied*, 493 U.S. 850 (1989). The Supreme Court denied Witters' petition for a writ of *certiorari*, *Witters v. Washington Dept. of Serv. for the Blind*, 493 U.S. 850 (1989), although Justice White thought the Court should have agreed to hear the free exercise issue. See *McMonagle v. Northeast Women's Ctr., Inc.*, 493 U.S. 901 (1989) (White, J., dissenting from denial of *certiorari*).

68. 487 U.S. 589 (1988).

69. 42 U.S.C. §§ 300z to 300z-10 (1988).

70. *Bowen*, 487 U.S. at 605.

Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems. . . . [I]t seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children.⁷¹

The Court held that the Constitution does not require that religious organizations be excluded "from participating in publicly sponsored social welfare programs,"⁷² at least when "a significant proportion of the federal funds will [not] be disbursed to 'pervasively sectarian' institutions."⁷³

The Court also rejected the lower court's reliance on the "political divisiveness" test. The Court stated: "It may well be that because of the importance of the issues relating to adolescent sexuality there may be a division of opinion along religious lines as well as other lines. But the same may be said of a great number of other public issues of our day."⁷⁴

Justice Blackmun's dissent concluded that it was unconstitutional to use federal funds "to support religious teaching."⁷⁵ More important, the dissent reflects a negative attitude about religion that has all too frequently characterized Establishment Clause case law. The dissent maintained that the congressional "solicitude for the participation of religious organizations"⁷⁶ weighed against the constitutionality of AFLA. The dissent repeatedly referred to "religious indoctrination" and expressed concern about government participation in "educat[ing] impressionable young minds on issues of religious moment."⁷⁷ While Justice Blackmun expressed concern that religious organizations not be secularized and demeaned by accepting public funds with their constitutionally required strings,⁷⁸ the overwhelming message of the dissent is a disdain for the efforts of some AFLA grant recipients.⁷⁹

71. *Id.* at 607.

72. *Id.* at 609.

73. *Id.* at 610.

74. *Id.* at 617 n.14. The Court also added the obligatory comment that "the question of 'political divisiveness' should be 'regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.'" *Id.* (quoting *Mueller v. Allen*, 463 U.S. 388, 404 n.11 (1983)).

75. *Id.* at 626 (Blackmun, J., dissenting). Justice Blackmun was joined by Justices Brennan, Marshall, and Stevens.

76. *Id.* at 637 n.8.

77. *Id.* at 636, 638 (emphasis added). Despite Justice Blackmun's disclaimer, *id.* at 634, he seemed to perceive the issue (i.e., chastity) as inherently religious and therefore not a proper subject for governmental concern. See, e.g., *id.* at 639 n.9.

78. *Id.* at 640 n.10.

79. *Id.* at 625-26, 635 n.7, 642 n.12.

Thus, *Bowen* confirms the important influence the privatization theory has had on the liberal Justices in Establishment Clause cases. The overwhelming message of these Justices is that religion is a private affair. Under this view, religion should be tolerated, but constant vigilance needs to be maintained to screen religion from any direct influence on public life. Justice Blackmun's dissent in *Bowen* echoes the opinions of Justice Douglas, who was extremely hostile to corporate religion.⁸⁰ These Justices exhibit this approach on a whole range of issues involving the interaction between law and religion. Thus, on substantive due process issues, these Justices predictably have been the most outspoken about the need to limit the role of religiously-influenced moral principles. Although theories exist that might explain the Establishment Clause rulings of these Justices, the principal alternative—the “no subsidy to religion view”—seems less persuasive for these Justices. These Justices, after all, are very sensitive to the impact of government funding on the exercise of constitutional rights.⁸¹ The contrast between their Establishment Clause decisions and their decisions involving rights they favor, such as abortion, along with their other writings on the role of religion, suggests that the privatization theory has significant explanatory power.

The Court's recent Establishment Clause decisions, *Bowen* in particular, reflect the declining influence of the privatization thesis. In this area, as in others, recent judicial appointees have significantly altered the legal doctrine. Although it still appears significant for certain Justices, the privatization thesis is no longer the dominant influence on Establishment Clause doctrine.⁸²

Bowen has signalled several important changes in the Establishment Clause doctrine. For example, *Bowen* may have eliminated the entanglement prong of the *Lemon* test.⁸³ Under this prong, the Court had previously invalidated aid to parochial schools after concluding that the extensive supervision which would be required to prevent the use of such aid for the promotion of religion would necessarily entail excessive entanglement in violation of the Establishment Clause.⁸⁴ In *Bowen*, however, the Court virtu-

80. See Smith, *supra* note 16, at 98-99.

81. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting); *Harris v. McRae*, 448 U.S. 297, 329 (1980) (Brennan, J., dissenting); *id.* at 337 (Marshall, J., dissenting); *id.* at 348 (Blackmun, J., dissenting); *id.* at 349 (Stevens, J., dissenting); *Maher v. Roe*, 432 U.S. 464, 482 (1977) (Brennan, J., dissenting); *Beal v. Doe*, 432 U.S. 438, 454 (1977) (Marshall, J., dissenting); *id.* at 462 (Blackmun, J., dissenting).

82. Professor Bradley's theory that the Court is committed to privatizing religion, see Bradley, *Dogmatomachy*, *supra* note 15, at 276-77, is overstated, or at least outdated. Although it does describe accurately the views of certain Justices, the privatization thesis fails to acknowledge recent important shifts in the Establishment Clause doctrine.

83. See sources cited *supra* note 32.

84. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 409-14 (1985).

ally abandoned the entanglement prong. The majority cited criticisms of "entanglement,"⁸⁵ and then concluded that there was no entanglement problem because the religious organizations involved were not "'pervasively sectarian' in the same sense as the Court has held parochial schools to be."⁸⁶ Thus, it can be inferred that the Justices in the majority in *Bowen* are not favorably disposed to the entanglement prong, and that it is only a matter of time before this part of the *Lemon* test is formally abandoned.⁸⁷

In addition, *Bowen* illustrates that a majority of the Court now rejects a principal manifestation of the privatization thesis⁸⁸—the political divisiveness test.⁸⁹ That test has been virtually ignored in many recent Establishment Clause cases,⁹⁰ and it now seems apparent that the Court does not regard the test as having any continuing validity. The Court never really relied solely upon the political divisiveness test to justify finding an Establishment Clause violation. Moreover, the Court no longer regards the political divisiveness that may be engendered by religious involvement in the political process as a warning signal of Establishment Clause problems. Indeed, the Court seems to have rejected the view that political divisiveness along religious lines is an evil, reasoning that such divisiveness is a normal part of the political process and is not a cause for concern.⁹¹

The rejection of political divisiveness is well founded, as the divisiveness rationale has had little historical support.⁹² Although some Framers of the Constitution were concerned about religious domination,⁹³ their solution was not to privatize religion.⁹⁴ The Framers, particularly James Madison,

85. *Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988).

86. *Id.* at 616.

87. Moreover, this prong would not be important if the current understanding of the effect prong is revised, since supervision is necessary only to avoid a violation of the second prong.

88. See *supra* text accompanying notes 11-18 (discussing the privatization thesis).

89. See *supra* notes 49-55 and accompanying text (discussing the divisiveness test).

90. See, e.g., *Bowen*, 487 U.S. at 617 n.14 (rejecting summarily the district court's conclusion that AFLA was unconstitutional because it was likely to lead to political divisiveness); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 n.17 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 683-85 (1984); *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983).

91. *Bowen*, 487 U.S. at 617 n.14; see Esbeck, *supra* note 53, at 528 ("[T]he political divisiveness element is now repudiated by a majority of the Court."). The Court does note that the political divisiveness test is still relevant in "'cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.'" *Bowen*, 487 U.S. at 617 n.14 (quoting *Mueller*, 463 U.S. at 404 n.11).

92. See, e.g., BRADLEY, *supra* note 53, at 4-9; Gaffney, *supra* note 53.

93. See McConnell, *supra* note 57, at 14-15.

94. See BRADLEY, *supra* note 53, at 5; Smith, *supra* note 32, at 959-75; Myers, *Nativity Scenes*, *supra* note 32, at 97-106 (arguing that the solution to the prospect of religious coercion was to prevent the development of an institutional relationship between a religious denomina-

viewed religious factions "as a source of peace and stability."⁹⁵ Likewise, most of our political history belies any suggestion that legislation is constitutionally suspect simply because religious groups were involved in its passage, or because particular supporters of the legislation acted out of religious convictions.⁹⁶

In addition, there is little reason today to believe that religious division is any more contentious than other kinds of divisions, such as those based on ethnic or racial lines.⁹⁷ Justice Powell observed that "[t]he risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote."⁹⁸ A recent work of one scholar supports Justice Powell's observation. This commentary examined the declining significance of denominationalism in American religion and noted that disagreements on controversial issues are more likely to be between religious liberals and religious conservatives, rather than between particular religious denominations.⁹⁹

More important, the Court now seems to recognize that the divisiveness test is not an appropriate instrument with which to control the country's political agenda, and that such a role is not really possible, even if it were desirable. Invoking the Establishment Clause to invalidate legislation on divisiveness grounds is not likely to lead to civic peace; rather, it serves only to shift the locus of discontent.¹⁰⁰ In the long run, the Court's involvement may make things worse.¹⁰¹

Bowen does, however, indicate the need for improvement. Although *Bowen* confirms that the Establishment Clause does not bar religious organizations from publicly funded programs, there seems to be little enthusiasm for these organizations maintaining strong religious identities—at least in the publicly funded program. Although it did allow religious institutions to

tion and the state, from which coercion was likely to flow, not to prevent all contact between religion and government).

95. McConnell, *supra* note 22, at 1515.

96. See *infra* notes 214-20 and accompanying text.

97. See, e.g., BRADLEY, *supra* note 53, at 9; Smith, *supra* note 16, at 97; Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 830 (1984).

98. *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part); see *Mueller v. Allen*, 463 U.S. 388, 400 (1983) (endorsing Powell's point).

99. See ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* 218-25 (1988).

100. See *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C. J., concurring in part and dissenting in part) ("Indeed, I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case."). This pacification strategy only works if those in favor of public religion acquiesce. See Frederick M. Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 139 (1991).

101. See Johnson, *supra* note 97, at 830-31.

be included in the AFLA program, Chief Justice Rehnquist's opinion relied on the fact that a significant proportion of the federal funds would not be distributed to "pervasively sectarian" organizations. Most of the Justices seemed concerned about public money going to organizations with a strong religious identity and the Justices seemed united in their opposition to having religious doctrine taught in a publicly funded program.¹⁰²

This position, which discourages religious institutions from maintaining strong religious identities, needs to be resisted. This aspect of the current doctrine fails to accord appropriate respect to both the value of religious liberty and the important contributions of religious institutions. The basic problem stems from the Court's understanding of the "primary effect" prong of *Lemon* in direct funding cases.¹⁰³ In most of the parochial aid cases, the

102. The Court upheld the facial validity of AFLA and remanded to determine whether the Act was unconstitutional as applied. The Court noted that a senate report on the Act had stated the view that " 'the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation.' " See *Bowen*, 487 U.S. at 614-15 (quoting S. REP. NO. 496, 98th Cong., 2d Sess. 10 (1984)). The majority admitted "that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees," *id.* at 620, and seemed to agree that it would violate the Establishment Clause if AFLA grantees used materials that had religious content or that were designed to inculcate the views of a particular religious denomination. *Id.* at 621. Justice O'Connor's concurring opinion emphasized her view that "any use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring).

Justice Kennedy's concurrence, which was joined by Justice Scalia, maintained that it would be insufficient on remand for the plaintiffs to prove the AFLA grants were made to "pervasively sectarian" institutions. According to Justice Kennedy, "[t]he question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant." *Id.* at 624-25 (Kennedy, J., concurring). He indicated that it would be unconstitutional if AFLA "funds are in fact being used to further religion." *Id.* at 624.

103. Notably, the Court is considering abandoning *Lemon*. See *supra* note 32. The proposals set forth in this Article do not require a complete rejection of all aspects of *Lemon* doctrine. If the Court does abandon the *Lemon* test, its new approach would likely be far more favorable to public funding of religious institutions. It now seems generally assumed that some of the earlier cases, such as *Aguilar*, would be decided the other way because of the recent changes in Court personnel. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1010 (1990) [hereinafter Laycock, *Neutrality Toward Religion*]. There still are some changes needed, however. The conservatives on the Court have generally voted against "direct" aid to parochial schools. See, e.g., *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973) (Burger, C.J., concurring in part and dissenting in part) (agreeing that a state grant to parochial schools for maintenance and repair of facilities and equipment violated the establishment clause because it was a direct aid to religion.). But see *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding direct reimbursement of parochial schools for the cost of administering state-prepared standardized tests). Chief Justice Burger's opinion in *Nyquist* was joined by Justice Rehnquist on this issue. Justice Kennedy appears to hold the same position. See *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that the government may not give direct benefits to religion).

Court's error in regard to the primary effect prong has been to isolate the portion of the government program that aids religion.¹⁰⁴ This focus is inappropriate in an era of pervasive government spending.¹⁰⁵ The more appropriate focus examines the government's overall role with respect to the subject in question. It is wrong, for example, to focus on just the portion of public funding that benefits a religious school; a broader focus on the public funding of education generally is necessary. From this broader perspective, it is difficult to imagine a situation where government funding would have the "primary effect" of advancing religion. This simple shift in perspective would allow the government to include religious institutions in various social welfare programs.¹⁰⁶ Moreover, since the focus would be on the government program as a whole, it would not be necessary for the religious institutions receiving assistance to abandon their religious identities. Although it might be preferable to abandon the *Lemon* test altogether, this change in understanding of the "primary effect" prong would greatly reduce the extent to which the Establishment Clause doctrine promotes the privatization model.

The conservative Justices' apparent view on this issue cannot be traced to the privatization thesis. Some of the conservative Justices—Justices Kennedy and Scalia, in particular¹⁰⁷—may believe that the government should not provide a direct subsidy to religion.¹⁰⁸ The history and tradition of the Establishment Clause considerably supports the view that the clause prohibits direct financial support for churches.¹⁰⁹ This view is not necessarily based upon hostility to a public role for religion. In fact, this view—opposition to compulsory taxation to support religion—significantly respects religious liberty.¹¹⁰ Indeed, there is little reason to believe that the

104. See Myers, *Nativity Scenes*, *supra* note 32, at 106 n.217, 110 (emphasizing the need to focus on the government's overall conduct). But see *Lynch v. Donnelly*, 465 U.S. 668, 707 & n.12 (1984) (Brennan, J., dissenting) (arguing that the Court should isolate the portion of the program that appears to violate the establishment clause).

105. See McConnell, *supra* note 39, at 1014-22; Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 263-271 (1989).

106. Under this view, it would not matter whether the religious institutions received the aid directly or indirectly. Chief Justice Burger noted that the direct-indirect distinction was "premised more on experience and history than on logic." *Nyquist*, 413 U.S. at 802 (Burger, C.J., concurring in part and dissenting in part). This Article supports the adoption of the more logically consistent approach to these questions, which does not depend on the direct-indirect distinction.

107. *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring).

108. See *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 42-43 (1989) (Scalia, J., dissenting) (indicating disapproval of direct subsidies).

109. See, e.g., Laycock, *Nonpreferential Aid*, *supra* note 34, at 916-17.

110. *Id.*

conservatives' disapproval of direct subsidies results from adherence to the privatization theory.

The conservative view is mistaken, however, at least in the context typically presented to the Court. The direct subsidy cases do not involve taxes specifically earmarked for religious groups.¹¹¹ Rather, when viewed from the appropriate baseline, cases such as those involving educational funding do not involve subsidies to religion at all.¹¹² The conservatives may be more inclined to view government funding against the baseline of common law entitlements. Therefore, the conservative Justices may be less concerned about the impact of denials of government funding¹¹³ than with the award of government funds in situations where the Constitution plausibly prohibits such assistance, such as in Establishment Clause cases. The explanation, however mistaken, is not the result of adherence to the privatization theory.

Similarly, it would be a mistake to explain Justice O'Connor's view in *Bowen* in terms of the privatization theory. Her opposition to direct public funding of the teaching of religious doctrine more accurately results from the same conservative view previously noted.¹¹⁴ More generally, her endorsement theory does not seem to reflect a negative view of religion.¹¹⁵ In fact, Justice O'Connor has been quite willing to countenance substantial public aid to religion.¹¹⁶ Her votes against public support for religion are

111. See Myers, *Nativity Scenes*, *supra* note 32, at 109 n.227.

112. The conservatives have sometimes recognized this point. See *Meek v. Pittenger*, 421 U.S. 349, 386-87 (1975) (Burger, C.J., concurring in part and dissenting in part); *id.* at 389, 395 (Rehnquist, J., concurring in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 803 (1973) (Burger, C.J., concurring in part and dissenting in part); *Lemon v. Kurtzman*, 403 U.S. 602, 665 (1971) (White, J., dissenting). There does not, however, seem to be any enthusiasm for the conclusion that the denial of aid is a free exercise violation, as *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986), suggests. See *supra* note 67 (discussing *Witters*).

113. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency." (quoting *Harris v. McRae*, 448 U.S. 287, 316 (1980)); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). Another way to characterize this conservative stance is to emphasize the conservatives' typical deference to the legislature. See *McConnell*, *supra* note 39, at 1049. This may help to explain *Witters*.

114. See *supra* notes 108-10 and accompanying text.

115. For a thorough criticism of Justice O'Connor's approach, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 274 n.45 (1987) (citing extensive commentary on Justice O'Connor's approach).

116. Justice O'Connor has supported substantial public aid to religion in cases such as *Bowen*, *Witters*, *Aguilar*, and *Mueller*.

better explained by her subjective perception of symbolic—as opposed to real—offense.¹¹⁷

This Article's position, which would allow direct funding of "pervasively sectarian" institutions,¹¹⁸ is based on an appeal to genuine pluralism. Religious institutions have long played an important role in providing a range of social welfare activities.¹¹⁹ Religious schools are the most notable example. These religious institutions, along with the family, are the most important of the "mediating structures"¹²⁰ that serve a vital role in maintaining the health and freedom of a society.¹²¹

Because these institutions play such an essential role in our society, we should be concerned about a legal doctrine that makes it difficult for them to retain their distinctive identities. *Bowen* and the school funding cases illustrate this danger. These cases indicate that religious institutions can be included in government programs only if they abandon their religious identity. Consequently, as government expands its role in activities that have been the responsibility of mediating institutions, such as child care, there is a risk of losing the unique contributions of these institutions. To avoid this result, the Court should abandon the approach adopted in *Bowen* and the school aid cases.

Society should recognize the valuable, public role of these institutions. The strong religious identity of a religious school or child care facility should not disqualify the religious institution from participation in a government funded program.¹²² We should, of course, maintain safeguards to ensure that government funding does not influence religious choice.¹²³ But assum-

117. Commentators have frequently noted the subjectivity of Justice O'Connor's approach. See, e.g., William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 536 (1986).

118. The author does not consider whether the Constitution *requires* such funding.

119. See generally Thomas W. Pickrell & Mitchell A. Horwich, "Religion as an Engine of Civil Policy": *A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 LAW & CONTEMP. PROBS. 111 (1981).

120. P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977); see also R. MCCARTHY ET AL., *SOCIETY, STATE & SCHOOLS: A CASE FOR STRUCTURAL AND CONFESSIONAL PLURALISM* (1981).

121. See BERGER & NEUHAUS, *supra* note 120; see also John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 587-88 (1990); Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 115-16.

122. *But see* *Habel v. Industrial Dev. Auth.*, 400 S.E.2d 516 (Va. 1991) (holding that the proposed bond issue violated the Establishment Clause because the educational institution involved was pervasively sectarian). For a critique of *Habel*, see Al McConnell, Note, *Abolishing Separate but (Un)equal Status for Religious Universities*, 77 VA. L. REV. 1231 (1991).

123. See Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 270 (1989) (suggesting that the

ing that appropriate safeguards are in place, there should be no barrier to including institutions with strong religious identities in government funded programs. In fact, their inclusion should be encouraged so as to maintain genuine pluralism without imposing financial disadvantages on religious actors.¹²⁴

2. Religious Symbols

The privatization thesis is also influential when courts find that displaying religious symbols on public property violates the Establishment Clause. The courts advocate that government should be insulated from religious symbols and practices so that it does not depart from "the constitutional command of secular government."¹²⁵ The major cases in this area are *Lynch v. Donnelly*¹²⁶ and *County of Allegheny v. ACLU*.¹²⁷ In *Lynch*, the Court held that it did *not* violate the Establishment Clause for Pawtucket, Rhode Island, to sponsor a Christmas display that included a Santa Claus house, a reindeer, a clown, an elephant, a teddy bear, a talking wishing well, Christmas lights, and a Nativity Scene.¹²⁸ In *County of Allegheny*, the Court considered the constitutionality of two holiday displays on public property. The Court held that it *did* violate the Establishment Clause to display a creche on the Grand Staircase of the Allegheny County Courthouse, but that it *did not* violate the clause to place a Jewish menorah just outside the City-County building next to a Christmas tree and a sign saluting liberty.¹²⁹

problem with AFLA was that there were only two grants per states; there was a need to protect the beneficiaries from unwelcome religious indoctrination because the beneficiaries had little choice about where to receive government funded services).

124. See Gedicks, *supra* note 12, at 445 (stating that in some circumstances government should assist religious groups as part of a general program when their religious teachings are consistent with the policy goals of the program). The child care regulations recently proposed by the Department of Health and Human Services, *see supra* note 6 and accompanying text, illustrate how the government should implement a social welfare program so as not to disadvantage religious institutions or individuals.

125. *County of Allegheny v. ACLU*, 492 U.S. 490, 611 (1989).

126. 465 U.S. 668 (1984).

127. 492 U.S. 573 (1989). *Stone v. Graham*, 449 U.S. 39 (1980), could also be characterized as a "religious symbol" case. In *Stone*, the Court relied on the absence of a secular legislative purpose in striking down a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms. Notably, Justice Rehnquist's stated in his dissent that "[t]he Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin." *Id.* 45-46 (Rehnquist, J., dissenting).

128. *Lynch*, 465 U.S. at 672-87 (1984). For a detailed discussion of *Lynch*, *see* Myers, *Nativity Scenes*, *supra* note 32.

129. *County of Allegheny*, 492 U.S. at 621. Justice Blackmun wrote the Court's opinion on the unconstitutionality of the creche display. This opinion was joined by Justices Brennan, Marshall, Stevens, and O'Connor. Justices Blackmun and O'Connor were also in the majority

The public role for religion involved in the religious symbol cases may seem rather innocuous. These cases, however, provide a framework to examine different theoretical approaches to the Establishment Clause.¹³⁰ The importance of symbols in shaping public culture should not be underestimated.¹³¹

The religious symbol cases do not inevitably reflect the privatization theory. There are a variety of approaches to the Establishment Clause that bar the public display of religious symbols that do not seem to be influenced by the privatization thesis. Some commentators who are quite supportive of a public role for religion maintain that the Establishment Clause bars all public displays of religious symbols. For example, Professor Laycock, a strong proponent of religious liberty,¹³² argues that the government itself cannot aid religion at all and concludes therefore that the names of many cities, such as Corpus Christi and Los Angeles, violate the Establishment Clause.¹³³ Moreover, the "no-preference" theory of the Establishment Clause, which is clearly placed in the accommodationist camp,¹³⁴ can be interpreted to bar the public display of religious symbols because such displays, like the one in *Lynch*, are usually preferential.¹³⁵

in upholding the menorah display. On this result, they were joined by Justices Kennedy, White, and Scalia and Chief Justice Rehnquist. For a discussion on the religious symbol issue, see Myers, *Nativity Scenes*, *supra* note 32. The Supreme Court cases have caused a great deal of confusion in the lower courts. See *id.* at 70-90 (discussing cases prior to *County of Allegheny*); Doe v. Small, 934 F.2d 743, 753 (7th Cir.) (citing many of the post-*County of Allegheny* cases), *vacated, reh'g granted*, 1991 U.S. App. LEXIS 25128 (7th Cir. 1991).

130. It is not a coincidence that the symbol cases have provided the first opportunity for extended articulations of the theories that are currently contending for dominance on the Court. See *County of Allegheny*, 492 U.S. at 655-79 (Kennedy, J., concurring in part and dissenting in part) (setting forth an approach to the Establishment Clause that places significant reliance on "coercion"); *Lynch*, 465 U.S. at 687-94 (O'Connor, J., concurring) (setting forth her endorsement theory).

131. See Marshall, *supra* note 117, at 550.

132. See Laycock, *Neutrality Toward Religion*, *supra* note 103; Laycock, *Nonpreferential Aid*, *supra* note 34; Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986) [hereinafter Laycock, *Equal Access*]; Laycock, *Religious Liberty*, *supra* note 30.

133. Laycock, *Equal Access*, *supra* note 132, at 8.

134. See Smith, *supra* note 32, at 981 n.136.

135. Laycock, *Nonpreferential Aid*, *supra* note 34, at 920. Although Justice O'Connor votes to strike down certain displays, *County of Allegheny*, 492 U.S. at 623-37 (O'Connor, J., concurring), she rejects the privatization thesis. Her endorsement theory is sometimes quite supportive of "public" religion. She typically votes in favor of aid to religious institutions, see *supra* note 116, and in favor of allowing religiously-influenced moral judgments to influence legislation. See *infra* Section III. Justice O'Connor may be the most consistently "pro-religion" Justice. She parts company with the conservatives in free exercise cases, where she is more supportive of free exercise claimants. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (O'Connor, J., concurring); *Bowen v. Roy*, 476 U.S. 693, 724-33

Yet, certain approaches to the religious symbol cases do reflect the privatization theory. For example, Justice Blackmun opposes the public display of religious symbols because the displays violate "the constitutional command of secular government."¹³⁶ Again, this explanation reflects a desire to screen religion from any direct influence on public life.

Under this theory, the determinative factor is whether a symbol is secular. The only justification for the National Motto ("In God We Trust") is that it has lost any religious content.¹³⁷ This position inevitably results from the view that "the Constitution mandates that *the government remain secular, rather than affiliat[ing] itself with religious beliefs or institutions*, precisely to avoid discriminating among citizens on the basis of their religious faiths."¹³⁸

The key factor then is how to define secular. Justice Blackmun repeatedly used the term "secular"¹³⁹ in a way that contrasts it with the concept "religious."¹⁴⁰ His reading of the Establishment Clause apparently "require[s] that the public sector be insulated from all things which may have a religious significance or origin."¹⁴¹

(1986) (O'Connor, J., concurring in part and dissenting in part); *Goldman v. Weinberger*, 475 U.S. 503, 528-33 (1986) (O'Connor, J., dissenting). The symbol cases may reflect her theory's shortcomings. Because her theory is highly subjective, it is difficult to apply consistently. Some commentators who admire her approach think that she does not apply it correctly. See, e.g., 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 (1986).

136. *County of Allegheny*, 492 U.S. at 611.

137. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting). Not everyone agrees that the National Motto is constitutional. See Laycock, *Equal Access*, *supra* note 132, at 8; Loewy, *supra* note 135, at 1059.

138. *County of Allegheny*, 492 U.S. at 610 (emphasis added).

139. Justice Blackmun used the term "secular" 55 times in his opinion in *County of Allegheny*.

140. Professor Smith notes that the concept of the "secular" is used in two different senses in the cases. He describes these as exclusionary and inclusionary. According to the exclusionary conception, which is the way Justice Blackmun used the word in *County of Allegheny*, secular is understood "by what [it] shuts out—beliefs and values that are religious in nature." Smith, *supra* note 32, at 1000. According to the inclusionary conception of secular, which was used by the majority in *Lynch*, secular is understood "through what it encompasses Secular beliefs, values, practices, or facts are those that pertain to the affairs of this world or this life; they stand in contrast to beliefs, values, practices or facts that pertain to other worlds, other lives, or other dimensions of reality." *Id.*

141. *Stone v. Graham*, 449 U.S. 39, 45-46 (1980) (Rehnquist, J., dissenting). "[R]igorous implementation of [this view of "secular"] might so shrink the category of permissible secular measures that virtually every law and public program would be vulnerable to an establishment clause challenge." Smith, *supra* note 32, at 1003. Although he did not deny that the menorah had religious significance, Justice Blackmun interpreted the display as basically secular in character. "[T]he city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season." *County of Allegheny*, 492 U.S. at 620. No other Justice agreed with Justice Blackmun's conclusion about the

Perhaps the "secular government" explanation overstates the consequences of Justice Blackmun's position. Granted, he did disavow any hostility or indifference to religion.¹⁴² His view is, however, hostile to any "public" manifestation of religion.¹⁴³ Whenever the command of secular government clashes with a claim of religious liberty, secularism prevails.

The public forum cases are a good illustration.¹⁴⁴ For example, in *Kaplan v. City of Burlington*,¹⁴⁵ the Second Circuit held that the display of a menorah in Burlington's City Hall Park violated the Establishment Clause, even though the park was a public forum.¹⁴⁶ As the *Kaplan* dissent concluded, "the denial of permission to display the menorah would constitute unnecessary hostility toward religion. . . . [D]enying access to the traditional public forum . . . would treat religious expression differently from other forms of protected expression"¹⁴⁷ Excluding religion from the public sector,

secular character of the menorah display. See *id.* at 633 (O'Connor, J., concurring); *id.* at 643-44 (Brennan, J., concurring in part and dissenting in part); *id.* at 676-77 (Kennedy, J., concurring in part and dissenting in part).

142. *County of Allegheny*, 492 U.S. at 611-12.

143. Apparently, the only exception arises in narrow situations where it is clear that there is no risk that anyone might construe that the government was endorsing religion. See *id.* at 612 (citing the example of a religious group going caroling through a city park during Advent). This exception is quite narrow, because Justice Blackmun appears to reject the argument that religious speakers have equal access to public forums. See *infra* note 144. Justice Blackmun is not hostile to religion, as his view on the free exercise clause indicates. See *infra* Section II.B. He only favors a private role for religion.

144. As the Court noted, *County of Allegheny* did not raise a "public forum" issue. *Id.* at 600 n.50. Yet, it appears that "the command of secular government" analysis prohibits even the display of a religious symbol in a public forum. Some lower court opinions have interpreted *County of Allegheny* the same way, and that conclusion seems to accurately reflect Justice Blackmun's view. In *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd*, 171 U.S. 83 (1985), the Second Circuit concluded that the Village of Scarsdale could not rely on the establishment clause to deny two private groups access to a public forum to display a Nativity scene. The Supreme Court affirmed by an equally divided Court. *Board of Trustees v. McCreary*, 471 U.S. 83 (1985). Justice Powell, who was with the 5-4 majority in *Lynch*, did not participate in *McCreary*. Thus, it appears that Justice Blackmun voted to reverse the Second Circuit's conclusion on the public forum issue.

145. 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990). For cases agreeing with *Kaplan* on the public forum issue, see *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990); *Doe v. Small*, 934 F.2d 743 (7th Cir.), *vacated, reh'g granted*, 947 F.2d 256 (7th Cir. 1991).

146. *Kaplan*, 891 F.2d at 1028-29.

147. *Id.* at 1034 (Meskill, J., dissenting). The United States Court of Appeals for the Sixth Circuit has indicated that it agrees with the dissent in *Kaplan*. See *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 462 (6th Cir. 1991), *appeal dismissed*, 1991 U.S. App. LEXIS 25128 (7th Cir. 1991); *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 309-10 (6th Cir. 1990); *ACLU v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir. 1990); see also *Doe v. Small*, 934 F.2d 743, 809 (7th Cir. 1991) (Coffey, J., dissenting) (expressing agreement with the dissent in *Kaplan*), *vacated, reh'g granted*, 947 F.2d 256 (7th Cir. 1991).

even when religious actors are denied rights of access freely available to the nonreligious, indicates that the secular government model owes a great deal to the privatization thesis.¹⁴⁸

An alternative approach to the religious symbol cases explicitly rejects the privatization thesis. Some Justices have been far more receptive to the public display of religious symbols, in part because they reject an interpretation of the Establishment Clause that supports the view that religion must be screened from public life. These Justices are concerned about sending a broader message that the government must be insulated from all things religious.¹⁴⁹ For example, Justice Kennedy's dissent in *County of Allegheny* rejects the "relentless extirpation of all contact between government and religion."¹⁵⁰ His view is far more sympathetic to a public role for religion. As Justice Kennedy stated, "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."¹⁵¹ Justice Kennedy's view rejects the "secular government" perspective, at least when secular is interpreted in a way that prohibits significant contacts between religion and the public sector.¹⁵² Justice Kennedy's view¹⁵³ comports with Justice Goldberg's position in *Abington Township v. Schempp*.¹⁵⁴

It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal

148. In light of the liberal Justices' views on other issues involving a public role for religion, such as funding and substantive due process cases, the secular government explanation should not be viewed as simply a rhetorical flourish. The explanation does accurately capture the liberals' stance *vis-à-vis* public religion.

149. See Myers, *Nativity Scenes*, *supra* note 32, at 113-15.

150. 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part).

151. *Id.* see also *Lynch v. Donnelly*, 465 U.S. 668, 672-78 (1984).

152. See *County of Allegheny*, 492 U.S. at 677-78 (Kennedy, J., concurring in part and dissenting in part).

153. See *id.* at 659.

154. 374 U.S. 203 (1963).

values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion¹⁵⁵

Justice Kennedy makes the important point that the "secular government" model that the majority finds embodied in the Establishment Clause is a model that would not have occurred to those responsible for the First Amendment.¹⁵⁶ As Professor Smith has stated in describing the world of eighteenth century Americans:

Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. For that reason, Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out.¹⁵⁷

Justice Kennedy appeals to that heritage, which rejects any rigid separation of religion and public life.¹⁵⁸ Under that approach, the public display of religious symbols might serve important functions. First, "public displays of religious symbols might be viewed as affirmations of the important role religion and religiously-based principles play in preserving the American experiment."¹⁵⁹ Second, the public display of religious symbols recognizes that there is an authority beyond that of the state.¹⁶⁰ In this regard, allowing religious symbols on public property is an act of humility, rather than the

155. *Id.* at 306 (1963) (Goldberg, J., concurring).

156. *See County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part).

157. Smith, *supra* note 32, at 966; *see also* M.E. Bradford, *Religion and the Framers: The Biographical Evidence*, 4 BENCHMARK 349 (1990).

158. *See also Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Id.

159. Myers, *Nativity Scenes*, *supra* note 32, at 114.

160. *Id.*; *see* Peter L. Berger, *The First Freedom*, COMMENTARY, Dec. 1988, at 64, 65. Berger states:

But the most important 'secular purpose' any church can serve is to remind people that there is a meaning to human existence that transcends all worldly agendas, that all human institutions (including the nation-state) are only relatively important, and that all worldly authority—even that of the Supreme Court of the United States—is disclosed as comically irrelevant in the perspective of transcendence.

Id.

aggressive threat of religious persecution that is commonly attributed to such government action.¹⁶¹

Nevertheless, despite the important functions religious symbols serve, the government should not require the posting of those symbols on public property. It would be entirely appropriate for a community to decide voluntarily not to display symbols that are likely to cause offense.¹⁶² Nonetheless, the Constitution should not be interpreted to require the exclusion of *all* religious symbols from public property to enforce a perceived constitutional command of secular government.¹⁶³

Some Justices argue that the public display of religious symbols leads to political divisiveness along religious lines, which is an independent ground for finding an Establishment Clause violation.¹⁶⁴ For three reasons that argument is unconvincing. First, the "divisiveness" rationale has little historical support.¹⁶⁵ Second, as a doctrinal matter, there is little if any vitality to the divisiveness theory.¹⁶⁶ Third, and perhaps most important, political divisiveness rhetoric is just that—rhetoric. The Court's appeal to "divisive-

161. Cf. McConnell, *supra* note 22, at 1516. McConnell states:

[T]he free exercise clause also makes an important statement about the limited nature of governmental authority. While the government is powerless and incompetent to determine what particular conception of the divine is authoritative, the free exercise clause stands as a recognition that such divine authority may exist and, if it exists, has a rightful claim on the allegiance of believers who happen to be American citizens. The actual occasions for free exercise exemptions may be rare now, as in our early history; but the importance of the principle outstrips its practical consequences. If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.

Id.

162. See Myers, *Nativity Scenes*, *supra* note 32, at 111-12. Outside the public forum context (where the Constitution requires equal access), the display of a religious symbol on public property would be a political question. *Id.* at 110 & n.234 (noting that there would, of course, still be constraints on the government's exercise of discretion; the government could not exercise its discretion in a discriminatory manner). That is how the courts normally handle the display of offensive symbols. See NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990). See generally Marshall, *supra* note 46.

163. *County of Allegheny*, 492 U.S. at 611.

164. See Lynch v. Donnelly, 465 U.S. 668, 702-704 (1984) (Brennan, J., dissenting) (discussing this argument); *County of Allegheny*, 492 U.S. at 651 (Stevens, J., concurring in part and dissenting in part). The majority in *Lynch* rejected the divisiveness argument. 465 U.S. at 684-85.

165. See *supra* note 54.

166. See *supra* notes 89-90 and accompanying text.

ness" is entirely derivative of the Court's underlying theory of the Establishment Clause.

The religious symbol cases are illustrative of this point. Regardless of how the issue is decided, it leads to division along religious lines.¹⁶⁷ Allowing the display of the symbols of the faith of the majority may offend members of minority religions. Excluding displays with a high religious content may also offend minority faiths because their symbols, such as menorahs, may be excluded while the symbols of the religious majority that a court perceives as secular, such as Christmas trees,¹⁶⁸ will be allowed.¹⁶⁹ Finally, excluding all religious symbols may offend those who would like to display their religious symbols. Any solution is likely to lead to divisiveness; the different options simply shift the locus of the opposition.

Perhaps the last form of resentment should be irrelevant because it merely expresses disagreement with the Establishment Clause itself.¹⁷⁰ This response is entirely derivative of the particular view of the Establishment Clause being advanced. The resentment of those who would like to see a creche displayed on the Grand Staircase of the Allegheny County Courthouse only can be discounted if we have already decided that the Establishment Clause prohibits such displays. That conclusion about the proper reading of the Establishment Clause may be correct, but the conclusion in no way depends on measuring whether government action has led to political division along religious lines. The conclusion rests on the underlying theory of the Establishment Clause that determines which forms of offense are constitutionally legitimate. The secular government model does not, therefore, gain any additional strength from its appeal to the divisiveness caused by the interaction between religion and government.¹⁷¹

167. Supreme Court decisions may make things worse. See Myers, *Nativity Scenes*, *supra* note 32, at 107 n.219.

168. As Judge Posner has pointed out, the Christmas tree does have religious connotations. *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986).

169. See Myers, *Nativity Scenes*, *supra* note 32, at 110 n.234; see also *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990) (holding that Chicago could refuse to allow erection of menorah at O'Hare Airport even though city sponsored a display that contained Christmas trees).

170. See *County of Allegheny*, 492 U.S. at 611.

To be sure, in a pluralistic society there may be some would-be theocrats, who wish that their religion were an established creed, and some of them perhaps may be even audacious enough to claim that the lack of established religion discriminates against their preferences. But this claim gets no relief, for it contradicts the fundamental premise of the Establishment Clause itself.

Id.

171. The divisiveness caused by enforcing constitutional rights is not itself a reason for judicial restraint. See Myers, *Nativity Scenes*, *supra* note 32, at 107 n.219. Hence government

As already noted, the religious symbol cases are difficult because they flesh out the different theoretical approaches to the Establishment Clause.¹⁷² While the privatization thesis has had some influence in this area, the influence is unwarranted. The possibility that there is something inherently suspect about the government "affiliat[ing] itself with religious beliefs or institutions" should be denied.¹⁷³ Granted this affiliation *may* be troublesome; indeed, certain contacts between government and religion may result in threats to religious liberty.¹⁷⁴ Such threats, however, do not inevitably arise from the connection between government and religion, as the privatization thesis suggests.

In some situations involving religious symbols, the privatization thesis severely disadvantages religion. The public forum cases illustrate how the thesis can threaten religious liberty. Rigorous pursuit of the "command of secular government" would exclude religious groups from equal access to a public forum. That conclusion suggests that there is something wrong with the theory. However the religious symbol cases are decided, the privatization thesis (or as it is manifested in this context, the "constitutional command of secular government"¹⁷⁵) should not have a role.¹⁷⁶

3. Purpose

The privatization thesis is also reflected in cases where the Court invalidated statutes because they failed the first prong of the *Lemon* test, the secular purpose requirement.¹⁷⁷ According to this test, an otherwise valid law is struck down if it is enacted for the purpose of advancing religion.¹⁷⁸ In

action that causes divisiveness is not *itself* a reason for finding the action unconstitutional. An independent justification addressing what kinds of divisiveness that should to be tolerated is needed.

172. See *supra* notes 132-65 and accompanying text.

173. *County of Allegheny*, 492 U.S. at 610.

174. The school prayer cases are an example. See *Myers, Nativity Scenes*, *supra* note 32, at 108 n.225. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), does not exemplify this proposition.

175. *County of Allegheny*, 492 U.S. at 611.

176. See *Myers, Nativity Scenes*, *supra* note 32 (discussing the author's views on the religious symbol issue).

177. See *supra* note 32 (explaining the *Lemon* test).

178. Focusing purely on motivation is peculiar to this particular area of constitutional law. See McConnell, *supra* note 57, at 47-48; Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915, 917. Although the Court uses a "purpose" analysis in other areas of constitutional law, see *Washington v. Davis*, 426 U.S. 229 (1976), the Court's use of illicit purpose alone, without regard to effect, is unique. For example, "[i]n equal protection cases, there is no inquiry into 'intent' unless there are disparate results; the function of legislative motivation is to determine whether discriminatory effects are unconstitutional." McConnell, *supra* note 57, at 47 (footnote omitted). This author

certain cases, *Wallace v. Jaffree*¹⁷⁹ and *Edwards v. Aguillard*¹⁸⁰ in particular, the Court suggested that the involvement of religious groups in the political process was objectionable. The Court's reliance on the religious statements and motives of the supporters of the legislation being challenged strongly suggested that religion should be confined to a purely private realm.¹⁸¹

If the Court aggressively used the secular purpose requirement, it would be a powerful instrument for promoting the privatization thesis. Some commentators have, in fact, cited the Court's secular purpose cases to support the theory that Establishment Clause doctrine promotes a privatized religion and secularized politics.¹⁸²

While the secular purpose cases are potentially troublesome, it would be a mistake to read too much into them. These cases do not establish a durable body of precedent that works to restrict the political participation of religious groups.¹⁸³ Further, the Court's more recent decisions on the issue

has argued that the *Lemon* test ought to be abandoned, see Myers, *Nativity Scenes*, *supra* note 32, at 97-106, and it appears that the *Lemon* test has a limited life-span. See *supra* note 32. Even if it retains the *Lemon* test, the Court should change its "purpose" analysis.

179. 472 U.S. 38 (1985). In *Wallace*, the Court held that an Alabama statute that authorized a one minute period of silence in public schools "for meditation or voluntary prayer," *id.* at 40, violated the Establishment Clause. The Court relied exclusively on the absence of a secular purpose. Relying heavily on a statement by the legislation's sponsor, the Court concluded that the statute was designed simply to return voluntary prayer to the public schools.

180. 482 U.S. 578 (1987). In *Edwards*, the Court held that the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, LA. REV. STAT. ANN. §§ 17:286.1-17:286.7 (West 1982), violated the Establishment Clause. The Court relied exclusively on the purpose prong of *Lemon*. Taking into account statements by the legislation's sponsor, the Court concluded that "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." 482 U.S. at 591.

181. This message also draws on the same concern about religious strife and religious domination that influenced the Framers. See McConnell, *supra* note 57, at 14-15. Yet, the Framers did not seek to deal with these concerns by screening religion from public life. See *supra* notes 94-95 and accompanying text. Further, our political history is full of religious activism in public life. See *infra* notes 216-19 and accompanying text.

182. Bradley, *Dogmatomachy*, *supra* note 15, at 315-16; Gedicks, *supra* note 12, at 426 n.27; Gedicks, *supra* note 100, at 138 n.94; Smith, *supra* note 32, at 993-99; Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 725 (1986).

183. One difficulty with the secular purpose prong of the *Lemon* test is that it is difficult to articulate precisely what the requirement means. As Justice Rehnquist noted in *Wallace*, "The secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate." 472 U.S. at 108 (Rehnquist, J., dissenting). See TRIBE, *supra* note 53, at 1209 ("As applied in establishment clause litigation, the secular purpose test remains only hazily defined."). The situation certainly has not changed since *Wallace*. The Court never has been entirely clear about such questions as the meaning of "secular." See Smith, *supra* note 32, at 999-1007. It is not clear whether the Court looks to the purpose of the statute or the motivations of the sponsors or supporters of the

seem to have put to rest the troubling implications of the language in earlier cases.¹⁸⁴

The Supreme Court has relied on the secular purpose requirement in only four cases: *Epperson v. Arkansas*,¹⁸⁵ *Stone v. Graham*,¹⁸⁶ *Wallace v. Jaffree*,¹⁸⁷ and *Edwards v. Aguillard*.¹⁸⁸ These cases share several features. First, their reliance on the secular "purpose" requirement itself is a bit of an oddity because, as Justice Scalia noted in his dissent in *Edwards*, "[a]lmost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter."¹⁸⁹ Second, the decisions all can be explained on other grounds.

legislation. See Laycock, *Equal Access*, *supra* note 132, at 23-24. It remains ambiguous about "how much secular purpose is required," *Cammack v. Waihee*, 932 F.2d 765, 782 (9th Cir. 1991) (Nelson, J., dissenting), and how to determine what the relevant "purpose" actually is. See *Edwards*, 482 U.S. at 636-39 (Scalia, J., dissenting). Because of these uncertainties, the doctrine tends to be applied unpredictably, and, as the subsequent discussion will illustrate, unnecessarily. The unpredictability can best be illustrated by comparing the four cases in which the Court found a violation of the secular purpose requirement, *see text* at notes 185-88, with cases such as *Lynch v. Donnelly*, 465 U.S. 668 (1984), where the Court found that there was a secular purpose for Pawtucket's display of a creche. *Id.* at 681. See *Smith*, *supra* note 32, at 1001-03 (discussing *Lynch*).

184. See e.g., *Board of Educ. v. Mergens*, 110 S. Ct. 2356 (1990).

185. 393 U.S. 97 (1968). In *Epperson*, the Court held unconstitutional Arkansas' anti-evolution law, which prohibited the teaching in public schools of the theory that man evolved from a lower order of animals. The Court explained that the law "was a product of the upsurge of 'fundamentalist' religious fervor of the twenties." 393 U.S. at 98. *Epperson* obviously did not rely on the first prong of the *Lemon* test, since *Epperson* was a pre-*Lemon* case. *Epperson* does rest on the Court's conclusion that an illicit motive was the basis for Arkansas' anti-evolution law.

186. 449 U.S. 39 (1980).

187. 472 U.S. 38 (1985).

188. 482 U.S. 578 (1987). The school prayer cases did not rely exclusively on the lack of a secular purpose. In *Engel v. Vitale*, 370 U.S. 421, 431 (1962), the indirect coercion involved was an important aspect of the decision. In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), where the Court explicitly articulated the secular purpose requirement, the Court seemed strongly influenced by the substance of the government action being challenged, namely, introducing religious exercises into the public schools. *Engel*, 374 U.S. at 222. The Court's holding did not rest on the lack of a secular purpose. See Culbertson, *supra* note 178, at 928-29 (discussing *Schempp*).

189. 482 U.S. at 613 (Scalia, J., dissenting). The Court tends to rely on "purpose" when effect is problematic. There is no real injury in these cases, only offense. Yet, the Court has the visceral (and incorrect) reaction that something is wrong. If we abandoned *Lemon* and the notion that coercion was not a necessary part of an Establishment Clause case, *see* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Myers, *Nativity Scenes*, *supra* note 32, at 101, we could get rid of focus on "purpose" as an independent test of unconstitutionality.

Epperson and *Edwards* are somewhat atypical because the subject matter involved—evolution—provokes extreme reactions on all sides.¹⁹⁰ The cases illustrate the principle that seemingly easy cases make bad law.¹⁹¹ Justice Scalia's assessment of the majority opinion in *Edwards* also applies to *Epperson*. Justice Scalia stated that the Court's opinion reflected "an intellectual predisposition created by the facts and legend of *Scopes v. State*—an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression."¹⁹² In striking down Arkansas' anti-evolution law, the *Epperson* Court relied on what it viewed as an unconstitutional motive. In particular, the Court stated that the teaching of evolution had been proscribed "because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."¹⁹³ Yet the Court could have reached the same result without reference to the motivations of the law's supporters. The principal evil of the Arkansas statute seemed to be that the state was tailoring the curriculum to the beliefs of a particular religious perspective.¹⁹⁴ According to the Court, however, the statute was tainted regardless of the motivations of the law's supporters.¹⁹⁵

Edwards can be explained in a similar fashion. The Court found an unconstitutional purpose in a Louisiana statute forbidding the teaching of evolution in public elementary and secondary schools unless balanced by instruction in the theory of creation-science.¹⁹⁶ Yet, the case also can be explained on other grounds. According to the Court's reading of the Louisi-

190. See generally PHILIP E. JOHNSON, *DARWIN ON TRIAL* (1991).

191. Cf. *Burnham v. Superior Court*, 110 S. Ct. 2105, 2126 n.* (1990) (Stevens, J., concurring in the judgment) ("Perhaps the adage about hard cases making bad law should be revised to cover easy cases.").

192. *Edwards*, 482 U.S. at 634 (Scalia, J., dissenting) (citation omitted).

193. 393 U.S. 97, 107 (1968) (emphasis added).

194. See *id.* at 106 (stating that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma").

195. See John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 892 (1984).

The holding [of *Epperson*] could be simply that the anti-evolution statute was incapable of justification on any ground other than the beliefs of a particular religion. No justification could be found under the constitutional philosophy for prohibiting the teaching of evolution while permitting the teaching of other theories of human origins.

Id.; see also Laycock, *Equal Access*, *supra* note 132, at 23 n.114 ("But the Court also viewed the statute as nonneutral in its effects, because the statute forbade only the teaching of evolution.").

196. See *Edwards*, 482 U.S. at 594 ("But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.").

ana statute, the state was attempting to introduce the teaching of religious doctrine into the public schools.¹⁹⁷ That would violate the Establishment Clause without regard to the motives of the Act's supporters.

Stone, which held unconstitutional a Kentucky statute requiring that a copy of the Ten Commandments be posted on the wall of each public classroom in the state,¹⁹⁸ can also be explained by factors other than the presence of an unconstitutional purpose. The Court did conclude that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."¹⁹⁹ Yet, as Justice Rehnquist's dissent maintained, the Kentucky legislature had articulated a secular purpose, which the Kentucky trial court accepted.²⁰⁰ Apparently, the key factor in the Court's *per curiam* decision was that "[t]he Ten Commandments are undeniably a sacred text."²⁰¹ The Court could have reached the conclusion that injecting religious texts into the classroom in the manner required by the Kentucky statute was unconstitutional without regard to the purpose of the statute.²⁰²

Even *Wallace* can be explained without reference to the religious motivations for the law. In *Wallace*, the Court held unconstitutional an Alabama statute authorizing a moment of silence in all public schools for "meditation

197. The Louisiana Act only required the teaching of the scientific evidence for creation. *See id.* at 581. Nevertheless, the Court interpreted "creation science" as "embod[ying] the religious belief that a supernatural creator was responsible for the creation of humankind." *Id.* at 592; *see also id.* at 596 ("The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety."). Justice Scalia objected to the majority's conclusion that the state was trying to introduce religious doctrine into the public schools. *See id.* at 629 (Scalia, J., dissenting). He noted that the Act simply required that scientific evidence against evolution be presented. Justice Scalia then commented:

Perhaps what the Louisiana Legislature has done is unconstitutional because there is no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in this summary judgment context, which includes ample uncontradicted testimony that "creation science" is a body of scientific knowledge rather than revealed belief.

Id. at 634.

198. *Stone*, 449 U.S. at 41.

199. *Id.*

200. *Id.* at 45-46 (Rehnquist, J., dissenting).

201. *Id.* at 41 (majority opinion).

202. Mansfield, *supra* note 195, at 892.

An adequate explanation of the result reached [in *Stone*] can be found in the fact that, in view of the contents of the Ten Commandments, the circumstances under which they were to be displayed and those to whom they were to be displayed, the effect of posting them, and therefore the statute's only justification, would be the promotion of a particular religion.

Id. The Court expressed concern about the effect of the posting. *Stone*, 449 U.S. at 42.

or voluntary prayer.”²⁰³ While the Court relied on what it characterized as the illicit motives of the legislation’s sponsor,²⁰⁴ the Court also noted “[t]he wholly religious character”²⁰⁵ of the Alabama statute.²⁰⁶ Professor Laycock has contended that this statute “openly favored religion” and that its religious purpose was shown on its face.²⁰⁷

In its latest foray into the secular purpose question, the Court adopted a narrow view of the purpose prong. In *Board of Education v. Mergens*,²⁰⁸ the Court upheld the Equal Access Act,²⁰⁹ which prohibits public secondary schools that maintain a “limited open forum” from discriminating against students who wish to use such a forum for a meeting on the basis of the “religious, political, philosophical, or other content of the speech at such meetings.”²¹⁰ Prior to *Mergens*, some commentators, relying on the text, legislative history, and the “strong support of equal access legislation among evangelical religious groups,”²¹¹ argued that the Equal Access Act failed to satisfy the secular purpose requirement.²¹² Yet, the Court effortlessly discovered a secular purpose. Disdaining the methodology used in *Wallace* and *Edwards*, the Court avoided a detailed inquiry into the religious affiliation and motives of the supporters of the Equal Access Act. Instead, the Court simply inquired into the statute’s purpose by focusing exclusively on the text

203. *Wallace v. Jaffree*, 472 U.S. 38, 59-60 (1985).

204. *Id.* at 56-60.

205. *Id.* at 58.

206. *Id.* at 58-59. An earlier statute already authorized a moment of silence for meditation; the version the Supreme Court considered added the words “or voluntary prayer.”

207. Laycock, *Equal Access*, *supra* note 132, at 23 (“The Court could have invalidated [the Alabama statute] for lack of a secular purpose, or it could have dispensed with the purpose test and invalidated [the statute] for lack of neutrality.”).

208. 110 S. Ct. 2356 (1990). Although Justice O’Connor’s opinion in *Mergens* on the secular purpose issue was not for a majority, the understanding of secular purpose expressed there is significant. *Id.* at 2370-71. Two of the Justices who did not join that portion of her opinion (Justices Kennedy and Scalia) are not favorably disposed to the secular purpose requirement. *Id.* at 2376. Justice Kennedy is on record advocating that the requirement be abandoned and the requirement is not a part of his approach to the Establishment Clause. See *Mergens*, 110 S. Ct. at 2376-78 (Kennedy, J., concurring in part and concurring in the judgment). Therefore, if a statute satisfies Justice O’Connor’s view of the secular purpose requirement expressed in *Mergens*, which was joined by three other Justices, then the statute will not be held unconstitutional on purpose grounds.

209. 20 U.S.C. §§ 4071-4074 (1988).

210. 20 U.S.C. § 4071(a)-(b).

211. Ruth G. Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 HAST. CONST. L. Q. 529, 557 (1985).

212. *Id.* at 556-59; see also Robert G. Boisvert, Jr., *Of Equal Access and Trojan Horses*, 3 LAW & INEQ. J. 373, 387 (1985). Professor Bradley also noted that the Equal Access Act would be susceptible to an Establishment Clause challenge under the approach used in *Wallace*. See Bradley, *Dogmatomachy*, *supra* note 15, at 315-16.

of the Act.²¹³ Because the Act was neutral on its face—the Act protected secular and religious speech—the Court found no illicit purpose.²¹⁴

Thus, the secular purpose requirement serves no real function, especially if the Court adopts its usual approach of construing “secular” in broad terms. Apparently, the Court realized that aggressive use of the secular purpose requirement would exclude religious citizens from the political process.²¹⁵ Religious groups and individuals participate actively in debates on civil rights legislation, sanctions against South Africa, aid to Israel, the minimum wage, nuclear arms, welfare, agricultural policy, as well as other legislative issues.²¹⁶ Pope John Paul II’s recent encyclical, *Centesimus Annus*,²¹⁷ presents Roman Catholic teachings on a whole range of issues, from the “family wage” and social insurance for old age and unemployment to the rights of unions. The encyclical urged the local churches (including the Roman Catholic Church in America) to advance these teachings in their own countries. It would be inconceivable to hold that any legislation that resulted from religious activism on any of these topics was unconstitutional simply because of the religious motivations of those involved in the legislative process.²¹⁸ As Justice Scalia noted,

[P]olitical activism by the religiously motivated is part of our heritage. . . . [W]e do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by or-

213. *Mergens*, 110 S. Ct. at 2371; see also Culbertson, *supra* note 178, at 932-33.

214. *Mergens*, 110 S. Ct. at 2371.

215. Laycock, *Equal Access*, *supra* note 132, at 23-24; see *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1811 (1990). In *Clayton*, the Eighth Circuit rejected an Establishment Clause challenge to a public school district’s policy prohibiting dances in the public schools, although the court acknowledged that many residents and public officials opposed dancing on religious grounds. The court stated:

We simply do not believe elected government officials are required to check at the door whatever religious backgrounds (or lack of it) they carry with them before they act on the controlling *Lemon* standards. In addition to its unrealistic nature, this approach would have the effect of disenfranchising religious groups when they succeed in influencing secular decision.

Id. at 380.

216. See generally ALLEN D. HERTZKE, *REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY* (1988); A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985); Edward M. Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1 (1990).

217. 21 ORIGINS 1 (1991).

218. See *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) (citations omitted). See generally Frederick M. Gedicks & Roger Hendrix, *Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America*, 60 S. CAL. L. REV. 1579 (1987); William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 130 (1987).

ganized religions or by adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.²¹⁹

The cases in which the Court has relied on the absence of a secular purpose differ from the examples noted above because of the Court's perception of the subject matter of the legislation. If it views the legislation as inherently religious, such as requiring the teachings of creationism, posting of the Ten Commandments, or prayer in the public schools, then the Court will occasionally invoke the secular purpose prong of the *Lemon* test.²²⁰ The Court's principal concern in these contexts is not religious motivations, as such, but the character of the legislation.

Aggressive application of the secular purpose requirement would promote the privatization thesis by greatly limiting religious groups' ability to participate in the political process. The Court's most recent decisions, *Bowen v. Kendrick*²²¹ and *Mergens*, are sensitive to this concern. Apparently, the Court is moving toward the view that it should "assess the constitutionality of the statute, not the religious beliefs of its supporters."²²² The Court ought to make this view explicit.²²³

The privatization thesis has played a significant role in influencing Establishment Clause doctrine. Although some contend that the privatization thesis dominates Establishment Clause jurisprudence, close analysis indicates that that assessment is only partially true. Several Justices are quite receptive to a public role for religion and the most recent Establishment Clause cases illustrate the declining influence of the privatization thesis. For the most part, the Establishment Clause doctrine has shifted toward the view that religion has a valuable role to play in the public realm.

219. *Edwards*, 482 U.S. at 615 (Scalia, J. dissenting) (citations omitted). See generally Gedicks & Hendrix, *supra* note 218; Porth & George, *supra* note 218, at 130.

220. See Esbeck, *supra* note 53, at 531-43.

221. 487 U.S. 589 (1988). While discussing the secular purpose requirement, the Court focused principally on the text of the statute and adopted a deferential approach typical of most discussions of the first prong of the *Lemon* test. *Id.* at 602-03.

222. Laycock, *Equal Access*, *supra* note 132, at 23.

223. "Purpose" should be used in a more conventional way. See McConnell, *supra* note 57, at 47-48. The formal existence of the first prong of *Lemon* is troublesome, especially given the broad language of certain opinions. The preceding discussion illustrates, however, that the secular purpose cases should not be overread. The results of the cases and the more recent rulings are not as dangerous as some suggest.

B. The Free Exercise Clause

The privatization thesis is not hostile to religion. Instead, the thesis is hostile to a particular type of religion—public religion. Most of the Justices who support the privatization thesis do not invariably vote against religious entities or individuals. In fact, the liberal Justices, with the exception of Justice Stevens, have been the strongest supporters on the Court for a more generous construction of the Free Exercise Clause.²²⁴ Yet, the liberals' pro-religion votes in free exercise cases also reflect the influence of the privatization thesis.

The Court's most recent free exercise case, *Employment Division, Department of Human Resources v. Smith*,²²⁵ is illustrative. In *Smith*, the Court rewrote free exercise jurisprudence by eliminating constitutionally compelled exemptions under the Free Exercise Clause.²²⁶ *Smith* involved two individuals who were denied unemployment compensation because of work-related misconduct. The workers were fired from their jobs with a drug rehabilitation organization due to their use of peyote, an illegal drug, even though they used peyote for religious purposes. The Court concluded that Oregon could "include religiously inspired peyote use within the reach of its general criminal prohibitions on use of that drug."²²⁷ To allow an exemption from laws prohibiting "socially harmful conduct"²²⁸ would allow an individual with a religious objection to such laws "to become a law unto himself."²²⁹ The majority opinion, written by Justice Scalia, reflects the same solicitude

224. E.g., *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (Blackmun, Brennan, and Marshall, JJ., dissenting).

225. *Id.* For a thorough discussion of *Smith*, see Kathleen P. Kelly, Note, *Abandoning Free Exercise Exemptions: Employment Div., Dep't of Human Resources v. Smith*, 40 CATH. U. L. REV. 929 (1991).

226. *Smith* has been quite controversial. See Gordon, *supra* note 23; Laycock, *supra* note 23; McConnell, *supra* note 23. At least one commentator supports the result, if not the opinion, in *Smith*. See William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

227. *Smith*, 494 U.S. at 872.

228. *Id.* at —.

229. *Id.* at — (citing *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). Justice Scalia's majority opinion quoted this passage twice. See *Smith*, 110 S. Ct. at 1600, 1603; see also *id.* at 1606 (rejecting "a system in which each conscience is a law to itself"). Interestingly, there is a critique of the idea that "every man is the law to himself" in Leo XIII's 1888 encyclical, *Libertas Praestantissimum* (June 20, 1888). See CLAUDIA CARLENIHM, *THE PAPAL ENCYCLICALS 1878-1903* (1990). Leo was critiquing the notion of "independent morality," that is, the idea that morality is purely subjective. *Id.* This critique is a common theme in Catholic moral teaching. See Cardinal Ratzinger, *Doctrinal Document on Threats to Life Proposed: Address to Cardinals Meeting*, 20 ORIGINS 755, 757 (1991) (including a critique of "an individualistic view of freedom, understood as the absolute right to self-determination on the basis of one's own convictions").

for government attempts to enforce public morality that characterizes the more recent substantive due process cases.²³⁰

The liberals (Justices Blackmun, Brennan, and Marshall) dissented,²³¹ just as they have in other recent cases where the Court had rejected free exercise claims.²³² As the privatization thesis suggests, the liberal Justices are supportive of religious liberty when "religion" is not seeking to undertake a direct public or culture-forming task. These Justices' pro-religion votes in the constitutionally compelled exemption cases are, therefore, consistent with the broader theory defended here. As *Smith* indicates, these Justices support those who dissent on religious grounds from public morality. These votes are in accord with their votes in substantive due process cases.²³³ In contrast, these Justices routinely oppose religion when it undertakes a public role.

II. SUBSTANTIVE DUE PROCESS

Typically, an analysis of the substantive due process doctrine does not involve an examination of religious issues. Under modern substantive due process cases, state statutes were not found unconstitutional because they promoted religious ends. *Griswold v. Connecticut*,²³⁴ for example, contains virtually no mention of the fact that the anti-contraception statute com-

230. See *infra* Section II.

231. In *Smith*, Justice O'Connor concurred in the judgment. She disagreed with the majority's elimination of the doctrine of free exercise exemptions, but concluded that the free exercise claim ought to be rejected under the "compelling interest" standard the Court has traditionally used in the free exercise area. *Smith*, 110 S. Ct. at 1615. Justice Blackmun wrote a dissent, which was joined by Justices Brennan and Marshall. Agreeing with Justice O'Connor's view that the compelling interest test should apply, the dissent also found that the denial of unemployment benefits violated the Free Exercise Clause because "religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion." *Id.* at 1622 (Blackmun, J., dissenting).

232. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (Justices Brennan, Marshall, and Blackmun dissented from the holding that the Free Exercise Clause does not prohibit the government from permitting timber harvesting and road construction in an area of a national forest traditionally used by Indians for religious purposes); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Justices Brennan, Marshall, Blackmun and O'Connor dissented from the holding that the Free Exercise Clause does not prohibit the Air Force from preventing an Orthodox Jew from wearing a yarmulke). Justice Stevens, who usually votes with the "liberals" in Establishment Clause cases, votes with the "conservatives" in cases rejecting free exercise claims. His position seems to be hostile to religion; he does not draw the public/private distinction that seems important for the other "liberals."

233. See Gedicks, *supra* note 100, at 121; Bradley, *Caesar's Religion*, *supra* note 15; *infra* Section III (discussing substantive due process).

234. 381 U.S. 479 (1965).

ported with the moral teachings of many religions.²³⁵ Similarly, *Roe v. Wade*²³⁶ does not rest explicitly on the grounds that anti-abortion statutes were sectarian, although some prominent commentators defended *Roe* on Establishment Clause grounds.²³⁷

Some commentators, however, contend that the Establishment Clause helps explain modern privacy cases. Professor David Richards made this point clearly, stating that "coercive constraints on the exercise of the right to privacy have become constitutionally suspect when, in contemporary circumstances, they can no longer be justified to society in the non-sectarian terms that constitutional principles require."²³⁸ Thus, according to Professor Richards, laws prohibiting the use of contraceptives, abortion, and consensual adult homosexual acts are unconstitutional because they cannot be justified in non-sectarian terms.²³⁹ This view has commanded increasing attention in recent substantive due process cases, most prominently in the recent opinions of Justice Stevens,²⁴⁰ and in some law review articles.²⁴¹

235. Justice Stewart did note this point in his dissent. *Id.* at 529 n.2 (Stewart, J., dissenting). Some commentators have emphasized the role of religious organizations in supporting birth control legislation. See, e.g., Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 927-31 (1990) (discussing the role of the Catholic Church in preventing the repeal of Connecticut's contraception statute).

236. 410 U.S. 113 (1973).

237. See, e.g., Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 21-25 (1973). Professor Tribe has now abandoned this position. See LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 116 (1990); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1350 (2d ed. 1988). For an analysis of Professor Tribe's views on abortion, see Charles E. Rice, *Tribe on Legalized Abortion: Where There's a Will There's a Way*, 4 BENCHMARK 155 (1990); David M. Smolin, *Why Abortion Rights Are Not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621 (1990) (reviewing LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990)).

238. David A.J. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, 51 LAW & CONTEMP. PROBS. 123, 141 (1988).

239. See, e.g., DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 202 (1989); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 255 (1986).

240. See *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2878 (1990) (Stevens, J., dissenting); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 560 (1989) (Stevens, J., concurring in part and dissenting in part); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (Stevens, J., concurring).

241. See, e.g., David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479 (1990); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1025-27 (1984); Robert L. Maddox & Blaine Bortnick, *Webster v. Reproductive Health Services: Do Legislative Declarations that Life Begins at Conception Violate the Establishment Clause?*, 12 CAMPBELL L. REV. 1 (1989); Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32 J. CHURCH & ST. 567 (1990); John M. Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*,

Because this position so clearly expresses the privatization thesis, an examination of the public role of religion²⁴² that is reflected in the modern substantive due process cases is warranted.²⁴³

This section begins by identifying how the privatization thesis has manifested itself in substantive due process doctrine. It then discusses why the privatization thesis has appealed to some Justices and commentators. Next, the Article focuses on the deficiencies of the privatization thesis. In this context, the privatization thesis errs by confusing morality with religion. The privatization thesis really reflects a hostility to the government enforcing moral norms that are external to the individual. This section then discusses the specific contexts in which the privatization thesis ought to be excluded from substantive due process debates.²⁴⁴

The modern substantive due process cases began with the contraception and abortion cases.²⁴⁵ These decisions do not contain any explicit arguments that religion should not play a role in influencing secular legislation. Justice Stewart's dissent in *Griswold* noted that no argument was made that the Connecticut statute violated the religion clauses.²⁴⁶ In fact, the various opinions in *Griswold* and *Roe* seem to be quite respectful of the moral teach-

39 CATH. U. L. REV. 1191 (1990); Karen F.B. Gray, Comment, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399 (1990); Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301 (1984).

242. This discussion broadly uses the term "religion." The term refers to moral judgments that may be religiously influenced. The relationship between religion and morality is quite complex. See GREENAWALT, *supra* note 11. For purposes of this discussion, I do not need to describe the relationship precisely, because all of the issues discussed below involve the temporal realm in the sense that they deal with human behavior. They do not involve matters of pure religious belief, such as belief in the Trinity.

243. The privatization thesis is frequently invoked in substantive due process cases without reliance on the Establishment Clause. A more typical statement of the position is that religiously-influenced moral judgments should be regarded as irrelevant to the constitutionality of the legislation being challenged because such judgments do not constitute "secular" interests that the government is limited to advancing. See *Bowers v. Hardwick*, 478 U.S. 186, 208-13 (1986) (Blackmun, J., dissenting); *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).

244. The privatization thesis comes up in two contexts: (1) in characterizing a "liberty" interest as "fundamental" and (2) in evaluating whether the state interest is "compelling." In the latter context, excluding the privatization thesis would force us to evaluate the state interest without relying on "sectarian" label.

245. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See generally Myers, *supra* note 20.

246. 381 U.S. at 528-29 (Stewart, J., dissenting). Justice Stewart further commented: "To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated." *Id.* at 529 n.2.

ings of religious denominations. For example, Justice Blackmun's discussion of the history of abortion in *Roe* does not reflect any animus to the influence of religion on the law of abortion.²⁴⁷

The contraception and abortion cases, however, are hostile to the idea that the government can enforce moral norms external to the individual. Therefore, the opinions are hostile to an idea traditionally associated with religion.²⁴⁸ Many of the opinions implicitly affirm the view that it is the individual who is the source of morality.²⁴⁹ In *Griswold*, for example, no one, not even the state of Connecticut, defended the moral judgment embodied in the Connecticut statute that the use of contraceptives is immoral.²⁵⁰ Justice Stewart, in defending the law's constitutionality, captured the pre-

247. See *Roe*, 410 U.S. at 130-47, 160-61; see also *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring); *id.* at 500 (Harlan, J., concurring) (incorporating portions of his opinion in *Poe v. Ullman*, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting)).

248. See Levinson, *supra* note 1, at 1070 (noting that the Roman Catholic Church believes in "the existence of moral claims upon us, the content of which can be known through the disciplined application of human reason").

249. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 663 (1990).

For classical liberals, it is the individual, not the community, who is the Authority on the nature of the good, not only with respect to religious beliefs and political ideas (separately insulated from community control by the first amendment), but also with respect to ways of life. Consequently, legislation that interferes with such individual authority is strongly disfavored, and properly subject to constitutional check. The obvious importance of *Bowers* is that it was the first 'privacy' case to reject definitively this classically liberal and individualist account of the good, of law, and hence of the constitutional right to privacy, and adopt in its stead a conservative communitarian conception.

Id. One could, of course, take the position that there are moral norms external to the individual, but that the government, as an expression of tolerance, ought not to enforce them. That position is not expressed, however, when one concludes that there is a fundamental constitutional right to engage in the activity in question. For example, the conclusion that homosexual sodomy is within the right of privacy

would be a public declaration that in the eyes of society and its laws, sexual preferences are merely that—personal and subjective preferences of no objective validity and no public importance. That view may . . . be the correct one, but it is not a neutral refusal to hold any view at all.

Francis Canavan, *The Pluralist Game*, 44 LAW & CONTEMP. PROBS. 23, 33 (1981). Indeed, Justice Blackmun's dissent in *Bowers v. Hardwick* is a quite explicit rejection of the notion that there are objective moral norms on issues of sexual morality. See Myers, *supra* note 20, at 604 (discussing Justice Blackmun's dissent in *Bowers*).

250. Justice White's opinion in *Griswold* noted that "[t]here is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself." 381 U.S. at 505 (White, J., concurring). Just four years earlier in *Poe v. Ullman*, the state of Connecticut had defended the anti-contraception law in such terms. See *Poe*, 367 U.S. at 545 (Harlan, J., dissenting) ("The State . . . asserts that it is acting to protect the moral welfare of its citizenry . . . in that it considers the practice of contraception immoral in itself . . .").

vailing sentiment: "As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs."²⁵¹

Similarly, Justice Blackmun's opinion in *Roe* rejects the notion that the state, or at least the state legislature, is permitted to take a position on the question of when life begins.²⁵² In his view, the question is insoluble. After considering the disagreement on the issue,²⁵³ Justice Blackmun concluded that a state legislature is not permitted to take a position on the question, at least not if the position it adopted would prohibit abortions.²⁵⁴

Recently, substantive due process cases have brought the "religious" aspects of this debate into clearer focus. Perhaps the most striking aspect of the recent cases is the extent to which certain Justices have explicitly accepted the privatization thesis. Justice Stevens has been the most forthright in this regard, as his opinions in *Thornburgh v. American College of Obstetricians and Gynecologists*,²⁵⁵ *Webster v. Reproductive Health Services*,²⁵⁶ and *Cruzan v. Director, Missouri, Department of Health v. Reproductive Health Services*²⁵⁷ attest.

In *Thornburgh*, Justice Stevens' concurring opinion discussed whether the state's interest in protecting the unborn is compelling during the entire period of pregnancy. Justice Stevens stated: "I recognize that a powerful theological argument can be made for that position, but I believe that our jurisdiction is limited to the evaluation of secular state interests."²⁵⁸ Justice Stevens later stated that "unless the religious view that a fetus is a 'person' is

251. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

252. See David M. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345, 403 (1988).

253. See *Roe*, 410 U.S. at 159.

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

254. *Id.* at 162. As Justice White noted, the Court implicitly took a position on the question. *Id.* at 222. As Professor Grano stated, "the Court necessarily rejected the legislative judgment that fetal life deserves protection." Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 24 (1981); see Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 LAW & CONTEMP. PROBS. 79, 115 (1988); Myers, *supra* note 20, at 610. In fact, Justice Blackmun did endorse the view that he found reflected in the relevant legal materials, namely, that "the unborn have never been recognized in the law as persons in the whole sense." *Roe*, 410 U.S. at 162.

255. 476 U.S. 747 (1986).

256. 492 U.S. 490 (1989).

257. 110 S. Ct. 2841 (1990).

258. 476 U.S. at 778 (Stevens, J., concurring).

adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures."²⁵⁹

In *Webster*, Justice Stevens concluded that the preamble to Missouri's abortion statute violated the Establishment Clause.²⁶⁰ The preamble stated that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being."²⁶¹ The preamble required that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Constitution and Supreme Court precedent.²⁶² According to Justice Stevens, "the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause."²⁶³ That conclusion was based on Justice Stevens' conviction "that

259. *Id.* at 779; see *Schneider*, *supra* note 254, at 115; see also *Thornburgh*, 476 U.S. at 795-96 n.4 (White, J., dissenting) (responding to Justice Stevens' position).

260. Justice Stevens also stated that because the preamble threatens to interfere with contraceptive choices it is unconstitutional under *Griswold* and subsequent cases involving access to contraceptives. 492 U.S. at 564 (Stevens, J., concurring in part and dissenting in part). Professor Smolin has noted that Justice Stevens is wrong in asserting that a state that protected human life from conception would interfere with common forms of contraception. See David M. Smolin, *Abortion Legislation After Webster v. Reproductive Health Services: Model Statutes and Commentaries*, 20 CUMB. L. REV. 71, 121-28 (1989). Interestingly, Justice Stevens noted that "there was unquestionably a theological basis for the Connecticut statute that the Court invalidated in *Griswold*." 492 U.S. at 566.

261. MO. ANN. STAT. §§ 1.205.1(1)-(2) (Vernon Supp. 1991).

262. *Id.* The preamble provided in full:

1. The general assembly of this state finds that:
 - (1) The life of each human being begins at conception;
 - (2) Unborn children have protectable interests in life, health, and well-being;
 - (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of the state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
3. As used in this section, the term 'unborn children' or 'unborn child' shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
4. Nothing in this section should be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

MO. ANN. STAT. § 1.205.

263. *Webster*, 492 U.S. at 566 (Stevens, J., concurring in part and dissenting in part).

the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose."²⁶⁴ Moreover, Justice Stevens noted that his view that the state of Missouri had provoked political division along religious lines by endorsing the view of a particular religious tradition supported his Establishment Clause analysis.²⁶⁵

More recently, in a dissenting opinion to *Cruzan v. Director, Missouri Department of Health*,²⁶⁶ Justice Stevens again took the view that the state of Missouri was inappropriately attempting to protect a theological interest. In *Cruzan*, the majority held that Missouri could constitutionally refuse to honor the request of Nancy Cruzan's parents to withdraw her nutrition and hydration.²⁶⁷ In contrast, Justice Stevens maintained that Missouri had no proper interest in the preservation of the life of Nancy Cruzan.²⁶⁸ He concluded that the state's assertion of an interest in Nancy Cruzan's physical existence was "an effort to define life."²⁶⁹ Further, he stated that the state's definition of life to include Nancy Cruzan could only be based upon "some theological abstraction."²⁷⁰ Finally, Justice Stevens decided that "to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life."²⁷¹

264. *Id.* at 566-67 (footnote omitted).

265. *Id.* at 571. Justice Stevens' comment on "political divisiveness" illustrates the shortcomings of such an inquiry. See *supra* notes 86-103, 159-66 and accompanying text. Holding the preamble to the Missouri statute unconstitutional would not likely reduce the level of discord. As Professor Tribe, a supporter of abortion rights, has noted: "It seems likely . . . that any legal approach to abortion will generate religious fragmentation; it cannot follow that all possible approaches violate the establishment clause." TRIBE, *supra* note 53, § 14-14 at 1281; see also *id.* at 1350. A Supreme Court decision advocating Justice Stevens' view might make things worse. See generally GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 95-97 (1st ed. 1985).

266. 110 S. Ct. 2841 (1990).

267. *Id.* at 2853-55. For a brief discussion of *Cruzan*, see NOWAK & ROTUNDA, *supra* note 53, at 812-16. The authors of this treatise note that "*Cruzan* did not establish a right to die." *Id.* at 816.

268. Justice Stevens seems to have concluded that Nancy Cruzan was in fact already dead. Justice Stevens stated that "Nancy Cruzan is obviously 'alive' in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is 'life' as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence." 110 S. Ct. at 2886 (Stevens, J., dissenting).

269. *Id.*

270. *Id.* at 2887.

271. *Id.* at 2888. In support of this proposition, Justice Stevens cited his *Webster* dissent. Justice Stevens later commented that "the only apparent *secular* basis for the State's interest in life is the policy's persuasive impact upon people other than Nancy and her family." *Id.* at 2889. Earlier in his dissent, he had stated: "The more precise constitutional significance of

Although he has not yet followed Justice Stevens' lead in explicitly invoking the Establishment Clause in recent privacy cases, Justice Blackmun's opinions also reflect the privatization thesis. For example, in his dissent in *Bowers v. Hardwick*,²⁷² Justice Blackmun claimed that "[t]he assertion that 'traditional Judeo-Christian values proscribe' [homosexual sodomy] cannot provide an adequate justification for [the statute]. . . . The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine."²⁷³ Justice Blackmun did not view the traditional religious condemnation of sodomy as a justification for the Georgia statute:

[F]ar from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.²⁷⁴

In his passionate dissent in *Webster*, Justice Blackmun explicitly endorsed Justice Stevens' rejection in *Thornburgh* of the argument that the state has a compelling interest in the fetus throughout pregnancy.²⁷⁵ In *Thornburgh*, Justice Stevens rejected the compelling interest argument because he thought it relied on a religious view about the status of the fetus.²⁷⁶

Interestingly, *Thornburgh*, *Webster*, and *Cruzan* fail to define key terms, such as "religion," "sectarian," or "secular." The substantive due process cases do not involve what might be regarded as pure matters of religious belief. For example, the cases do not involve the enforcement of laws requiring a belief in the Trinity or transubstantiation. Instead all of the cases address the temporal realm in the sense that they deal with human behavior.²⁷⁷

death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience." *Id.* at 2885. This statement captures the essence of the privatization thesis—if the matter touches "religion" or "faith" it is not a proper public concern.

272. 478 U.S. 186 (1986).

273. *Id.* at 211 (Blackmun, J., dissenting) (citation omitted). Justices Brennan, Marshall, and Stevens joined Justice Blackmun's dissent. See also *Webster*, 492 U.S. at 558 (Blackmun, J., dissenting); *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2993 (1990) (Blackmun, J., dissenting) (referring to "professed moral or religious grounds" to object to abortion).

274. *Bowers*, 478 U.S. at 211-12 (Blackmun, J., dissenting) (footnote omitted). Other passages in the opinion also reflect this sensibility. E.g., *id.* at 200, 205, 211 n.6, 212-13; see also *Akron Ctr.*, 110 S. Ct. at 2993 (Blackmun, J., dissenting). See generally Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the Bowers v. Hardwick Dissent*, 25 WAKE FOREST L. REV. 501 (1990).

275. *Webster*, 492 U.S. at 490 552-53 (Blackmun, J., dissenting).

276. See *supra* notes 258-59.

277. See Smith, *supra* note 32, at 969-71, 1000-07.

Yet, according to the privatization thesis, the state statutes involved in these cases touch on religious matters.

The most extensive treatment has been Justice Stevens' discussion of what he regards as "sectarian" views of human life.²⁷⁸ For example, in *Thornburgh*, Justice Stevens categorized the position that the State has a compelling interest in the unborn from conception to birth as necessarily theological. He also stated that the State's position that the fetus is a "person" is religious.²⁷⁹ Nevertheless, Justice Stevens did not explain why these positions are theological or religious.²⁸⁰ His conclusion seems to be based on the idea that his view—that the state's interest increases with the state of development—is "obvious,"²⁸¹ "fundamental and well-recognized,"²⁸² and "supported not only by logic, but also by history and by our shared experiences."²⁸³ Justice Stevens views the state interest in protecting human life as varying "as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day."²⁸⁴ While this view is not uncommon,²⁸⁵ Justice Stevens never explained why an alternative view is "religious."²⁸⁶ In fact, as Justice White's dissenting opinion points out, there is no reason to consider either of the two competing views

278. As noted, in *Webster*, Justices Blackmun, Brennan, and Marshall endorsed Justice Stevens' view on this issue. See *Webster*, 492 U.S. at 566-67.

279. *Thornburgh*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring).

280. *Id.*

281. *Id.* at 778.

282. *Id.* at 779.

283. *Id.* (footnote omitted). It is not clear to whom "our" refers. See *infra* note 297 and accompanying text (offering a suggestion).

284. *Id.* at 778.

285. In the literature on issues such as abortion and euthanasia, many commentators assert that a human being does not have an interest in continued life unless the individual has some capacity for social interaction. See, e.g., Rebecca Dresser, *Relitigating Life and Death*, 51 OHIO ST. L.J. 425, 428-29 (1990); Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 441-42 (1988) ("A vitalist believes that life, in and of itself, is a good worth preserving. In my view, however, a more plausible solution is that life is a precondition for the experiencing of human goods, and is no longer inherently beneficial."); Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 623, 626 (1991) ("To insist that personhood be understood as the attainment of a certain level of human development, rather than as the potential for such development, is ultimately to insist that a person must be distinguished from the biological material of which he is made."). This approach is quite controversial. See Germain Grisez, *Should Nutrition and Hydration Be Provided to Permanently Unconscious and Other Mentally Disabled Persons?*, 5 ISSUES IN LAW & MED. 165, 172-73 (1989) (adopting an opposing position).

286. See *Thornburgh*, 476 U.S. at 795 n.4 (White, J., dissenting) ("Justice Stevens omits any real effort to defend his judgment.").

sketched by Justice Stevens as religious. Put differently, there is no reason to consider one position religious and the other secular.²⁸⁷

Justice Stevens' dissent in *Webster* is no more clear on this point. He again asserted that there is no "secular" basis for the state to claim an interest in human life immediately after fertilization.²⁸⁸ He stated: "As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth."²⁸⁹ Apparently, the only secular interest involved in protecting human life is preventing "physical pain or mental anguish."²⁹⁰ To Justice Stevens, this is all "obvious." Even if one agreed with the controversial conclusion that the states' interest increased throughout pregnancy, Justice Stevens never explains why his view is secular, while the position that the state has an interest in human life at each stage of development is "religious." He seems to regard this position as "religious" because he erroneously thinks it relies on the existence of a soul from the moment of conception.²⁹¹ The Roman Catholic Church, for example, does not take a position on the time of ensoulment or on the beginning of human personhood.²⁹² The position that early abortion is wrong is based

287. *Id.* Justice Blackmun is no more helpful in explaining the secular-religious distinction. His opinion in *Webster*, which endorsed Justice Stevens' discussion in *Thornburgh*, does not explain the distinction. *Webster*, 492 U.S. at 552-53. Justice Blackmun's dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), is no more informative. In *Bowers*, Justice Blackmun rejected the view that the moral judgment the state of Georgia advanced in support of its anti-sodomy statute, namely that homosexual sodomy is immoral, provided an adequate justification. He stated: "The legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine." *Id.* at 211 (Blackmun, J., dissenting). Although the state of Georgia had relied in part on the long history of religious groups condemning homosexual sodomy, *id.*, Justice Blackmun never explained why the moral view expressed by the statute was inevitably religious. There are of course those who condemn homosexual sodomy without invoking "religious" justifications. See John M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 445 n.60 (1987); John M. Finnis, *Personal Integrity, Sexual Morality and Responsible Parenthood*, in *ANTHROPOS: RIVISTADI STUDI SULLA PERSONA E LA FAMIGLIA*, 43-55 (1985).

288. 492 U.S. at 569 (Stevens, J., dissenting).

289. *Id.*

290. *Id.*; see also *id.* at 572 ("sensation and movement"); *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2886-89 (Stevens, J., dissenting) (emphasizing consciousness).

291. See 492 U.S. at 569 (Stevens, J., dissenting) (discussing ensoulment); *Thornburgh*, 476 U.S. at 778 n.7 (Stevens, J., concurring). Notably, Justice Stevens stated that the preamble is a religious tenet. *Webster*, 492 U.S. at 566 (Stevens, J., dissenting).

292. See Joseph Card. Ratzinger, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, ORIGINS, March 19, 1987, at 13 (statement of Congregation for the Doctrine of the Faith) ("The Magisterium has not expressly committed itself to an affirmation of a philosophical nature [about ensoulment], but it constantly reaffirms the moral condemnation of any kind of procured abortion."); John R. Connery, S.J., *The Ancients and the*

on the "fundamental and well-recognized" fact that human life begins at conception²⁹³ and that human life is inherently good.²⁹⁴ There is nothing purely "religious" about this argument; it does not depend on appeals to biblical authority.²⁹⁵

Justices Stevens and Blackmun have not taken the position that a view is "religious" simply because it conforms to the teaching of some religious organizations. Indeed, Justice Stevens has expressly disassociated himself from that position.²⁹⁶ This fact suggests that the privatization of religion thesis is viewed in a selective manner. It is only when religiously-influenced moral judgments depart from the Justices' own moral views²⁹⁷ that they are considered objectionable. In Professor Bradley's phrase, "[W]here religious morality exceeds liberalism, the liberal constitutionalism of our Establishment Clause overrules it."²⁹⁸ Thus, the privatization thesis is invoked only when religion makes a difference; only when that possibility exists is it necessary to raise the specter of religious oppression. Characterizing a position as religious then serves to discount the position without having to challenge it forthrightly. Using the "religious" label ends the debate, while reinforcing the conclusions that are likely to be reached by members of this social group.²⁹⁹

Medievalists on Abortion: The Consensus the Court Ignored, in ABORTION AND THE CONSTITUTION: REVERSING *Roe v. Wade* THROUGH THE COURTS 123, 126 (Dennis J. Horan et al. eds. 1987).

293. John M. Finnis, *Natural Law and the Rights of the Unborn*, in ABORTION AND THE CONSTITUTION: REVERSING *Roe v. Wade* THROUGH THE COURTS 115, 116, 119 (Dennis J. Horan et al. eds. 1987); Rice, *supra* note 237, at 156 ("The most troublesome obstacle for any proponent of legalized abortion is the verifiable fact that each abortion, at whatever stage of pregnancy, kills a human being.").

294. See, e.g., John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFF. 117 (1972); Grisez, *supra* note 285, at 172-73; William E. May et al., *Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons*, 3 ISSUES IN LAW & MED. 203, 204 (1987).

295. Natural law reasoning supports the argument. See Finnis, *supra* note 294. "It is sometimes said that one cannot accept the doctrine of natural law unless one has antecedently accepted 'its Roman Catholic presuppositions.' This, of course, is quite wrong. The doctrine of natural law has no Roman Catholic presuppositions." JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 109 (1960).

296. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 566 (Stevens, J., dissenting); see also *Bowen v. Kendrick*, 487 U.S. 589, 634 (1988) (Blackmun, J., dissenting) (agreeing with Chief Justice Rehnquist's analysis that AFLA had a secular purpose and did not serve a religious objective because some of the statute's goals coincided with the beliefs of certain religious denominations). But see *id.* at 639 n.9 (Blackmun, J., dissenting) (suggesting that the chastity issue is inevitably religious).

297. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring) (referring to *our* shared experiences).

298. Gerard Bradley, *Caesar's Religion*, 15 HUM. LIFE REV. 52, 60 (1989).

299. See Bradley, *supra* note 289; Schneider, *supra* note 254, at 115.

Two other theories may help to understand how these Justices use the religious-secular distinction. First, the use of religion demonstrates the Justices' hostility to the idea that there are moral norms external to the individual. Justice Blackmun's dissent in *Bowers* most clearly expresses the commitment to the idea that it is the individual who creates his own morality. There, Justice Blackmun stated:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.³⁰⁰

There are, of course, those who support Justice Blackmun's view of morality even though it is hotly contested.³⁰¹ Justice Blackmun's position is not strengthened, however, by labelling the opposing view "religious." Again, the religious label is used to dismiss an argument, not to meet it forthrightly. The strength of the view that the Constitution incorporates Mill's *On Liberty* ought to be evaluated directly, not by labelling one's adversaries religious.³⁰²

Second, the religious label seems to be used to describe beliefs that the Justices believe are not "rational." This point, which draws on a significant body of literature,³⁰³ deserves more extended elaboration. Justice Blackmun's opinion in *Webster* is illustrative. After endorsing Justice Stevens' conclusion in *Thornburgh* that fetal personhood was a religious view, Justice Blackmun then defended the viability standard he had crafted in *Roe*:

The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot *reasonably*

300. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting); see also *id.* at 212 (Blackmun, J., dissenting) (addressing "private morality"). Justice Blackmun's opinion is filled with constant invocations of the words "private" and "intimate". See John M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 443 n.46 (1987); see also BORK, *supra* note 39, at 120-26, 247, 249-50 (discussing Justice Blackmun's dissent in *Bowers*); Bradley, *supra* note 274 (critiquing Justice Blackmun's dissent in *Bowers*); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 8-18 (same).

301. See Myers, *supra* note 20, at 604.

302. *Id.* See generally Bradley, *supra* note 274, at 519-20.

303. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (1989); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); David A.J. Richards, Book Review, 23 GA. L. REV. 1189 (1989); Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFF. 259 (1989).

and *objectively* be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.³⁰⁴

The divide seems to be reason, logic, and scientific truth on the one hand and religious dogma on the other.³⁰⁵

That view should be rejected. Although the invocation of "rationality" has powerful appeal, it suffers from grave infirmities. That framework often fails to recognize that the conception of "rationality" that is invoked to settle important public policy disputes is highly partisan.

The claim that there are *rational* principles, independent of a metaphysic or a theology, capable of resolving conflicts between groups with competing interests has shown itself to be empty. There are in fact competing and contradictory understandings of rationality and justice, resting on fiduciary formulations which are now rarely examined and whose importance and indeed existence is frequently denied.³⁰⁶

Consider, for example, the discussions of abortion by David Richards and John Finnis. Richards defends *Roe*, in part, on the ground that the state's

304. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 553 (1989) (Blackmun, J., dissenting) (emphasis added). The change in Justice Blackmun's tone from *Roe* is striking. He is not cautious here, as he seemed to be in *Roe*. His *Webster* dissent is full of confident assertions about the truth on abortion, in contrast to his relativism in other contexts. See, e.g., *id.* at 554 (Blackmun, J., dissenting) ("In *Roe*, we discharged that responsibility as logic and science compelled. The plurality today advances not one reasonable argument as to why our judgment in that case was wrong and should be abandoned."). See generally Smolin, *supra* note 252, at 407-08 (commenting on the change in Justice Blackmun's approach).

305. See *Bowen v. Kendrick*, 487 U.S. 589, 640 (1988) (Blackmun, J., dissenting) ("religious dogma"). By "dogma" Justice Blackmun seems to mean, as Webster's says, "a point of view or tenet put forth as authoritative without adequate grounds." WEBSTER'S NEW COLLEGIATE DICTIONARY 337 (1977). This view is essentially that of Professor Richards. See, e.g., David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 849 (1986).

306. D. FORRESTER, BELIEFS, VALUES AND POLICIES: CONVICTION POLITICS IN A SECULAR AGE 5 (1989). Here Forrester draws on Alasdair MacIntyre's recent work. See ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY (1990); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988). Professor Michael Perry made this same point in a similar fashion:

There are, of course, competing conceptions of rationality—that is, competing sets of criteria for determining what beliefs to accept and what beliefs to reject. No privileged standpoint exists from which to adjudicate among competing conceptions of rationality—no standpoint that does not itself presuppose a particular conception of rationality.

Michael J. Perry, *Comment on "The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment"*, 27 WM. & MARY L. REV. 1067, 1067-68 (1986); see also HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 73-74 (1974); Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J.L. & POL. 449, 461-63 (1990); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 938-39 (1989).

interest in fetal life is not sufficient to justify prohibiting abortion. Richards concludes that it is not "reasonable" for the state to claim a compelling interest in the fetus throughout pregnancy because the belief that the fetus is a full moral person throughout pregnancy is "not reasonably shared at large"³⁰⁷ and because the fetus "lacks relevant characteristics of being a person—at a minimum, the capacity for self-consciousness, agency and the like."³⁰⁸ In contrast, Finnis argues that abortion is the "denial of right, which is also a denial of the basic arguments of human reason. . . . [A]bortion is one of the most destructive philosophical and practical errors perpetuated by modern culture."³⁰⁹ The basic justification for Finnis's view is that it is wrong to directly attack human life,³¹⁰ and that human life begins at conception.³¹¹

Both of these positions are "reasonable," if one gives the term a liberal construction. What seems apparent is that Richards and Finnis operate in different worlds.³¹² Their disagreements reflect different traditions and different ways of understanding "rationality." Thus, Richards' dismissal of Finnis' reasoning as "sectarian"³¹³ means only that Finnis does not share Richards's particular partisan conception of rationality.

The counterargument to this response claims that the Constitution specifically incorporates the liberal account of rationality. The argument can be summarized in this fashion: "The Establishment Clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith. As an embodiment of these Enlightenment values, the Establishment Clause requires that the political influence of religion be substantially diminished."³¹⁴ Although Justice Blackmun does not offer an extended argument in support of the view that the Constitution necessarily requires the exclusion of views

307. DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 263 (1986).

308. *Id.* at 264.

309. Finnis, *supra* note 293, at 119.

310. *Id.* at 118; Finnis, *supra* note 294, at 132.

311. Finnis, *supra* note 293, at 116, 119.

312. Their disagreements extend to other issues as well. Compare RICHARDS, *supra* note 303, at 258-61 (contraception) and *id.* at 268-80 (homosexual acts) with Grisez et al., "Every Marital Act Ought to be Open to New Life": Toward a Clearer Understanding, 52 THE THOMIST 365 (1988) (contraception) and Finnis, *supra* note 300, at 445 n.60 (homosexual acts). Note that those who take Richards' position on abortion, which emphasizes that a human being needs a certain level of self-consciousness before it is entitled to legal protection, have a difficult time defending prohibitions on infanticide. See Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37 (1972) (defending infanticide); Cf. Finnis, *supra* note 293, at 118 (criticizing infanticide).

313. See, e.g., Richards, *supra* note 238, at 146-47; Richards, *supra* note 305, at 849-50.

314. Gey, *supra* note 43, at 79.

that fail to conform to his conception of rationality, he views the requirement of "secular reasons" as a necessary implication of our democratic system. This view, although quite common, is profoundly mistaken. In the late twentieth century, it is possible to contemplate "a wholly secular government and politic[al] culture."³¹⁵ Yet, the claim that there is a "constitutional command of secular government"³¹⁶ misrepresents the extent to which the religion clauses embody a rigid separation between religion and government.

Professor Smith's assessment bears repeating:

If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not. Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. For that reason, Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out.³¹⁷

Moreover, although secular rationalism is part of the American tradition, privileging that conception of rationality would do violence to the views of most Americans,³¹⁸ the vast majority of whom believe that morality is derived from religion. Granted, a small segment of the population, including prominent scholars, believes that liberal democracy requires the screening of public life from the influence of moral views that are not justified in wholly secular terms. Nonetheless, it seems difficult to accept a position that is inconsistent with most of the country's history and the experience of most people in contemporary America.³¹⁹

315. Smith, *supra* note 32, at 975.

316. *County of Allegheny*, 492 U.S. at 611.

317. Smith, *supra* note 32, at 966; see ELLIS SANDOZ, A GOVERNMENT OF LAWS 128 (1990) (challenging the view that the Constitution's Framers intended to create a purely secular government); see also Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context*, 35 AM. J. LEGAL HIST. 172, 204 (1991) ("The 'wall,' however, was never meant to effect a complete and absolute separation between church and state prohibiting religious influence in state-sponsored activities and laws."); McConnell, *supra* note 22, at 1513 (noting that the rationalistic Enlightenment had little influence on the Free Exercise Clause).

318. See Neuhaus, *Eastern Europe and the Swedish Model*, FIRST THINGS, March 1991, at 57 ("[T]he overwhelming majority of Americans . . . do say that religion is the source of morality."); Smith, *supra* note 32, at 1012-15.

319. The argument that legislation must be supported by secular reasons so that the public debate can be conducted in terms that are accessible to all, see Smith, *supra* note 32, at 1010, is also flawed. The secular reasoning that our liberal democracy is purported to require is foreign to most Americans. " 'Accessibility,' it turns out, has little to do with the beliefs, values, and

In recent cases, the Court has generally rejected this manifestation of the privatization thesis, which provides that legislation must be justified in the terms of secular rationality. The endorsements of this version of the privatization thesis are found in some dissenting opinions. Since at least 1986, a majority of the Court now seems more accepting of religiously-influenced moral judgments. For example, in *Bowers v. Hardwick*,³²⁰ Justice White's conclusion that the fundamental right of privacy did not extend to homosexual sodomy was supported by the observation that "[p]roscriptions against that conduct have ancient roots."³²¹ In applying the rational basis test, Justice White denied that it was impermissible for the Georgia statute to reflect a moral judgment about homosexual sodomy. Justice White stated:

The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.³²²

Former Chief Justice Burger's separate concurrence was even more explicit about invoking the religious influence on the Georgia statute in support of its constitutionality. He stated that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."³²³

Similarly, Justice Scalia's opinions reflect an acceptance of religiously-influenced moral judgments. Typically, Justice Scalia does not advocate that religiously-influenced moral judgments should play an important role in influencing legislation. His approach, as one might expect from a professed

reasons that the actual citizens in a democracy *do* in fact understand and use." *Id.* at 1015; see Baer, *supra* note 306, at 463. Similarly, many of the conclusions that purportedly flow from this version of our constitutional scheme depart radically from the moral views of most Americans. See DAVID RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* 116-21, 185-89 (1982) (the constitutional right of privacy protects prostitution and drug use). These views suggest that there is something wrong with the liberal account of liberal democracy. "[I]f the picture of liberal democracy presented by academic theorists diverges from the deeply held beliefs not only of large numbers of citizens but also of the founders of our democratic system, the obvious conclusion is that the theorists have not succeeded in capturing the meaning of our democracy." Smith, *supra* note 32, at 1015 (footnote omitted).

320. 478 U.S. 186 (1986).

321. *Id.* at 192.

322. *Id.* at 196.

323. *Id.* at 196 (Burger, C. J., concurring).

adherent to judicial restraint,³²⁴ is to defer to the democratic process. Justice Scalia's approach to substantive due process is, therefore, receptive to legislation that embodies what might be characterized as a traditional moral position, even if that position may have been religiously-influenced.³²⁵

In his substantive due process opinions, Justice Scalia has set forth his approach to determining whether a fundamental right exists. For Justice Scalia, it is necessary that a "claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference."³²⁶ Justice Scalia's approach accepts the use of societal traditions to support the constitutionality of legislation, even when the tradition reflects strong moral judgments. His opinion in *Michael H. v. Gerald D.*³²⁷ is instructive. The case involved the effort of Michael H. to establish his paternity of, and obtain the right to visit, Victoria D. Victoria D. was born to Carole D., who was married to Gerald D. Pursuant to a California statute, a child born to a married woman living with her husband is presumed to be a child of the marriage. Someone in Michael's position, who allegedly fathered Victoria during an affair, is not permitted to rebut the presumption. Justice Scalia's plurality opinion, which rejected Michael's substantive due

324. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). See generally Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1 (1990); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

325. See West, *supra* note 249, at 659-60, 668, 677; Hafen, *supra* note 300, at 18-23. See generally Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 123 (1986). Justice Scalia stated:

One would be foolish to deny the relevance of moral perceptions to law. Society's moral beliefs necessarily affect its constitutional perceptions in general and its perceptions of what economic rights are protected by its constitution in particular. There is no need to apologize for the phenomenon, even when the moral beliefs spring from a theological belief. In any case, it is useless to rail against the phenomenon because it is inevitable.

Id. The author does not suggest that a majority of the Justices necessarily share all aspects of Justice Scalia's views on these issues. In fact, Justice Scalia often writes separately on substantive due process issues. See, e.g., *Cruzan*, 110 S. Ct. at 2859 (Scalia, J., concurring). Justice Scalia is, however, typically in the majority on substantive due process questions, and thus the Court's results suggest that it is likely to accept a role for religiously-influenced moral judgments.

326. *Cruzan*, 110 S. Ct. at 2859-60 (Scalia, J., concurring). Justice Scalia's approach has generated a great deal of scholarly criticism. See generally Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337.

327. 491 U.S. 110 (1989). For an excellent discussion of *Michael H.*, see Joan C. Sylvain, Note, *Michael H. v. Gerald D. The Presumption of Paternity*, 39 CATH. U. L. REV. 831 (1990).

process claim, continually referred to the "adulterous" relationship in the course of rejecting the argument that our traditions protected Michael's effort to assert parental rights.³²⁸ According to Justice Scalia, the state is permitted to act upon moral judgments.³²⁹

Similarly, in *Cruzan*, after noting Justice Stevens's view that life and death decisions must be left to the private realm of conscience, Justice Scalia stated: "This is a view that some societies have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable."³³⁰ In addition, in rejecting the view that the Constitution contains a right to abortion, Justice Scalia stated in *Ohio v. Akron Center for Reproductive Health*: "[Such a right] is not to be found in the longstanding traditions of our society."³³¹ In Justice Scalia's view, the State is clearly permitted to legislate on the basis of moral judgments, even on such controversial subjects as abortion, homosexual rights, and the right to die—subjects that the dissenters regard as private or religious. Justice Scalia, on the contrary, would permit these issues to be the subject of *public* action.³³²

In sum, the Court's recent substantive due process decisions, like its recent Establishment Clause decisions, have reflected the declining influence of the privatization theory. Here, too, the changing composition of the Court has transformed the legal doctrine. Since 1986, the Court's substantive due process decisions are far more receptive to state legislation reflecting a moral position, even if that position may have been religiously-influenced in some sense. *Bowers*, *Webster*, *Hodgson*, *Akron*, and *Cruzan* are all consistent with this view. There is, however, still a significant minority who explicitly endorse the privatization theory. That group is in the minority, though, and it was so even prior to the retirements of Justices Brennan and Marshall.

Currently, the legal doctrine on substantive due process issues accepts a public role for religion, and it is likely to remain so for the foreseeable future. Those with more traditional views on moral issues, such as abortion, may

328. There are eight references to adultery in Scalia's opinion.

329. "Plainly, for Scalia the legal status of a couple has moral significance; for him natural relationships are sometimes important, but judgments can be made about their relative moral quality. In contrast, the mindset typified in the Brennan dissent is insistently reductionist and relativistic." Robert F. Nagel, *Constitutional Doctrine and Political Direction*, TRIAL, Dec. 1989, at 72, 73; see Hafen, *supra* note 300, at 18-23.

330. 110 S. Ct. at 2862-63 (Scalia, J., concurring).

331. *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2984 (1990) (Scalia, J., concurring).

332. Justice Scalia's position applies to other areas of constitutional law. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465 (1991) (Scalia, J., concurring) ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral.").

well not succeed in the political arena. The mixed record on abortion legislation since *Webster* is evidence of this. These failures may be the result of the same acceptance by some (the secularized elite, in particular) of the privatization theory. But these failures cannot be attributed to the legal doctrine, which in recent years has consistently rejected the privatization theory.

The Court's current position on substantive due process ought to be applauded. The Court has properly rejected the privatization theory that some Justices have advanced. As noted above, the real debate is over whether it is appropriate for the government to legislate on the basis of moral norms. The real divide is not between religious and secular; rather, it is whether it is proper for the government to enforce moral norms external to the individual.³³³

The Court's current approach, which accepts the legitimacy of moral views that may have been influenced in some sense by religion, is the most desirable position. The principal virtue of this view is that it is receptive to traditional understandings of morality, which may well provide us with a superior form of moral knowledge.³³⁴ The social consequences of our acceptance of viewing morality as purely personal certainly suggest that we should welcome the contribution of more traditional understandings.

The implications of the Court's deferential approach on substantive due process doctrine ought to be clear. Rejecting the privatization thesis would affect substantive due process in two ways. First, it would affect whether a particular right is characterized as "fundamental." Second, it would affect how the Court evaluates the state interests involved. With respect to the fundamental right question, accepting a public role for religiously-influenced moral judgments increases the likelihood that the Court will conclude that the right involved is not fundamental. A Court that acknowledges the legitimacy of a tradition rejecting a particular practice, such as sodomy or abortion, is less likely to view the claimed right as "fundamental."³³⁵ The

333. See Gerard V. Bradley, *The Enduring Revolution: Law and Theology in the Secular State*, 39 EMORY L.J. 217, 231 (1990) (book review) ("[D]iscussants of law and religion will [increasingly] find themselves divided into two camps cutting across religious boundaries, one called the 'autonomists' and the other 'theonomists,' in the specific sense of adhering to objective moral norms external to the individual.").

334. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1504 (1989) (book review).

335. Focusing on tradition could also work in the other direction. The Court might rely on a tradition protecting a particular practice in support of finding a fundamental right. This might explain why Justice Scalia, usually a critic of expanded notions of substantive due process, seems to support *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 1601 (1990) (citing *Pierce* favorably).

contending positions in *Bowers* illustrate this point. The Justices in the majority, who clearly rejected the privatization thesis, thought it was proper to take into account the long history of religiously-influenced moral opposition to homosexual sodomy. In contrast, Justice Blackmun evaluated the right in a more abstract manner, thus avoiding any recourse to a history that he believed expressed religious intolerance.

As to the state interest question, rejecting the privatization thesis does not by itself decide the outcome of any case. Accepting a public role for religiously-influenced moral judgments only means that the Court needs to evaluate forthrightly the strength of the state interest involved. The Court will not be able to dismiss out of hand an asserted state interest because the interest is viewed as religious, as some Justices have done in certain cases.³³⁶ Eliminating the use of the "religious" label to dismiss a state interest does not assist in evaluating the strength of a state interest.³³⁷ It simply means that, however that task is undertaken, the Court will need to contend with state interests that are in some sense traced to "religion."

III. CONCLUSION

An examination of Establishment Clause and substantive due process doctrine reveals that the Justices' view of the role of religion in public life has considerable explanatory power. There are two visions contending for control. The privatization theory—that religion is a private affair that should not play a role in public life—has had considerable support on the Court. Justices Brennan, Marshall, Blackmun, and Stevens have consistently supported this theory.³³⁸ Thus, these Justices have typically denied the consti-

336. See *supra* notes 256-67 and accompanying text.

337. See generally Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988); Schneider, *supra* note 254.

338. Although his opinion in *McDaniel v. Paty*, 435 U.S. 618 (1978), seems generally supportive of a "political" role for religious individuals, Justice Brennan only supported the view that the Constitution protects these individuals' formal rights to participate in the political process. In fact, the opinion closes with a very real hostility to the view that we ought to regard their participation with approval. The opinion even suggests that it might be unconstitutional if religious individuals succeeded in their efforts. See 435 U.S. at 642 (Brennan, J., concurring). As Justice Brennan stated:

The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

Id. This is not the voice of a man who favors a public role for religion; in fact, he regards it as pathological. See Gey, *supra* note 43, at 179. In this regard, note the district court opinion in

tutionality of both aid to religious institutions and the constitutionality of legislation that embodies religiously-influenced moral principles. These Justices are not necessarily hostile to religion and these Justices do not invariably vote against either religious entities or individuals. Instead, these Justices are hostile to religion when it takes a public role. As the free exercise cases illustrate, when religion is used to "dissent" from some standard of public order, these Justices are quite supportive. Despite several enthusiastic supporters on the Court, the privatization theory is losing influence among the Justices. The conservatives on the Court—Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and White—reject the privatization theory, as revealed by their positions on the Establishment Clause and substantive due process. These Justices accept the constitutionality of both the inclusion of religious institutions in publicly funded programs and legislation that embodies religiously-influenced moral principles. With the conservatives in control of the Court—a situation that is not likely to change in the foreseeable future—the privatization theory should become less and less significant, at least as a matter of constitutional law.

In the long run, the privatization thesis may be more troublesome. Some argue that the culture has moved in the direction of privatized religion. It may be, as some argue, that the current majority on the Court is lagging behind the culture. If so, the privatization thesis is likely to resurface in the next generation. It should, as this Article argues, be resisted.

Clayton, which suggested that although religious groups can participate in the political process they cannot be successful. *Clayton v. Place*, 690 F. Supp. 850, 856 (W.D. Mo. 1988), *rev'd*, 884 F.2d 376, 380-81 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1811 (1990).