Fostering Harmony among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State

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FOSTERING HARMONY AMONG THE JUSTICES:
HOW CONTEMPORARY DEBATES IN THEOLOGY
CAN HELP TO RECONCILE THE DIVISIONS ON
THE COURT REGARDING RELIGIOUS
EXPRESSION BY THE STATE

Kathleen A. Brady*

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INTRODUCTION

In his famous Memorial and Remonstrance,\(^1\) James Madison eloquently describes his expectation that the separation of religion and government will produce "moderation and harmony"\(^2\) among different religious sects and promote "forbearance, love and charity"\(^3\) among their adherents. In this statement, Madison is echoing a belief that is common to the leading proponents of religious liberty in eighteenth-century America.\(^4\) These leaders envisioned that a careful demarcation of the roles and responsibilities of religion and government and the dismantling of state establishments to support religion would help to diffuse the tensions among the sects by removing one of the

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\(^1\) James Madison, Memorial and Remonstrance Against Religious Establishments (1785), reprinted in 8 The Papers of James Madison 295 (Robert A. Rutland & William M.E. Rachal eds., 1973). Madison's Memorial and Remonstrance was written to protest a bill under consideration by the Virginia legislature to provide for a general assessment to support teachers of the Christian religion. For a discussion of the Assessment controversy, see Marvin K. Singleton, Colonial Virginia as First Amendment Matrix: Henry, Madison, and Assessment Establishment, 8 J. Church & St. 344 (1966), and see also Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 140-48 (1986); Lance Banning, James Madison, the Statute for Religious Freedom, and the Crisis of Republican Convictions, in The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History 109 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

\(^2\) Id. at 302.

\(^3\) Id. at 303. Madison borrows this language from Article 16 of the Virginia Declaration of Rights (1776), in 10 Sources and Documents of the United States Constitutions 50 (William F. Swindler ed., 1979). Madison was instrumental in drafting Article 16. For discussions of Madison's role in drafting Article 16, see Thomas E. Buckley, Church and State in Revolutionary New Virginia 1776-1787, at 17-19 (1977), and John T. Noonan, Jr., The Lustre of Our Country: The Experience of Religious Freedom 69-70 (1998).

\(^4\) See, e.g., Thomas Jefferson, Notes on the State of Virginia 161 (William Peden ed., 1982) (1787) (stating that in states without establishments, "harmony" among sects is "unparalleled"). Leading defenders of religious liberty from dissenting evangelical communities expressed the same views. See, e.g., Isaac Backus, An Appeal to the Public for Religious Liberty (1773), reprinted in Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789, at 303, 335 (William G. McLoughlin ed., 1968) [hereinafter Backus, Church, State, and Calvinism] (asserting that equal liberty among religious societies produces "happy ... effects in civil society" whereas coercive measures provoke " emulation, wrath, and contention"); John Leland, The Virginia Chronicle (1790), reprinted in The Writings of the Late Elder John Leland 91, 109 n.* (L.F. Greene ed., New York, G.W. Wood 1845) [hereinafter Leland Writings] ("The only way to live in peace and enjoy ourselves as freemen, is to think and speak freely, worship as we please, and be protected by law in our persons, property and liberty.").
chief causes of their animosities. As a general matter, they were certainly correct that state-supported religion was a source of divisions among the sects, and the abandonment of state establishments in eighteenth and early nineteenth-century America has undoubtedly contributed to a lessening of these tensions. However, demarcating the precise boundary between religion and state has proved neither easy nor obvious, and while animosities among the sects have died down with the passing of the most egregious forms of establishment, disagreements among jurists, scholars, and the larger American populace have continued to rage about the proper contours of the relationship between church and state. Indeed, it is, perhaps, commonplace to note that the task of giving meaning to the Free Exercise and Establishment Clauses of the First Amendment has been the source of some of the deepest divisions on the Court.

Nowhere have the disagreements among the Justices been so highly charged than in the Court’s recent Establishment Clause jurisprudence regarding religious expression by the state. The contours of the Court’s current jurisprudence in this area began to emerge in 1983 with the decision in *Marsh v. Chambers.* *Marsh* addressed the constitutionality of legislative chaplains paid by the state, and the next year the Court decided the first of its holiday display cases in *Lynch v. Donnelly.* In 1989, the Court addressed two additional holiday displays in *County of Allegheny v. ACLU,* and, in 1992, the Court addressed the practice of using clergy members to offer graduation

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5 See Madison, supra note 1, at 302-08; see also Backus, supra note 4, at 336 (citing argument made by Baptists in Providence in early 18th century).

6 Indeed, even Madison was not always sure where the line should be placed and his views on this subject changed over time. In 1785, the same year that Madison wrote in his *Memorial and Remonstrance* that religion is "wholly exempt" from the "cognizance" of civil government, Madison, supra note 1, at 299, he also introduced bills in the Virginia legislature for the punishment of Sabbath breakers and for appointing days of public fast and thanksgiving, see A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers, in 2 The Papers of Thomas Jefferson 555 (Julian P. Boyd ed., 1950); A Bill for Appointing Days of Public Fasting and Thanksgiving, in 2 The Papers of Thomas Jefferson, supra, at 556. He later recognized that government proclamations recommending days of thanksgiving and fasts were inconsistent with his separationist principles. See James Madison, Detached Memoranda, reprinted in 3 Wm. & Mary Q. 534, 560-61 (Elizabeth Fleet ed., 1946) [hereinafter Madison, Detached Memoranda]; see also Letter from James Madison to Edward Livingston (July 10, 1822), in 9 The Writings of James Madison 98, 100-01 (Gaillard Hunt ed., 1900-10).

prayers in public high schools in *Lee v. Weisman*. While there are nuances which distinguish the views of the various Justices, these views have coalesced around three general positions. One position is a strict separationism that draws historical support from the writings of James Madison and Thomas Jefferson. The second is the "endorsement" analysis proposed by Justice O'Conner in *Lynch v. Donnelly* and embraced by a number of other Justices, including those who have expressed separationist tendencies. The third position is held by accommodationists, who oppose both separationism and the endorsement test and would permit a far greater scope for religious expression by the state.

The intensity and, indeed, animosity which have characterized the Court's divisions in this area are well illustrated by the opinions in *Allegheny*. The most bitter disagreements are between accommodationists, on the one hand, and those who favor a separationist or en-


11 As will be discussed further below, I am using the term "accommodationist" to refer to those Justices who believe that the government may, consistent with the Establishment Clause, engage in religious expression that "acknowledges," "recognizes," and even "celebrates" the central role that religion plays in American society. See, e.g., *Allegheny*, 492 U.S. at 657, 663 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Lynch*, 465 U.S. at 674–81. Accommodationists reject the view that religion and government should be kept strictly separate, and they believe that government endorsement of religion is permissible as long as it merely reflects or "accommodates" the religious traditions of the American people and does not use coercive force, cross over into proselytizing, or provide direct benefits to religion in a way that tends to establish a state religion. See *Allegheny*, 492 U.S. at 659–60 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Lynch*, 465 U.S. at 678.

It is important to note, however, that there is considerable debate among Justices and scholars about the proper use of the term "accommodationism." Those who favor the separationist or endorsement approach recognize that some degree of accommodation of religion will be necessary in a society with considerable numbers of religious people, but they define the scope of permissible accommodation much more narrowly than those I have termed "accommodationists." For example, separationists and supporters of the endorsement approach agree that accommodation is permissible if it is designed to alleviate identifiable burdens on free exercise, but many would limit accommodation to this limited purpose. See, e.g., *Weisman*, 505 U.S. at 629 (Souter, J., concurring); *Allegheny*, 492 U.S. at 613 n.59. Those who believe that accommodation is properly limited to alleviating identifiable burdens on free exercise might object to my use of the term "accommodationism" and argue that their opponents are not, in any true sense, "accommodationists." Cf. *Allegheny*, 492 U.S. at 613 n.59 (stating that where no discernible burden on free exercise exists, "accommodation plainly has no relevance"). However, my use of the term "accommodationism" reflects the language of those who adopt this position, and also has the virtue of providing a good indication of the type of relationship between church and state they envision.
endorsement approach on the other. Led by Justice Kennedy, the accommodationists accuse their colleagues of harboring a "latent hostility toward religion" and a "callous indifference toward religious faith." Justice Blackmun, writing at this point for a majority that includes both separationists and those who favor an endorsement approach, counterattacks by arguing that Justice Kennedy's "accusations" are both "offensive" and "absurd." He then accuses the accommodationists of failing to show sufficient respect for religious liberty and pluralism, an accusation which is repeated by several other Justices. When Justice Kennedy suggests that his views regarding Justice O'Connor's endorsement test might be "uncharitable," Justice Stevens jumps upon this comment to suggest that Justice Kennedy's criticisms are not only "uncharitable" but "unfounded," and Justice Blackmun goes a step further by taking the opportunity to air some of his own "uncharitable" opinions regarding Justice Kennedy's position. Tempers flare in *Allegheny*, and there are, perhaps, few other Court decisions characterized by such bitter invective and even personal insult.

This Article endeavors to identify the underlying source of these disagreements and to offer an approach which recognizes and reconciles the concerns of the Court's different factions. There are certainly numerous factors which contribute to the divisions on the Court. The Justices disagree over the relevance of history to their analyses and how to apply history. They also disagree about the ap-

12 *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).
13 Id. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part).
14 Id. at 610 (Blackmun, J.).
15 See id. at 610–13 (Blackmun, J.).
16 See id. at 627–28 (O'Connor, J., concurring in part and concurring in the judgment); id. at 653 & n.11 (Stevens, J., concurring in part and dissenting in part).
17 Id. at 675 (Kennedy, J., concurring in the judgment in part and dissenting in part).
18 Id. at 650 n.6 (Stevens, J., concurring in part and dissenting in part).
19 Id. at 607 (Blackmun, J.).
20 For example, while Justices Scalia and Kennedy have argued that the relevant history is the nation's long-standing practices and traditions, see *Lee v. Weisman*, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting); *Allegheny*, 492 U.S. at 669–70 (Kennedy, J., concurring in the judgment in part and dissenting in part), Justice Brennan looks at the level of principle rather than practice. For Justice Brennan, the fact that the founders may have approved of a practice which has continued as a long-standing historical tradition is not decisive if the practice is inconsistent with their principles and purposes. See *Marsh v. Chambers*, 463 U.S. 783, 816–17 (1983) (Brennan, J., dissenting); see also *Weisman*, 505 U.S. at 622–26 (Souter, J., with Stevens, J. &
propriateness of fact-sensitive inquiries and the dangers associated with judicial discretion. There have also been disagreements about which approach is best for the state.

However, one of the most important, though largely unrecognized, areas of disagreement is theological. Echoing James Madison and the other leading proponents of religious liberty in eighteenth-century America, all of the Justices argue that their position is best for religion as well as the state. Their opponents immediately suspect them of disingenuousness. These uncharitable assumptions are due, in large part, to the fact that the Justices fail to see that they are working with very different understandings of the nature of religious belief and the conditions essential for its protection. The opinions of the Justices make clear that each faction does, in fact, care deeply about religion. Indeed, it is precisely this sensitivity to the importance of religion and its protection that contributes to the raised tempers and bitter tone of their debates. Where the real disagreement lies is in their theological assumptions regarding how religious faith is formed and how it is sustained.

The first three Parts of this Article will clarify these theological differences. Part I begins by looking at the historical sources that the Court has most commonly relied upon in the interpretation of the

O'Connor, J., concurring) (asserting that it is the ideals and principles and not the practices of the founders that are decisive).

21 For example, Justices Scalia and Kennedy have both opposed Justice O'Connor's endorsement approach on the grounds that its fact sensitive approach gives too much discretion and too little guidance to judges. See Allegheny, 492 U.S. at 674-79 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Scalia argues that deference to long-standing historical practices is critical to ensure that judges are not "left to [their] own devices," Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting), with the resulting danger that constitutional guarantees "rest upon the changeable philosophical predilections" of the Court, Weisman, 505 U.S. at 692 (Scalia, J., dissenting). By contrast, Justice O'Connor believes that part of the judicial task involves "sifting through the details" and drawing "fine lines" based "on the particular facts of each case." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring).

22 For example, Justice Stevens has expressed great concern about protecting the state from "bitter religious controversy," Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 814 (1995) (Stevens, J., dissenting) (quoting Everson v. Board of Educ., 330 U.S. 1, 27 (1947) (Jackson, J., dissenting)), and this concern lies behind his frequent adoption of a separationist position, see id. at 797, 811-14; see also Allegheny, 492 U.S. at 650-51 & n.10 (Stevens, J., concurring in part and dissenting in part). By contrast, Justice Scalia is more apt to emphasize the beneficial effects of religious diversity in the public square. See Weisman, 505 U.S. at 646 (Scalia, J., dissenting) (arguing that graduation prayer by rabbi is a "unifying mechanism" that "inoculate[s] [those of other faiths] from religious bigotry and prejudice").
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Establishment Clause and the theological assumptions that underlie these sources. The focus in this Part will be on the writings of James Madison and Thomas Jefferson and their counterparts in the Baptist tradition who also played a critical role in the struggle for religious liberty in the early republic. All of these figures favored strict separationism. While the Court has recognized that an absolute separation between church and state is not possible and the use of Madison and Jefferson as the touchstone for Establishment Clause jurisprudence has been challenged particularly over the past fifteen years, it is appropriate to begin with these figures because their positions have continued to exert great influence on the Court’s decisions and have been used repeatedly to support a separationist approach.

In Part II, the Article moves from a discussion of history to an examination of contemporary debates in academic theology and how these debates both support and challenge the theological assumptions underlying strict separationism in the founding era. As in Part I, the discussion in Part II focuses on debates regarding the nature of religious belief and how religious faith is developed and sustained. This Part draws primarily upon theological scholarship in the Christian tradition. While work in other traditions may well prove as fruitful for the project in this Article, they lie beyond my own expertise, and it would not be possible to do justice to other traditions in a single article.

23 Indeed, it was not long after the Court adopted a separationist stance in <i>Everson v. Board of Education</i>, 330 U.S. 1, 16 (1947), that it recognized that the “wall of separation” advocated by Jefferson cannot be absolute, see <i>Zorach v. Clauson</i>, 343 U.S. 306, 312 (1952). Many of those who continue to advocate strict separationism also recognize that a complete separation between church and state is not possible. See, e.g., <i>Marsh</i>, 463 U.S. at 809 (Brennan, J., dissenting); see also <i>Rosenberger</i>, 515 U.S. at 889 (Souter, J., dissenting) (recognizing limited exceptions to strict prohibition against direct funding of religious activities).

24 The first Justice to challenge directly the use of Jefferson as a source for First Amendment jurisprudence was Justice Rehnquist in his dissent in <i>Wallace v. Jaffree</i>, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting that Jefferson was in France at the time of the drafting of First Amendment). While Rehnquist’s dissent recognized Madison’s central role in drafting the First Amendment, Rehnquist argued that “it was James Madison speaking as an advocate of sensible legislative compromise,” not as an advocate of strict separation. Id. at 97–98. In case law regarding religious expression by the state, accommodationists have also rejected the use of Jefferson and Madison’s strict separationist principles in favor of deference to long-standing historical practices which frequently manifest a far closer relationship between church and state than separationist principles would allow. See, e.g., <i>Allegheny</i>, 492 U.S. at 657, 671–74 (Kennedy, J., concurring in the judgment in part and dissenting in part); <i>Lynch v. Donnelly</i>, 465 U.S. 668, 674–77 (1984) (Burger, C.J.).
In Part III, the contemporary theological debates discussed in Part II will be used to help clarify the theological divisions which underlie the Court’s jurisprudence regarding religious expression by the state. I will not be making the claim that there is a causal connection between contemporary debates in theology and the theological positions adopted by the Justices. With few exceptions, there is no evidence that the Justices are deeply versed in academic theology or aware of these debates. However, theologians and jurists both exist in the same cultural milieu, and thus, it is perhaps not surprising to find strong correlations between their understandings of religious belief. Examining the positions of academic theologians can be extremely helpful in understanding the views of the Justices because theological scholarship can elucidate assumptions that remain largely unarticulated and perhaps even unrecognized by the Justices themselves.

In Part IV, the Article moves beyond clarifying the theological assumptions that divide the Court to developing an approach to the case law that seeks to reconcile and balance these underlying theological divisions. I will be arguing that all of the factions on the Court have important insights regarding the nature of religious belief and legitimate concerns regarding its protection. My proposal seeks to restore harmony among the Justices by accounting for all of these concerns. In doing so, I will be shifting my attention from case law addressing religious expression by the state to the Court’s decisions regarding private religious expression in the public sphere. I will be arguing that robust private religious expression in the public square rather than religious expression by the government is the best way to address the concerns of the accommodationists while also respecting the concerns of separationists and supporters of the endorsement approach. Even if I do not succeed in reconciling the various factions on the Court, I hope that I will at least succeed in promoting greater charity among them.

I. History

In 1947 in *Everson v. Board of Education*, the Court squarely addressed the meaning of the Establishment Clause for the first time. *Everson* was also the first time that the Court applied the clause to the states, and thus, the Court was faced with the task of developing Establishment Clause principles that would apply to the states as well as the

25 Justice Brennan’s opinions do evidence considerable awareness of theological scholarship, and as will be discussed later, Justice Brennan taps into one of the foundational sources for “postliberal” theology. See infra text accompanying notes 633-34.

federal government. History played a substantial role in the Court's decision, and in developing the principles for its decision, the Court turned to the history surrounding the struggle for religious liberty in Virginia and the passage of the Virginia Act for Establishing Religious Freedom. The Court focused, in particular, on the views of James Madison and Thomas Jefferson and made their principles a touchstone for Establishment Clause jurisprudence.

The Everson Court recognized that Jefferson and Madison both supported a strict separation between religion and government, and one of the most frequently quoted paragraphs in the Court's decision ends with an affirmation of Jefferson's famous metaphor of a "wall of separation between church and state." The Court's choice to look to the leading figures in the passage of the Virginia statute as the standard for constitutional meaning has been heavily criticized by scholars and historians as has the use of the "wall" metaphor. The Virginia struggle preceded the adoption of the federal Constitution and the passage of the Bill of Rights, and the purposes of the two provisions were not the same. The strict separationist principles embraced by

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27 See id. at 13 ("This Court has previously recognized that the provisions of the First Amendment, in the drafting and adopting of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.").


30 See, e.g., Gerard V. Bradley, Church-State Relationships in America 3, 12 (1987). Whereas the purpose of the Virginia statute was to prohibit government support for religion at the state level, scholars have forcefully argued that the First Amendment was not intended to interfere with state establishments but, rather, was designed to express clearly that the federal government is one of limited powers without a "shadow of a right . . . to intermeddle with religion." Curry, supra note 1, at 208 (quoting from James Madison's remarks in defense of the Constitution at the Virginia Ratifying Convention on June 12, 1788); see also Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 21 (1995)
Madison and Jefferson were also inconsistent with many of the practices of the nation's early Congresses. 31 Jefferson, it is further noted, was in France when the First Amendment was drafted, 32 and his reference to a wall of separation between church and state was in a letter to the Danbury Baptist Association eleven years after the Bill of Rights was adopted. 33

However, regardless of the criticisms of scholars and commentators, the Court has repeatedly returned to the Virginia struggle in its later decisions, and it has never followed the suggestion of scholars and dissenting Justices that it correct its original misstep. 34 The Court has, to be sure, scaled back from an absolute separation between church and state. 35 However, a separationist current has continued to

(explaining that the First Amendment was designed to keep the federal government out of religion and to leave religious questions to the jurisdiction of the states). Federalists and Anti-Federalists alike agreed on this principle. See Curry, supra note 1, at 208. Indeed, some of the strongest defenders of the need for the religion clauses were Virginia Anti-Federalists who had supported the general assessment bill in the Virginia legislature a few years earlier. These included Patrick Henry, the bill's sponsor, and Richard Henry Lee, both of whom demanded protection for religious liberty in the Constitution. See Speech of Patrick Henry in the Virginia Ratifying Convention (June 12, 1788), in 5 The Complete Anti-Federalist 239, 240 (Herbert J. Storing ed., 1981); Letter of Richard Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), in 5 The Complete Anti-Federalist, supra, at 111, 116.


33 The Bill of Rights was adopted in 1791 when Virginia became the necessary 11th state to ratify the amendments. See Adams & Emmerich, supra note 28, at 19. Jefferson's letter to the Danbury Baptists was written in 1802. See Letter from Thomas Jefferson to the Danbury Baptist Association, supra note 29, at 281.

34 See Adams & Emmerich, supra note 28, at 11 (“[N]o other historical episode has influenced the Supreme Court's interpretation of the religion clauses more than the Virginia experience.”).

35 In Everson, the Court stated that the wall between church and state erected by the First Amendment “must be kept high and impregnable” without “the slightest breach.” Everson v. Board of Educ., 330 U.S. 1, 18 (1947). In subsequent cases, the Court has recognized that an absolute separation between church and state is not possible. See, e.g., Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973) (“[D]espite Madison's admonition and the 'sweep of the absolute prohibitions' of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation . . . .”) (footnote omitted); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (“[T]he separation must be complete and unequivocal. The
run through the case law, both in majority opinions\(^{36}\) and, more recently, predominantly in concurrences and dissents,\(^{37}\) and separationism is a major strand in the Court's recent case law addressing religious expression by the state.\(^{38}\) When Justices do embrace separationist principles, they return to the Virginia struggle and to the ideas of Madison and Jefferson.\(^{39}\)

Those Justices who have embraced the separationist position have also recognized a second historical source supporting their views. In addition to Madison and Jefferson, they frequently cite the Baptist tradition that they associate with Roger Williams as support for separationism.\(^{40}\) The reference to Roger Williams is actually a historical

\(^{36}\) See, e.g., Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122-23 (1982) ("Jefferson's idea of a 'wall,' was a useful figurative illustration to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, but the concept of a 'wall' of separation is a useful signpost.") (citations omitted); Engel v. Vitale, 370 U.S. 421, 431 (1962) ("Union of government and religion tends to destroy government and to degrade religion.").

\(^{37}\) See, e.g., Agostini v. Felton, 521 U.S. 203, 243-44 (1997) (Souter, J., dissenting) (drawing on Madison and Roger Williams to support the claim that a "flat ban on subsidization" of religion is necessary to protect religion from being compromised by the taint of secularism); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 868-74 (1995) (Souter, J., dissenting) (drawing upon the Virginia struggle to support the principle that the First Amendment prohibits any direct public funding of religious activities); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting) ("The sequence of sectarian displays disclosed by the record in this case illustrates the importance of rebuilding the 'wall of separation between church and State' that Jefferson envisioned."); Lee v. Weisman, 505 U.S. 577, 599-601, 606 & n.8, 608-09 (1992) (Blackmun, J., concurring) (approving of the separationism strain in the Court's past case law and the history on which this case law rests); Marsh v. Chambers, 463 U.S. 783, 802-03 (1983) (Brennan, J., dissenting) (approving of Jefferson's "wall" metaphor and stating that the First Amendment embraces the principles of "separation" and "neutrality"); Committee for Pub. Educ. & Rel. Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (calling for a return of the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment" in the Court's parochial school funding cases (quoting Everson, 330 U.S. at 18)); Wolman v. Walter, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part and dissenting in part) (same).

\(^{38}\) See infra Part III.

\(^{39}\) See cases and parentheticals cited in supra note 37.

\(^{40}\) See, e.g., Agostini, 521 U.S. at 243 (Souter, J., dissenting); Weisman, 505 U.S. at 608 n.11 (Blackmun, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 260 (1963) (Brennan, J., concurring). The Court made its first reference to the views of Roger Williams in Engel v. Vitale, 370 U.S. 421, 434 n.20 (1962),
anachronism. The Justices are correct that in the late eighteenth and early nineteenth centuries, the Baptists played a critical role in the struggle for religious liberty both in New England and in the southern states. The most influential of the Baptist leaders in this struggle were Isaac Backus and John Leland. Both of these evangelists were active in the struggle for disestablishment in New England, and Leland also worked with Madison in Virginia to defeat Patrick Henry's general assessment bill for the support of Christian education and to pass Jefferson's Bill for Establishing Religious Freedom.41 It was Backus who rediscovered the works of Williams, whose writings had remained largely forgotten42 and without any continuous influence outside of Rhode Island.43 In addition to Roger Williams, the Baptists drew upon Scripture, Locke, and their own experience of persecution, which was the crucible in which their views were formed.44

Madison and Jefferson and these Baptist leaders shared a similar view that government and religion were separate "jurisdictions"45 or "spheres"46 that must not be "mixed"47 or "confounded"48 together.

and one year later in Schempp, Justice Clark, writing for the majority, stated that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States," Schempp, 374 U.S. at 214.


45 Isaac Backus, Government and Liberty Described (1778), reprinted in Backus, Church, State, and Calvinism, supra note 4, at 345, 357; John Leland, The Yankee Spy (1794), reprinted in Leland Writings, supra note 4, at 215, 228; Letter from James Madison to Edward Livingston, supra note 6, at 98, 100; Thomas Jefferson, A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 77, 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

46 Declaration of the Virginia Association of Baptists (Dec. 25, 1776), in 1 The Papers of Thomas Jefferson, supra note 6, at 660, 661; see also John Leland, A Blow at the Root (1801), reprinted in Leland Writings, supra note 4, at 233, 240 ("Religious opinions are not the object of government or in any way under its control."); Letter from Thomas Jefferson to the Danbury Baptist Association, supra note 29, at 282 (advocating "wall of separation between church and state"); Madison, Detached...
They argued that the state simply has no business "interfering" or "intermeddling" with religion, and when it came to religious expression by the state, most interpreted this principle strictly. For example, Jefferson and Madison opposed presidential proclamations recommending days of thanksgiving, fasts, and prayer, and they also opposed funding for legislative chaplains. Backus voiced no opposition to days of thanksgiving or prayer, and his only recorded objection to legislative chaplains appears to focus primarily on the fact that the chaplains at that time were Episcopalians. However, the principles that Backus expressed in his writings were strictly separationist, and Leland followed similar principles to their logical con-

Memoranda, supra note 6, at 555 (stating that God has put religion and government "asunder").

47 Leland, A Blow at the Root, supra note 46, at 251; Letter from James Madison to Edward Livingston, supra note 6, at 102; see also Isaac Backus, Policy as Well as Honesty (1779), reprinted in Backus, Church, State, and Calvinism, supra note 4, at 375, 380 (arguing that church and state must not be "blended").

48 Backus, supra note 4, at 312.

49 Id. at 315; John Leland, The Rights of Conscience Inalienable (1791), reprinted in Leland Writings, supra note 4, at 177, 191; Letter from James Madison to Reverend Adams (1832), in 9 The Writings of James Madison, supra note 6, at 484, 487.

50 Backus, supra note 45, at 358; Leland, supra note 49, at 302; Letter from Thomas Jefferson to the Reverend Samuel Miller (Jan. 23, 1808), in 11 The Writings of Thomas Jefferson, supra note 6, at 428, 428.

51 See Letter from James Madison to Edward Livingston, supra note 6, at 100–01; Letter from Thomas Jefferson to the Reverend Samuel Miller, supra note 50, at 428; Madison, Detached Memoranda, supra note 6, at 558–62. In 1785, Madison presented to the Virginia Legislature A Bill for Appointing Days of Public Fasting and Thanksgiving, supra note 6, and he also followed the practice of earlier presidents in recommending days of thanksgiving and fasts, see Letter from James Madison to Edward Livingston, supra note 6, at 101. However, later in life he opposed such practices as inconsistent with the principle of "perfect separation." Id. at 101–02; see also Madison, Detached Memoranda, supra note 6, at 560–62. Similarly, while Madison later opposed funding for legislative chaplains, see Letter from James Madison to Edward Livingston, supra note 6, at 100; Madison, Detached Memoranda, supra note 6, at 558–59, he was a member of the congressional committee that recommended funding for chaplains, see Cord, supra note 31, at 25, and there is no evidence that he voiced any opposition when the funding was first approved, see Antieau, supra note 31, at 180–81.

52 Indeed, Backus observed government appointed days of fast and thanksgiving in his own congregation. See McLoughlin, supra note 44, at 268.

53 See Isaac Backus, The Testimony of the Two Witnesses 46–47 (Boston, Samuel Hall 2d ed. 1793).

54 See, e.g., Backus, supra note 4, at 312 ("God has appointed two kinds of government . . . never to be confounded together, one of which is called civil and the other ecclesiastical government."). In the same work, Backus writes,
clusion and rejected both practices\textsuperscript{55} as well as any laws which gave special recognition or protection to religion.\textsuperscript{56}

And it appears to us that the true difference and exact limits between ecclesiastical and civil government is this, That the church is armed with \textit{light and truth} to pull down the strongholds of iniquity and to gain souls for Christ and into his Church to be governed by his rules therein, . . . while the state is armed with the \textit{sword} to guard the peace and the civil rights of all persons and societies and to punish those who violate the same. And where these two kinds of government, and the weapons which belong to them are well distinguished and improved according to the true nature and end of their institution, the effects are happy, and they do not at all interfere with each other.

\textit{Id.} at 315. Backus also frequently cited passages from Roger Williams which reflect the strict separationism of his thought. \textit{See, e.g., \textit{id.} at 322.}

\textsuperscript{55} \textit{See 2 McLoughlin, supra note 41, at 931, 933; McLoughlin, supra note 44, at 194. For specific citations to Leland's writings regarding legislative chaplains, see John Leland, Speech Delivered at the House of Representatives of Massachusetts on the Subject of Religious Freedom (1811), in \textit{Leland Writings, supra note 4}, at 353, 355, and Letter from John Leland to Col. R.M. Johnson (Jan. 8, 1830), in \textit{Leland Writings, supra note 4}, at 561, 563.}

\textsuperscript{56} \textit{See Leland, supra note 49, at 188; John Leland, Transportation of the Mail (1830) [hereinafter Leland, Transportation of Mail], reprinted in \textit{Leland Writings, supra note 4}, at 564, 565; \textit{see also} Edwin S. Gaustad, \textit{The Backus-Leland Tradition, in Baptist Concepts of the Church} 106, 130 (Winthrop S. Hudson ed., 1959). Leland even went so far as to oppose a petition for stopping the mails on Sunday. \textit{See id., in Baptist Concepts of the Church, supra, at 132. See Leland Writings, supra note 4, at 561–69, for some of Leland's correspondence regarding the Sunday mail. Backus and Leland both opposed compulsory Sabbath attendance, \textit{see 1 McLoughlin, supra note 41, at 605–06 (discussing Backus's discussion of this issue in a letter in the Boston Independent Chronicle on Dec. 2, 1779); see also Isaac Backus, A Door Opened for Christian Liberty (1783) [hereinafter Backus, Christian Liberty], reprinted in \textit{Backus, Church, State, and Calvinism, supra note 4}, at 427, 433 ("We believe that attendance upon public worship and keeping the first day of the week holy to God are duties to be inculcated and enforced by his laws instead of the laws of men, but we have had no controversy with our rulers about that matter."); John Leland, Address Delivered at the Request of the Republican Committee of Arrangements, at Pittsfield, on the Anniversary of American Independence (July 4, 1824) [hereinafter Leland, American Independence], reprinted in \textit{Leland Writings, supra note 4}, at 501, 506; John Leland, On Sabbatical Laws (1815) [hereinafter Leland, Sabbatical Laws], reprinted in \textit{Leland Writings, supra note 4}, at 440, and even voiced opposition to laws regulating morality where there is no danger of injury to others, \textit{see Isaac Backus, The Doctrine of Particular Election and Final Perseverance (1789) [hereinafter Backus, Particular Election], reprinted in \textit{Backus, State, and Calvinism, supra note 4}, at 447, 468; Leland, supra note 46, at 237; John Leland, Short Essays on Government (1820) [hereinafter Leland, Essays on Government], reprinted in \textit{Leland Writings, supra note 4}, at 473, 476.}

One preeminent historian on Backus has noted that most Baptists in the 18th and 19th centuries did not oppose all government support for religion and were content with laws for compulsory church attendance, the inculcation of the Westminster
For all of these men, strict separationism was not intended primarily to protect the government from religion. Rather, for all of them, religion was of deep if not supreme importance, and the Justices who draw upon their principles note that they were certain that religion will thrive best where government and religion are kept strictly separate. This Part analyzes the theological assumptions that lie behind this confidence. Understanding these assumptions is critical for understanding the current divisions on the Court regarding religious expression by the state. When the Justices adopt the Madisonian or Baptist statement that religion thrives best where it is wholly

Confession in the New England public schools, and laws against profanity, blasphemy, theater-going, or desecration of the Sabbath. See McLoughlin, supra note 42, at 149. McLoughlin notes that Backus himself did not object to most of these laws, see id.; McLoughlin, supra note 44, at 267–68, and he also notes that Backus even appeared to support the clause in the Massachusetts Constitution requiring all officeholders to take an oath stating “I believe the Christian religion and have a firm persuasion of its truth,” id. at 194, 267. However, close examination of the passage McLoughlin cites to support the latter point reveals that Backus’s support for the oath seems to rest primarily on the fact that Christian officeholders will recognize that the Gospel demands the separation of church and state. See Backus, Christian Liberty, supra, at 436–37. Furthermore, while McLoughlin argues that the other practices Backus supported place him closer to the contemporary accommodationists on the Court rather than separationists, see McLoughlin, supra note 44, at 259, 267–69. Backus’s principles are clearly closer to the latter. The fact that Backus may not have taken these principles to their logical conclusion does not mean that he did not have separationist principles.

Some scholars argue that Jefferson, in particular, favored the separation of church and state largely for secular reasons. For the views of these scholars and a refutation of their argument, see infra notes 99–103 and accompanying text.

See Backus, supra note 4, at 333–34 (arguing that state support of religion “tends to destroy the purity and life of religion” by “bringing in an earthly power between Christ and his people”); John Leland, An Oration, Delivered at Chesire, July 5, 1802, on the Celebration of Independence, reprinted in Leland Writings, supra note 5, at 257, 270 (“The Gospel. The only hope of man: may it prevail in its virgin purity—free from the legal apparatus and traditional complexion which have long covered its native beauty.”); Letter from James Madison to Edward Livingston, supra note 6, at 103 (“Religion flourishes in greater purity, without the aid of government.”); Jefferson, supra note 45, at 77 (stating that “truth is great and will prevail if left to herself”).

The Justices repeatedly cite Madison, in particular, for his belief that religion thrives in greater purity when it is separated from the state. See, e.g., Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., dissenting); Lee v. Weisman, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring); Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting). Roger Williams is also cited on this point. See, e.g., Agostini, 521 U.S. at 243 (Souter, J., dissenting); Weisman, 505 U.S. at 608 n.11 (Blackmun, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 259–60 (1963) (Brennan, J., concurring).
separate from the government, they are affirming a statement that rests on a series of assumptions regarding the nature of religious belief, how people come to faith, and how faith is sustained. As will become clear below, while the religious views of Madison and Jefferson and the Enlightenment stamp that they bear differ dramatically from the evangelical underpinnings of the Baptist tradition, all of these figures agreed that the survival of religion does not require its formation by and through a religious community. Jefferson, Backus, and Leland shared an individualistic conception of religious belief, and they did not believe that churches were essential to mediate religious truth. While Madison's understanding of religion was less individualistic, he also did not view communities as essential for the formation of faith. In their view, establishments were not necessary to support religion because the role of churches is not so much to inculcate religion as to serve as a voluntary association of individuals who already share a common faith.

A. The Strength of Human Faculties

While the religious views of Madison and Jefferson differed significantly, they were both deeply influenced by the Enlightenment, and it is these influences that best explain why they were certain that religion will thrive best where religion and government are kept strictly separate. The impact of Enlightenment thought on the views of Madison and Jefferson as well as many of the other leading figures in the founding era is well recognized, but there is significant controversy over what “the Enlightenment” means. The Enlightenment in both Europe and America certainly comprised a wide variety of thinkers whose conclusions often differed widely, and some scholars are now challenging the idea that there ever was “one” Enlightenment. However, many scholars continue to argue that it is possible to identify an underlying principle that unites these diverse thinkers, and this underlying unity has usually been described as a new attitude or ap-

59 See cases cited in supra note 58.
60 See AHLSTROM, supra note 43, at 358–59; HERBERT M. MORAINS, DEISM IN EIGHTEENTH CENTURY AMERICA 17 (1934).
63 See, e.g., HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976) (arguing that there were four distinct Enlightenment developments in America); see also OUTRAM, supra note 61, at 1; ROY PORTER, THE ENLIGHTENMENT 10 (1990).
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proach to knowledge and philosophic thought.\textsuperscript{64} Ernst Cassirer, who remains the leading authority on the philosophy of the Enlightenment, locates the foundation for this “new perspective”\textsuperscript{65} in the method developed by Newton for the natural sciences.\textsuperscript{66} Reason is conceived of as an intellectual force which can, through observation and experiment and the other tools of the “new science,” discover the truths about reality.\textsuperscript{67} Enlightenment thinkers take these new methods and apply them to all fields of knowledge, including law, government, religion, and psychology as well as the natural sciences.\textsuperscript{68} As they seek a firm foundation for knowledge in reason and investigation, received opinions, tradition, and authority come under scrutiny, and the greatest obstacles to the discovery of truth become the “ignorance,” “superstition,” or “prejudice” which result from accepting received opinions without questioning.\textsuperscript{69}


\textsuperscript{65} Cassirer, supra note 62, at vii.

\textsuperscript{66} See id. at 7–14. It is important to note that there is disagreement among scholars over whether to include the deductive “rationalism” characteristic of 17th century thinkers such as Descartes or Leibniz within the scope of the Enlightenment or whether to limit the Enlightenment to those who embraced the scientific “empiricism” that dominated in the 18th century. Cassirer limits the Enlightenment to those thinkers who adopted the empirical methods of Newton, see id., but other scholars would not exclude thinkers whose thoughts draw primarily upon the older deductive methods, see, e.g., Lively, supra note 64, at xiii; May, supra note 63, at xiv. Indeed, Cassirer himself includes the English rationalist Samuel Clarke among those he considers Enlightenment thinkers. See Cassirer, supra note 62, at 177–78.

Note that in the following text and notes, I am using the term “rationalist” or “rationalism” to refer generally to Enlightenment trends rather than specifically to those who follow deductive methods in their work. Thus, the reference includes predominantly empirical thinkers but also covers Clarke and other 18th century philosophers and divines who made considerable use of deductive arguments but were nonetheless central participants in the philosophical debates of the 18th century.

\textsuperscript{67} See Cassirer, supra note 62, at vii, 7–9, 15–14.

\textsuperscript{68} See id. at vii, 12, 136.

Americans partook of the currents of the Enlightenment in different degrees and assimilated its patterns of thought in different ways. For most Americans, "the wines of the Enlightenment were sipped with cautious moderation," and those who were most deeply influenced still generally followed Locke in believing that revelation is a necessary supplement to the truths discoverable by reason. Others, however, followed the English deists in arguing that reason alone should be the standard for religious truth, and that whatever is in the Bible that is unreasonable must be stripped away. Jefferson was one of the latter, and the very individualistic understanding of "the giving up of our assent to the common received opinions, either of our friends or party, neighborhood or country," id. at 294. In religious matters, too, "[r]eason must be our last judge and guide," id. at 280, and "every man ought sincerely to inquir into himself, and by meditation, study, search, and his own endeavors attain the knowledge of [such matters]." Locke, A Letter Concerning Toleration, supra, at

71 Id. at 358.
72 See id. at 357, 366; MORAI, supra note 60, at 13–15; see also MAY, supra note 63, at 353 (stating that liberal New England clergy in 18th and early 19th centuries continued to argue that revelation is necessary to complement reason). As discussed in supra note 69, Locke believes that "[r]eason must be our last judge and guide in every thing," LOCKE, ESSAY ON HUMAN UNDERSTANDING, supra note 69, at 280, and this applies to religious matters as well as all other fields of knowledge. Some truths about religion can be discovered through reason alone. See id. at 273. Revelation also enlarges these discoveries with truths above reason which are communicated directly by God and assented to by faith. See id. However, Locke insists that the mind must be justified in its faith by proofs that attest to the divine origin of Biblical materials because "it still belongs to reason to judge the truth of its being a revelation." Id. at 269, 270. The evidence that Locke cites for his belief that the Bible is the source of divine revelation is the miracles performed by Jesus and His disciples and the fact that reason confirms the principles they taught. See JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY 63–64, 67 (I.T. Ramsey ed., Stanford Univ. Press 1968) (1695). The English divines that followed Locke in defending the truth of Christianity against deism and skepticism made similar arguments, see ABLSTROM, supra note 43, at 354–55; MAY, supra note 63, at 12, which were also adopted by clergymen in America, see ABLSTROM, supra note 43, at 356–57.

74 See MAY, supra note 63, at 293; MORAI, supra note 43, at 116, 15–17; see also ADRIENNE KOCH, THE PHILOSOPHY OF THOMAS JEFFERSON 27 (Quadangle Books 1964) (1943). Jefferson often called himself a Unitarian Christian rather than a deist, see Letter from Thomas Jefferson to Benjamin Waterhouse (Jan. 8, 1825), in ROY J. HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON 92, 92 (1931); see also KOCH, supra, at 26; MAY, supra note 63, at 293; MAY, supra note 64, at 172, and like many American deists, he certainly saw himself as a reformer of Christianity not its destructor, see MORAI, supra note 60, at 15. However, he shared with the English deists the view that the Bible discloses no truths beyond reason and that whatever the Bible contains that is not reasonable must be discarded. For Jefferson as the English deists,
religious belief that results from these suppositions explains why Jefferson was certain that religion would survive best where it is kept strictly separate from government.

According to Jefferson, reason is the "only oracle" which God has given for the discovery of religious truth. The path to true religion is a process of "free enquiry" which "shake[s] off all the fears and servile prejudices" that dominate the mind and keep it under ignorance and error. For Jefferson, this process of discovery is fundamentally an individual enterprise. It should not be commenced until an age when reason has reached maturity, and then individuals must "think for themselves" and form their own opinions. Jefferson's grandson recalled Jefferson's reticence about his religious beliefs among his family members: "If asked by one of them, his opinion on any religious subject, his uniform reply was, that it was a subject each was bound to study assiduously for himself, unbiased by the opinions of others—it was a matter solely of conscience . . . that the expression of his opinion might influence theirs, and he would not give it!"

Thus, for Jefferson, reason provides a direct link between the individual and God. It is as though reason functions as a ladder upon which the individual can climb directly to God. Churches have no role to play in this process but are, rather, potentially dangerous sources of error. It is the "priests" who have obscured the "pure and

it is reason that provides the standard for identifying what is true in the Bible. See Max, supra note 63, at 20–21, for a discussion of English deism.

75 Letter from Thomas Jefferson to Miles King (Sept. 26, 1814), in 14 The Writings of Thomas Jefferson, supra note 29, at 196, 197; Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in 6 The Writings of Thomas Jefferson, supra note 29, at 256, 261.

76 Jefferson, supra note 4, at 160; see also Letter from Thomas Jefferson to Benjamin Rush (Apr. 21, 1803), in 10 The Writings of Thomas Jefferson, supra note 29, at 379, 379–80 (stating that Jefferson's religious views are the "result of a life of inquiry and reflection").

77 Letter from Thomas Jefferson to Peter Carr, supra note 75, at 258.

78 See Jefferson, supra note 4, at 147; Letter from Thomas Jefferson to Peter Carr, supra note 75, at 258; see also Robert M. Healey, Jefferson on Religion in Public Education 173 (1962).


81 Jefferson's condemnations of "priests" (by which he means clergymen in general) and theologians are numerous. See, e.g., Letter from Thomas Jefferson to
simple”82 teachings of Jesus with “artificial structures”83 and dogmas that “enslave”84 the mind in ignorance and superstition.85 Without them, the mind will easily discover true religion, which for Jefferson was the three-fold creed accepted by rationalist Christians and deists alike: one God, a virtuous life, and a future state of rewards and punishments.86 According to Jefferson, these were the doctrines taught by Jesus, and these doctrines and the pure and simple morals87 which He taught are “within the comprehension of a child”88 and easily separable from the accretions added by His followers as “the diamond from the dunghill.”89
Deeply suspicious of organized religious communities, Jefferson sometimes speaks as though he thinks that they should not exist, and he repeatedly emphasizes his individualistic conception of religion as "a matter which lies solely between man and his God." At other times, Jefferson states his willingness to worship with Unitarians. At best, however, religious communities are understood as strictly voluntary associations of like-minded individuals, not as vehicles for forming faith or "moulding [the] mind[."

Early in his life, Jefferson adopted Locke's understanding of churches as "voluntary societ[ies]" based on mutual consent. Individuals join that society which they determine to be in accordance with their own beliefs, and they are free to leave if they discover anything erroneous after joining. Later in life, Jefferson even goes further than Locke and conceives of the church as based on contract:

90 See, e.g., Letter from Thomas Jefferson to Ezra Stiles (June 25, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON, supra note 29, at 202, 203 ("I am of a sect by myself, as far as I know."); Letter from Thomas Jefferson to John Adams, supra note 79, at 350 ("We should all then, like the Quakers, live without an order of priests, moralise for ourselves, [and] follow the oracle of conscience . . . .")


92 See Letter from Thomas Jefferson to Benjamin Waterhouse (July 19, 1822), in 15 THE WRITINGS OF THOMAS JEFFERSON, supra note 29, at 390, 391 ("When I lived in Philadelphia, there was a respectable congregation of that sect [Unitarians], with a meeting-house and regular service which I attended, and in which Doctor Priestly officiated to numerous audiences."); Letter from Thomas Jefferson to Benjamin Waterhouse, supra note 74, at 92 ("I am anxious to see the doctrine of one god commenced in our state. But the population of my neighborhood is too slender, and is too much divided into other sects to maintain any one preacher well. I must therefore be contented to be an Unitarian by myself, although I know there are many around me who would become so, if once they could hear the questions fairly stated.").

93 Letter from Thomas Jefferson to William Short, supra note 81, at 247.

94 Thomas Jefferson, Notes on Locke and Shaftesbury (1776), in 1 THE PAPERS OF THOMAS JEFFERSON, supra note 6, at 544, 545 (emphasis omitted). These notes were prepared by Jefferson for speeches and petitions in the House of Delegates in connection with his efforts to disestablish the Episcopal church. Jefferson quotes directly from Locke. See LOCKE, A LETTER CONCERNING TOLERATION, supra note 69, at 20.

95 See Jefferson, supra note 94, at 545; see Locke, A LETTER CONCERNING TOLERATION, supra note 69, at 20. Locke emphasizes that "[n]obody is born a member of any church." Id.
Collections of men associate together, under the name of congregations, and employ a religious teacher of the particular sect of opinions of which they happen to be, and contribute to make up a stipend as a compensation for the trouble of delivering them, at such periods as they agree on, lessons in the religion they profess. . . . Whenever, therefore, preachers, instead of a lesson in religion, put them off with a discourse on the Copernican system, on chemical affinities, on the construction of government, or the characters or conduct of those administering it, it is a breach of contract, depriving their audience of the kind of service for which they are salaried, and giving them, instead of it, what they did not want, or, if wanted, would rather seek from better sources in that particular art or science.96

Thus, for Jefferson, religion will fare the best where there is a strict separation between church and state because it thrives best when it is freed from the weight of human authority. It is the model of religion as something which must be formed and shaped in human community which Jefferson objects to. Communities are not necessary to mediate religious truth. Like the priests that they support, establishments erect a "spiritual tyranny"97 and "vassalage"98 over the mind. It is common for scholars to argue that Jefferson favored the separation of church and state for secular reasons and that his principal concern was to protect the state from religion.99 Some of the Justices have occasionally repeated this argument.100 However, Jefferson's writings do not bear this thesis out. To the contrary, Jefferson saw himself as a defender of religious truth. He was, he argued, the "real Christian,"101 and he is certain that when the freedom of reli-

96 Letter from Thomas Jefferson to P.H. Wendover (Mar. 13, 1815), in 14 THE WRITINGS OF THOMAS JEFFERSON, supra note 29, at 279, 280–81. Apparently the letter was never sent.
98 Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), in 6 THE WRITINGS OF THOMAS JEFFERSON, supra note 29, at 8, 10.
100 See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 259–60 (1963) (Brennan, J., concurring) ("It has rightly been said that 'our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams.'" (quoting PAUL A. FREUND, THE SUPREME COURT OF THE UNITED STATES 84 (1961))).
101 Letter from Thomas Jefferson to Charles Thompson (Jan. 9, 1816), in 14 THE WRITINGS OF THOMAS JEFFERSON, supra note 29, at 385, 385; see also Letter from Thomas Jefferson to Salma Hale (July 26, 1818), in JEFFERSON'S EXTRACTS, supra note
gion guaranteed in law was succeeded by freedom of thought from "the overbearing inquisition of public opinion, truth will prevail over fanaticism, and the genuine doctrines of Jesus, so long perverted by His pseudo-priests, will again be restored to their original purity." Indeed, late in life, Jefferson repeatedly expressed his confidence that "there is not a young man now living in the United States who will not die an Unitarian." Others in the founding era who shared the deist belief that reason is sufficient by itself to discover religious truth had a similarly individualistic conception of religious belief and supported strict separationism on grounds resembling those of Jefferson. For example, St. George Tucker, a deist and professor of law at William and Mary, argued that reason in religious matters must be free from "the control or intervention of any human power or authority whatsoever." Establishments hamper the pursuit of truth because they bias the mind and obstruct human inquiry and investigation. The result is "superstition." Thomas Paine even more forcefully condemned the "King, . . . Bishop, . . . Church or . . . State, . . . Parliament, or anything else, that obtrudest thine insignificance between the soul of man and its Maker."

91, at 385, 385. This meant a disciple of the pure doctrines of Jesus. See Letter from Thomas Jefferson to Charles Thompson, supra, at 385; Letter from Thomas Jefferson to Salma Hale, supra, at 385. Indeed, evidencing the level of his faith, Jefferson took the time to produce two extracts from the Gospels that isolated what he believed were the true teachings of Jesus from the "dross" of His followers. See Eugene R. Sheridan, Introduction to Jefferson's Extracts, supra note 91, at 3, 27–38 (discussing Jefferson's The Philosophy of Jesus (1804) and his The Life and Morals of Jesus (approximately 1819–20)).

102 Letter from Thomas Jefferson to the Reverend Jared Sparks (Nov. 4, 1820), in 15 The Writings of Thomas Jefferson, supra note 29, at 278, 288.

103 Letter from Thomas Jefferson to Benjamin Waterhouse, supra note 86, at 383, 385; see also Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), in 15 The Writings of Thomas Jefferson, supra note 29, at 408, 409 ("I confidently expect that the present generation will see Unitarianism become the general religion of the United States."); Letter from Thomas Jefferson to Thomas Cooper (Nov. 2, 1822), in 15 The Writings of Thomas Jefferson, supra note 29, at 403, 405 ("That this [Unitarianism] will, ere long, be the religion of the majority from north to south, I have no doubt.").

104 See May, supra note 63, at 141.

105 St. George Tucker, Blackstone’s Commentaries (1803), reprinted in 5 The Founders’ Constitution, supra note 45, at 96, 97.

106 See id. at 97.

107 See id.

108 Id.

While Madison was also influenced by Enlightenment thought, it would be a great mistake to equate his religious views with those of Jefferson. While Jefferson claimed to keep his religious views to himself,\textsuperscript{110} it was Madison who was by far the more reserved, and thus, it is difficult to piece together his religious beliefs from the few writings which touch on them.\textsuperscript{111} It is clear, however, that Madison did not go as far as Jefferson and the American deists in rejecting revelation as a supplement to reason, and he certainly remained a Christian.\textsuperscript{112} However, Madison's religious beliefs were deeply influenced by rationalist trends,\textsuperscript{113} and as for Jefferson, it is these influences that account for many of the reasons that Madison gives for his belief that religion will thrive best where there is a strict separation between church and state. Lacking the deist's confidence in the ability of reason to discover religious truths on its own, Madison does not share Jefferson's radically individualistic understanding of religion. While he frequently uses an anticlerical tone when referring to Virginia's Anglican establishment,\textsuperscript{114} he expresses no general opposition to the clergy nor is he deeply suspicious of organized religious communities. To the contrary, he delights in the increase of religious instruction and the attendance of the people on that instruction.\textsuperscript{115} However, like Jefferson, Madison does not view religious communities as essential for the formation of faith, and for Madison, as for Jefferson, communities flow from, rather than form, the religious choices of individuals.

\textsuperscript{110} See Healey, supra note 78, at 25.
\textsuperscript{113} See Ketcham, supra note 111, at 177–180 (describing the influence of English rationalism and Scottish Common Sense Realism on Madison's religious views); see also Morais, supra note 60, at 115–16.
\textsuperscript{114} See Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), in 1 The Writings of James Madison, supra note 6, at 18, 21 ("Poverty and luxury prevail among all sorts: pride, ignorance, and knavery among the priesthood, and vice and wickedness among the laity."); Letter from James Madison to William Bradford, Jr. (Apr. 1, 1774), in 1 The Writings of James Madison, supra note 6, at 22, 23 ("[T]he clergy are a numerous and powerful body, have great influence at home by reason of their connection with and dependence on the Bishops and Crown, and will naturally employ all their art and interest to depress their rising adversaries; for such they must consider dissenters who rob them of the good will of the people, and may, in time, endanger their livings and security.").
\textsuperscript{115} See Letter from James Madison to Robert Walsh (Mar. 2, 1819), in 8 The Writings of James Madison, supra note 6, at 425, 430–32.
In a letter written to Edward Everett in 1823, Madison gives three reasons that recur in his writings for his conviction that religion fares better where it is exempt from civil cognizance. One of these reasons is his familiar argument that experience shows that religion thrives in greater purity where church and state are strictly separate. The other two relate to Madison’s theological assumptions about how religious faith is formed and sustained. In the first place, Madison argues that there are “causes in the human breast, which ensure the perpetuity of religion.” At other times, Madison also speaks of humanity’s “propensities [and] susceptibilities” to religion, and he associates these with an innate belief in God and future existence. The idea that belief in God and a future existence are self-evident propositions seen with intuitive force was drawn from the “Common Sense” philosophy that Madison learned at Princeton from President John Witherspoon. Reacting to the skepticism of David Hume, “Scottish Common Sense Realism” was a development in Enlightenment thought in the latter half of the eighteenth century which discovered at the foundation of all reasoning certain principles of common sense which are implanted in our natures and whose truth

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116 Letter from James Madison to Edward Everett (Mar. 19, 1823), in 9 The Writings of James Madison, supra note 6, at 124.
117 Id., in The Writings of James Madison, supra note 6, at 127; see also Letter from James Madison to Reverend Adams, supra note 49, at 485–86; Letter from James Madison to Edward Livingston, supra note 6, at 102; Madison, supra note 1, at 301.
118 In his Memorial and Remonstrance, Madison gives several additional theological arguments for why he believes that religion survives best where there is a strict separation between religion and government. For example, Madison argues that the “innate excellence” and “patronage of its Author” will preserve Christianity without external support. Madison, supra note 1, at 301. Madison also speaks about the power of the “light of revelation.” Id. at 303. These arguments reflect a more orthodox Christian perspective than generally appears in his later writings, and it is unclear to what extent these arguments reflect Madison’s own views or the fact that his Memorial and Remonstrance was intended for a broad audience including evangelical Baptists as well as rationalist Episcopalians. It is also possible that Madison’s views may have become more liberal over time. Cf. Ketcham, supra note 111, at 178–79 (noting that while Madison was fond of theological debate in his college years, it is apparent from his writings that “Madison did not maintain his interest in theological controversy very long after his period of entrance into public life in 1776”). In any event, Madison does not emphasize these arguments in his other writings but instead focuses on the arguments that are discussed in the above text.
119 Letter from James Madison to Edward Everett, supra note 116, at 126–27.
120 Letter from James Madison to Reverend Adams, supra note 49, at 485.
121 See id.; see also Letter from James Madison to Frederick Beasley (Nov. 20, 1825), in 9 Writings of James Madison, supra note 6, at 229, 230–31.
122 See Ketcham, supra note 111, at 179.
is irresistible. In his Lectures on Moral Philosophy, Witherspoon told his students that some Scottish thinkers were advancing the argument that the belief in God was one of these universal "dictates of common sense," and Madison clearly adopted this position. From the English rationalists who more deeply affected Jefferson, Madison also derived his belief that the existence of God is provable by more abstract reasoning as well.

Thus, for Madison, humans are by their nature religious beings, and humanity's propensity to religion exists prior to organized religion. Establishments are not necessary to support religion because religion will thrive even apart from the churches that they support. However, unlike Jefferson, Madison does envision an important role for religious communities in the discovery of religious truth. In his letter to Everett, the third reason that Madison gives for his belief that religion thrives where it is strictly separate from government is that a multiplicity of rival sects with equal rights will "exercise mutual censorships in favor of good morals." Thus, for Madison, competition among the sects is instrumental in promoting truth by sustaining a marketplace of religious ideas that exposes error and refines truth.

Early in life, Madison expressed his belief that uniformity in religion

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123 The founder and central thinker of the Common Sense philosophy was the Scottish minister and academic Thomas Reid. For a discussion of Reid's philosophy, see R.F. Stalley, Common Sense and Enlightenment: The Philosophy of Thomas Reid, in Philosophers of the Enlightenment 74 (Peter Gilmore ed., 1990). For a discussion of Scottish Common Sense Realism and its impact in America, see May, supra note 63, at 342-57.


125 See Ketcham, supra note 111, for a discussion of the influence of the rationalism of 18th century Anglican theology and Scottish Common Sense thought on Madison's religious views. Ketcham notes that in a letter to Frederick Beasley written in 1825, Madison approved of the "celebrated work" of the English divine Samuel Clarke, who sought to prove the central truths of Christianity by deducing them from universally valid premises. See Letter from James Madison to Frederick Beasley, supra note 121, at 230. For discussions of Clarke's thought, see May, supra note 63, at 11-12, and Cassirer, supra note 62, at 177-78. Madison's letter to Beasley also bears the stamp of Scottish Common Sense philosophy, which Madison prefers as the surest proof for the existence of God. See Letter from James Madison to Frederick Beasley, supra note 121, at 250-31.

126 Letter from James Madison to Edward Everett, supra note 116, at 127.

127 Madison makes a similar point in his letter to Reverend Adams. See Letter from James Madison to Reverend Adams, supra note 49, at 487 (stating that if any sect runs into "extravagances," "[r]eason will gradually gain its ascendancy").
dulls the mind and begets ignorance,128 and he argued that knowledge in religion and other fields depends upon an environment of free inquiry sustained by "mutual emulation and mutual inspection."129 For Madison, churches are part of the process of free inquiry that the Enlightenment championed not antagonistic to it.

However, the type of religious communities that Madison believed would be instrumental in the promotion of truth differ from the type of community envisioned by the supporters of the establishment. In the general assessment bill which occasioned Madison's Memorial and Remonstrance, state support for teachers of the Christian religion was defended as necessary for the "instruct[i]on [of] such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge."130 Madison rejected this model of the church as a formative institution which must shape and mold the faith of a recipient laity. For Madison, it is not instruction which produces faith but, rather, faith that seeks instruction. Arguing against state-supported chaplains for the army and navy, Madison writes that where "the spirit of armies be devout,"131 religious instruction will be supported from voluntary sources, and where that spirit is lacking, "the official services of their Teachers are not likely to produce it. It is more likely to flow from the labours of a spontaneous zeal."132 Thus, churches do not so much form faith as they are formed by faith, and one of their critical roles is to purvey rival spiritual products to individuals who are naturally predisposed to religion and free to choose what seems the most reasonable to them. Consistent with these views, Madison shares with Jefferson the Lockean view that churches are voluntary associations of like-minded individuals. In Madison's words, "[r]eligion consist[s] in voluntary acts of individuals, singly, or voluntarily associated."133

The views of Madison's teacher, John Witherspoon, regarding the role that religious communities play in fostering faith provide an illustrative contrast to those of Madison. While Witherspoon instructed his students that some Scottish philosophers had advanced the argu-

129 Letter from James Madison to William Bradford, Jr. (Apr. 1, 1774), supra note 114, at 23–24.
131 Madison, Detached Memoranda, supra note 6, at 559.
132 Id.
133 Id.
ment that belief in God is a self-evident dictate of common sense.” Witherspoon himself questioned this view and expressed sympathy with those who argued that humans are incapable on their own of conceiving the idea of a spirit or future state and, thus, that these ideas must first have been communicated by God and “handed down by information and instruction from age to age.” Witherspoon finds “something ingenious and a good deal of probability in this way of reasoning.” Reflecting this view, Witherspoon lists “tradition” as one of the supports for belief in God whereas such a reference is noticeably absent from the writings of his pupil. Witherspoon’s view that religious communities have an important function in inculcating and forming faith also leads to a critical disagreement with Madison on the role of the state in supporting religion. Like the sponsors of Virginia’s general assessment bill, Witherspoon argues that there “is a good deal of reason” for such even-handed support for religious education “so instruction may be provided for the bulk of common people, who would many of them neither support nor employ teachers unless they were obliged.” Witherspoon views the magistrate’s role as “something like that of a parent” with “a right to instruct, but not to constrain.” Conceiving of the magistrate or clergy in the role of a parent is wholly alien to the thought of Madison. Madison’s commitment to free inquiry and his faith in the capacity of individuals to sustain this process of inquiry through the healthy competition among churches has no place for Witherspoon’s skepticism regarding the religious capacities of the common man and the corresponding role of the church as guardian. For Madison, humans will naturally form religious communities, and he is not surprised to see them increase when the government withdraws its supporting hand.

134 See supra text accompanying note 124.
135 WITHERSON, supra note 124, at 173.
136 Id.
137 Id. at 167.
138 Id. at 213.
139 Id.
140 Madison clearly had a strong awareness of the weaknesses of human nature, and his account of the origins of faction in The Federalist was one of the most influential contributions to American constitutionalism. However, when it comes to religion, Madison is confident that humanity’s propensity to faith is sufficient to support religion without the hand of government (though the “zeal for different opinions concerning religion,” The Federalist No. 10 (James Madison), is a chief cause of faction). For Madison’s discussion of faction and other weaknesses of human nature, see The Federalist Nos. 10, 49, 51 (James Madison).
B. *The Power of God*

In many respects, the evangelical views of the Baptist separatists are in dramatic contrast to the rationalism of Jefferson and the liberalism of Madison. When John Leland spoke of himself as a "feeble, sinful worm," and of the inability of "natural man" to come to a knowledge of religious truth, he expressed the Baptist conviction that humans are born with corrupt and sinful natures that are separated from God. Humans cannot ascend to God on their own through reason nor do they have a natural propensity towards religion. However, the Baptists shared Jefferson's belief that religious truth is discovered as the result of a direct encounter between God and the individual. For the Baptist, however, it is not the individual who ascends to God through reason, but God who reaches down directly to the sinner through grace and a powerful and intensely personal conversion experience.

Both Backus and Leland were part of the "Separate-Baptist" movement that grew out of the Great Awakening in New England in the mid-eighteenth century. From its inception, Puritan theology had taught that the church was properly understood as a society of visible saints called out of the world by the special power of God's converting grace. However, by the 1730s when the Awakening broke out, many ministers of New England's standing order had modified the older New England theology to reflect the fact that fewer and fewer New Englanders were experiencing the conversions of their parents and grandparents, and many communities had only a small body of professing Christians qualifying as visible saints. Gradually the church came to be understood as a means of grace rather than as a

144 Isaac Backus expressed similar views about the corrupt state of human nature. See BACKUS, *supra* note 4, at 311; ISAAC BACKUS, *The Sovereign Decrees of God* (1773), reprinted in BACKUS, *Church, State, and Calvinism, supra* note 4, at 289, 297; see also McLoughlin, *supra* note 44, at 39 ("Backus did not here or elsewhere accept the Enlightenment view that men were inherently good or rational. He always remained a Calvinist, and his own experience as a dissenter from majority rule confirmed Calvin's teachings about the innate depravity of man.").
145 See, e.g., ISAAC BACKUS, *Truth Is Great and Will Prevail* (1781), reprinted in BACKUS, *Church, State, and Calvinism, supra* note 4, at 397, 403 (stating that "[u]nassisted reason" cannot come to a knowledge of the truth).
146 See GOEN, *supra* note 41, and McLoughlin, *supra* note 42, for good discussions of the emergence of the Separate-Baptists.
communion of visible saints, and the Lord’s Supper, formerly available only to those who could attest to a conversion experience, was now made available as a converting ordinance to the whole community. In this context, a new emphasis was placed upon the role of the community in forming and shaping faith. By nurture and education, the church was understood to prepare individuals for salvation, which was now viewed as an organic process of growth rather than a dramatic conversion experience.

The Great Awakening marked a resurgence of experiential piety and the pure church model. The famous itinerant preachers who sparked the revivalistic fervor across New England reemphasized the necessity of an inner conversion experience for salvation and church membership and the character of this experience as a work of God, not man. Initially, many ministers welcomed the Awakening and the revival of a vital piety in the churches. However, divisions soon arose even among those who supported the revivals as the more extreme “New Lights” were unwilling to remain in churches where “unconverted” ministers failed to make regeneration a condition of church membership and the more conservative “New Lights” chose to remain within the established churches and work for renewal from within. In the 1740s, many of the extreme New Lights left the established churches to form their own “Separate” congregations, and soon thereafter a steady stream of “Separate-Baptists” left the Separate churches over the issue of infant Baptism. The Baptists took the pure church model to its logical extreme and argued that, like the

149 See id. at 4–5. Thus, “the ‘pure churches’ of ‘visible saints’ became national churches with birthright membership.” McLoughlin, Introduction to Isaac Backus, A Short Description of the Difference Between the Bondwoman and the Free (1756), reprinted in Backus, Church, State, and Calvinism, supra note 4, at 130, 131; see also McLoughlin, supra note 42, at 76.

150 See Goen, supra note 41, at 5–6, 40–41; McLoughlin, supra note 42, at 63. Thus, on the eve of the Great Awakening, “one went to heaven in New England by a diligent employment of the ordinary means of grace offered through the regular ministries of the churches.” Goen, supra note 41, at 40.


152 See id. at 286.

153 See id. at 290; Goen, supra note 41, at 34–35; McLoughlin, supra note 42, at 18–22. The New Lights also divided over the practice of lay preaching and exhorting and some of the more extreme emotional manifestations of revivalism with the more conservative New Lights opposing the practice of lay preaching as well as what they saw as the Awakening’s emotional extravagances. See Goen, supra note 41, at 34–35.

154 See Ahlstrom, supra note 43, at 292; Goen, supra note 41, at 206–07.
Lord's Supper, Baptism is an outward mark of conversion and not a means of grace for the unregenerate.\textsuperscript{155}

Isaac Backus was among the first generation of Separate-Baptists, and as a prolific writer, he played a central role in defending the new movement against the attacks of the standing order.\textsuperscript{156} Among the practices Backus defended was the Baptist commitment to a strict congregational church structure which lodged the choice of ministers in the hands of the congregation without the educational requirements or county oversight characteristic of the standing churches.\textsuperscript{157} Backus also took the lead in defending Baptist opposition to compulsory religious taxation and state-supported religion.\textsuperscript{158} The standing order viewed the Separate-Baptists as trouble-makers whose secession from the standing churches threatened the survival of religion by undermining the ecclesiastic and social structure of the New England commonwealths.\textsuperscript{159} According to the established clergy, without a learned clergy, the people cannot "know whether [they] have the pure divine truths or not,"\textsuperscript{160} and without the support of the law, "farewell meetinghouses, farewell ministers, and farewell all religion."\textsuperscript{161}

Backus's responses to these concerns drew upon the evangelical theology of the Awakening and its experiential understanding of religious faith. Like other revivalists, Backus emphasized that salvation is the direct work of God, not man,\textsuperscript{162} and he argued that God can be counted on to produce conversions without the assistance of the formalistic system of training, preparation, and covenant-owning that had come to characterize the New England churches.\textsuperscript{163} Like other Separate-Baptists, he rejected the view that salvation is a process of

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\item \textsuperscript{155} See Ahlstrom, supra note 43, at 292; McLoughlin, supra note 42, at 75–76.
\item \textsuperscript{156} See Ahlstrom, supra note 43, at 292–93; Goen, supra note 41, at 222–24; McLoughlin, supra note 42, at 167.
\item \textsuperscript{157} Backus's first published work addressed this issue. See Isaac Backus, A Discourse Showing the Nature and Necessity of an Internal Call to Preach the Everlasting Gospel (1754), reprinted in Backus, Church, State, and Calvinism, supra note 4, at 65–128.
\item \textsuperscript{158} See supra note 41 and accompanying text.
\item \textsuperscript{159} See McLoughlin, supra note 44, at 4–5.
\item \textsuperscript{160} See Isaac Backus, A Fish Caught in His Own Net (1768), reprinted in Backus, Church, State, and Calvinism, supra note 4, at 167, 230 (quoting Reverend Joseph Fish, the standing minister in Stonington, Connecticut).
\item \textsuperscript{161} See 1 McLoughlin, supra note 41, at 619 (quoting a letter by Reverend Samuel West in the Independent Ledger (Apr. 17, 1780)).
\item \textsuperscript{162} See Backus, supra note 157, at 76–77, 95.
\item \textsuperscript{163} See, e.g., Backus, supra note 160, at 265; see also Goen, supra note 41, at 42; McLoughlin, supra note 42, at 152–53; McLoughlin, supra note 44, at 35; Gaustad, supra note 56, at 110.
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organic growth mediated by the institutionalized churches,\textsuperscript{164} and he viewed salvation as the miraculous effect of a direct personal call of God to the individual.\textsuperscript{165} For Backus as well as other Separate-Baptists, all that is needed is the Word, a preacher, and the Spirit of God,\textsuperscript{166} and the best preaching is that which lays bare the sinfulness of humanity and the need for divine intervention rather than teaches a process of human preparation.\textsuperscript{167}

To the charge that a learned ministry was necessary to preserve true religion, Backus argued that Scripture is the sole standard of truth in religious matters,\textsuperscript{168} and that in the conversion process, the Spirit of God not only converts the heart but enlightens the mind to

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\textsuperscript{164} See Backus, supra note 160, at 265 (stating that people do not become “Christ’s sheep” by “natural growth” but rather by being “born again”). Not all revivalists completely rejected a role for the church in preparing the sinner for salvation. New Light ministers who stayed within the established order continued to envision an important role for the churches as means of grace even though they would limit actual membership to those who had experienced conversion. For example, Jonathan Edwards, who was the chief apologist for the Awakening’s experiential piety, see Aihlstrom, supra note 43, at 301, approved of such a role for the congregational parishes and supported state laws regarding church attendance, see Johnathan Edwards, An Humble Inquiry into the Rules of the Word of God, Concerning the Qualifications requisite to a Compleat Standing and Full Communion in the Visible Christian Church 83 (Boston, S. Kneeland 1749) [hereinafter Edwards, Humble Inquiry]. Edwards also approved of the requirement of an educated ministry, see Johnathan Edwards, Thoughts Concerning the Present Revival of Religion in New-England 264–66 (Boston, S. Kneeland & T. Green 1742) [hereinafter Edwards, Revival of Religion in New-England], and condemned the “excesses” of the Awakening, such as lay preaching and exhorting and separations from the standing order, see Edwards, Humble Inquiry, supra, at v. It was, perhaps, the Separate-Baptists’ special sensitivity to the corruptions of the standing order and their decision to come out from these churches that led them to minimize their role in the process of salvation.

\textsuperscript{165} See McLoughlin, supra note 44, at 35.

\textsuperscript{166} See McLoughlin, supra note 42, at 154.

\textsuperscript{167} See Backus, supra note 157, at 92. Backus writes, And the preparatory work before conversion is quite another thing than many conceive it to be. . . . The preparatory work that is wrought in the soul before conversion is no more of an excellency in the creature, or fitness for grace and mercy than a man’s being brought to see and feel himself full of sores and dreadful diseases is any qualification in him to be healed. Id. God calls His evangelists directly, see id. at 78, 80, and works through itinerants and lay exhorters as well as settled ministers, see Backus, supra note 160, at 287 (approving of mutual lay exhortation); Backus, supra note 145, at 424 (noting the critical role of itinerant preachers in the Great Awakening); see also Goen, supra note 41, at 28–29; McLoughlin, supra note 42, at 17–18, 28–29.

\textsuperscript{168} See Backus, supra note 157, at 72, 76; Backus, supra note 144, at 295; Backus, supra note 145, at 423.

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understand His Word correctly. Human wisdom and learning are not only unnecessary in this process, but are a dangerous source of error when they place the traditions of men over the truths of Scripture. The convert can and should "judge for himself" in religious matters, rather than follow his minister in an "implicit or customary way."

Thus, Backus shares with Jefferson an individualistic understanding of religion, and like Jefferson, he repeatedly states that religion is "ever a matter between God and individuals." In the conversion experience that is the center of evangelical piety,

all saints know that when they received Christ they had no creature to see for them, but each soul acted as singly towards God as if there had not been another person in the world. . . . Now if each saint is complete in him which is the Head of all wisdom and power, then they have no need of philosophers to see for them, nor of princes to give them power to act for God . . . .

The religious community assumes a secondary role in Backus's theology. Because God's direct call to the sinner precedes church membership, the church is secondary both in time and significance. Rather than the vehicle for salvation, the church becomes a "temporary way station for saved souls." Like Jefferson, Backus expressly draws upon Locke's understanding of the church as a "free

169 See BACKUS, supra note 157, at 76–77, 103; BACKUS, supra note 160, at 230. Jonathan Edwards, who was the chief apologist for the experimental piety of the Great Awakening, see AHLSTROM, supra note 43, at 301, laid out a normative pattern for religious experience that was shared by Backus and others in the revival tradition, see GOEN, supra note 41, at 13–15. Edwards describes conversion as the direct action of the Holy Spirit which sheds a new "spiritual light" on the mind and heart of the sinner so that the sinner gains a "due apprehension" of the teachings of Scripture and a conviction of their truth in his "heart." JONATHAN EDWARDS, A DIVINE AND SPIRITUAL LIGHT (1734), reprinted in JONATHAN EDWARDS: BASIC WRITINGS 123, 126–32 (Elizabeth Winslow ed., 1966).

170 See BACKUS, supra note 157, at 86, 102–03, 119.

171 See id. at 73, 105, 108, 110; BACKUS, supra note 160, at 280.

172 BACKUS, supra note 4, at 335.

173 BACKUS, supra note 160, at 225.

174 BACKUS, CHRISTIAN LIBERTY, supra note 56, at 432; see also ISAAC BACKUS, THE INFINITE IMPORTANCE OF THE OBEDIENCE OF FAITH 31 (Boston, Samuel Hall 2d ed. 1791); BACKUS, supra note 145, at 422.

175 BACKUS, supra note 160, at 273.

176 See Gaustad, supra note 56, at 113; GOEN, supra note 41, at 289; McLoughlin, supra note 44, at 35.

177 McLoughlin, supra note 44, at 35; see also Gaustad, supra note 56, at 114.
and voluntary society,178 and he speaks of saints forming churches rather than churches forming saints: Christians "use[,] their Christian liberty [to] join[,] together to worship God according to their own understanding of divine rule."179 Because each saint is complete in Christ and has the capacity to understand the Scripture on his or her own, the relationship among church members is egalitarian. Church members have the right to choose their own ministers,180 who should not domineer over their congregations but treat all members as “brethren in Christ, not as slaves or minors.”181 Within the churches, members are “built up together”182 through “mutual watch.”183

John Leland belongs to the second generation of Separate-Baptists in New England,184 and like many Separate-Baptists before him, he played a significant role in spreading Baptist revivalism within the southern states before returning to his native New England in 1791.185 Leland shared with Backus the belief that the Bible is the standard for

178 Backus, supra note 47, at 376 (quoting Locke, A Letter Concerning Toleration, supra note 69, at 20).
179 Backus, supra note 160, at 249 (emphasis omitted); see also Backus, Christian Liberty, supra note 56, at 432, 437 (arguing that consent is the basis for religious societies).
180 See Backus, supra note 160, at 273.
181 Id. at 217 (quoting 2 Thomas Prince, A Chronological History of New-England: The New-England Chronology 92 (Boston, Kneeland & Green 1736)).
182 Id. at 273.
183 Id. at 248 (quoting John Owen, A Guide to Church Fellowship and Order 76 (London, William Marshall 1692)). Backus also emphasizes that Christ is the sole head and lawgiver of His church and that He calls His ministers directly. See Backus, supra note 4, at 313; Backus, supra note 45, at 352; Isaac Backus, An Appeal to the People (1780), reprinted in Backus, Church, State, and Calvinism, supra note 4, at 385, 390, 392. All hierarchies, schemes for licensing ministers, and state support and interference put man in God's place and human traditions between God and His church. See Backus, supra note 4, at 317, 333–34, (discussing tax support and state interference); Backus, supra note 157, at 109–13 (discussing licensing schemes); Backus, supra note 160, at 184, 274–75 (regarding church hierarchies).
185 See John Leland, Events in the Life of John Leland, in Leland Writings, supra note 4, at 9, 19–29. On the role of the Separate-Baptists in bringing revivalism to the South, see Ahlstrom, supra note 43, at 319–24. By the end of the 18th century, union between Separate-Baptists and other Baptist groups in New England and the South had buried the name of “Separate-Baptist.” See id. at 321; Goen, supra note 41, at 282. However, the Separate-Baptists left a lasting stamp on the character of Baptist thought and piety. See Ahlstrom, supra note 43, at 321; Goen, supra note 41, at 282.
truth in religious matters and that it is the Spirit of God through conversion that enlightens the mind to understand revelation correctly. Leland also rejects human traditions which depart from the Biblical standard and emphasizes the ability of the common man to think for himself. Like Backus, Leland describes salvation as the work of God, and he also conceives of conversion as an intensely personal experience in which God acts directly on the heart and mind of the sinner. To the claim of the established clergy that religion will not survive without state support, Leland answers that God can be trusted to preserve His church, and he points to the “marvellous work of God” in states without establishments.

Similarly, churches take on a secondary role in Leland’s theology as they do for Backus. Religion is a “matter entirely between God and individuals,” and churches are voluntary associations of the saved, not formative institutions for sinners. Leland describes a “church

186 See L.F. Greene, Further Sketches of the Life of John Leland, in LELAND WRITINGS, supra note 4, at 41, 51; LELAND, supra note 58, at 270.

187 In his last sermon, Leland preached that “[t]rue Christians are anointed ones; anointed with gifts and spiritual endowments by the Spirit of Grace which comes from the Holy One, enlightening and strengthening the eyes of the understanding, and enabling those who receive it, to ‘know all things’ concerning Christ and his religion.” Greene, supra note 186, at 47 (quoting from Leland’s last sermon).

188 See JOHN LELAND, THE BIBLE BAPTIST (c. 1790), reprinted in LELAND WRITINGS, supra note 4, at 78, 87; LELAND, supra note 58, at 270.

189 See Leland, supra note 142, at 172; John Leland, A Memorial, in LELAND WRITINGS, supra note 4, at 659, 661; see also JOHN LELAND, THE HISTORY OF JACK NIPS, reprinted in LELAND WRITINGS, supra note 4, at 73, 76–77. According to Leland, one of the great defects of establishments is that they “tend[ ] to keep people in ignorance. By implicitly believing what the ruler and the priest says, they give up their own judgments, and suppose it is a crime to think and speak for themselves.” LELAND, supra note 46, at 252.

190 Leland repeatedly speaks of conversions as the “work” of God. See, e.g., Leland, supra note 185, at 11, 19, 25, 26–27, 30, 31; LELAND, supra note 4, at 112–14; John Leland, Sermon Preached at Ankram, Dutchess County, N.Y., at the Ordination of Rev. Luman Birch (June 17, 1806), in LELAND WRITINGS, supra note 4, at 301, 305.

191 See JOHN LELAND, A BUDGET OF SCRAPS (1810), reprinted in LELAND WRITINGS, supra note 4, at 330, 342; Greene, supra note 186, at 47.

192 See Leland, supra note 55, at 358; JOHN LELAND, THE GOVERNMENT OF CHRIST A CHRISTOCRACY (1804), reprinted in LELAND WRITINGS, supra note 4, at 273, 279.

193 LELAND, supra note 58, at 264.

194 LELAND, supra note 4, at 108; see also LELAND, supra note 46, at 249; LELAND, supra note 49, at 181; Leland, supra note 55, at 353.

195 See Gaustad, supra note 56, at 113–14. Leland wants to “explode[ ]” the idea of a “national church,” LELAND, supra note 4, at 107, or “Christian commonwealth,” id., that takes in the entire populace and to replace it with an understanding of the church as comprising only those who have experienced conversion, see LELAND, supra note 192, at 275.
of Christ” as “a congregation of faithful persons, called out of the world by divine grace, who mutually agree to live together, and execute gospel discipline among them; which government, is not national, parochial, or presbyterial, but congregational.”

Relationships among church members are, therefore, not only voluntary but egalitarian.

The primary difference between Leland and Backus is that Leland takes the principles at the foundation of Baptist theology even further than Backus. Leland is far more willing to cast aside the past practices of the New England churches as unbiblical tradition. While Backus is deeply versed in the Calvinist theology of New England’s Puritan heritage and continues to engage in detailed theological disputations with clergymen in the standing order, Leland rejects “creeds” and “systems” as formalisms which stand between the soul and Scripture. Leland goes even further than Backus in championing the capacities of the common man, emphasizing the ability of the convert to know truth in religious matters without learning or education, and condemning ministers who enter the ministry for “filthy lucre’s sake.” When it comes to churches, Leland even goes so

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196 Leland, supra note 4, at 108.
197 Leland also shares with Backus the belief that God governs His church directly as its only head and lawgiver and that hierarchical structures and state support interfere with divine governance. See id.; Leland, supra note 192, at 278.
198 For example, Leland becomes embroiled in controversy when he refuses to celebrate the Lord’s Supper at his church in Cheshire, Massachusetts. See Greene, supra note 186, at 59–64.
199 See Nathan O. Hatch, The Democratization of American Christianity 99 (1989); 2 McLoughlin, supra note 41, at 929.
200 See, e.g., Leland, supra note 4, at 114 n.* ("[W]hat need of a confession of faith? Why this Virgin Mary between the souls of men and the scriptures?"); John Leland, Miscellaneous Essays, in Prose and Verse (after 1810), reprinted in Leland Writings, supra note 4, at 406, 423 (“The Bible is not written in systematical form . . . .").
201 The references to the ability and requirement that the common man think for himself are numerous in Leland’s writings. See, e.g., Leland, supra note 46, at 252; Leland, supra note 189, at 76–77; Leland, supra note 142, at 172; Leland, supra note 189, at 661. A famous line from Leland’s The History of Jack Nips expresses his conviction on this matter well: “Jack Nips for himself.” Leland, supra note 189, at 77.
202 While Backus served on the Board of Trustees of the newly organized Baptist College in Rhode Island, see McLoughlin, supra note 42, at 215, Leland voiced opposition to the creation of theological seminaries, see 2 McLoughlin, supra note 41, at 932; John Leland, Which Has Done the Most Mischief in the World, The Kings-Evil or Priest-Craft?, in Leland Writings, supra note 4, at 484, 494.
203 John Leland, The Modern Priest, in Leland Writings, supra note 4, at 193, 195. Leland, like Jefferson, expressed a significant degree of anti-clericalism. He repeatedly condemns ministers of the established churches who “rush[ ] into the sacred
far as to say that joining a church is an optional matter for the convert.  

Scholars have noted the continuity between Leland’s thought and that of other populist evangelical leaders in the early nineteenth century who shared a strong individualism and strident anti-clericalism and anti-institutionalism.  

As these populist leaders championed the ability of the common man to shape his own faith, they “mounted a frontal assault upon tradition, mediating elites, and institutions.” Other scholars have also noted a rationalist strain in Leland’s writings that is not present in Backus’s thought and bears more resemblance to the ideas of Thomas Jefferson. For example, Leland frequently states that truth is found through “cool investigation and fair argument,” “fair reasoning,” and an “honest appeal to the reasons and judgments of men.” Like Jefferson, Leland argues that conscience must be set free from “Priest-Craft” and formalistic creeds which frustrate the pursuit of truth by “confin[ing] the mind into a particular way of reasoning” and establish truths “beyond the reach of investigation.” However, Leland just as often states that “natural men” cannot know religious truth without the converting power of God’s spirit, and that conscience is by nature weak and “so defiled by sin” that it can only judge aright if kept in “strict subordi-
tion” to the Gospel. Thus, for Leland reason and free inquiry must always take place in a Biblical world and can only lead to truth where the mind is enlightened by the Spirit of God. Qualified in this way, however, Leland does place a new emphasis on reason and free inquiry that is not present in Backus’s works, but this emphasis serves only to further the individualism already present in earlier Baptist thought.

Thus, while there are certainly differences between Backus and Leland, what they share is, perhaps, the more important, at least when it comes to explaining why they were certain that true religion would thrive best where government and religion are kept separate. For both, religious truth is discovered as the result of a direct encounter between God and the individual rather than by and through the churches. The danger of established churches is that by taking on a mediating role between God and the individual, they do more to frustrate the work of God than to promote it. While Jefferson was sure that with the advent of religious liberty and the separation of church and state, most Americans would become Unitarians, the Baptists were just as confident that freeing the human mind and soul from the weight of religious authority would open the path for the work of God and result in the triumph of Baptist revivalism.

C. Other Voices

While the Court has tended to focus on leading supporters of strict separationism in the founding era, these were not the only voices in the late eighteenth and early nineteenth-century America. Most Americans in the founding era probably held a “centrist” position that favored limited government support for religion. The type of “mild” establishment that they envisioned typically included laws protecting Sabbath observance; the proclamation of days of thanksgiving, prayer and fasting, and other public acknowledgments of the country’s dependence on God; legislative and military chap-

216 Leland, supra note 4, at 123.
217 See Leland, supra note 49, at 192; Backus, supra note 145, at 425; see also McLoughlin, supra note 42, at 186, 224, 229; McLoughlin, supra note 44, at 63.
218 This is the term that Arlin M. Adams and Charles J. Emmerich use for the proponents of limited government support for religion. See Adams & Emmerich, supra note 28, at 26.
219 See id.
lains; laws punishing blasphemy; and support for religious education.\textsuperscript{221} Scholars have pointed out that the strict disestablishment position implemented in Virginia was an anomaly in the late eighteenth century,\textsuperscript{222} and that most state practices, in fact, included numerous forms of cooperation between church and state.\textsuperscript{223}

The reasons for the division between strict separationists and those who supported mild establishments cannot be explained with simple labels. Supporters of the establishments included those who were deeply influenced by Enlightenment thought,\textsuperscript{224} as well as New Light ministers\textsuperscript{225} who kept the evangelical piety of the Great Awakening alive in the established churches of New England.\textsuperscript{226} However, the most significant reasons for their split were, nevertheless, theological. Most of those who supported mild establishments opposed the

\begin{itemize}
\item \textsuperscript{221} See John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties 34–36 (forthcoming 1999); Antieau, supra note 31, at 62–63; Adams & Emmerich, supra note 28, at 26–28. A letter by "David" in the Massachusetts Gazette in March of 1788 expresses this position well:
\begin{quote}
  The practice of our own country has been uniformly in favour of a limited power of this kind in the government. We have from the beginning had laws in favour of a learned and able clergy, and have provided means for their education and support. We have had and still have laws for a due observance of the Sabbath; and our annual fasts and thanksgivings are not only uniform proofs of the exercise of such a power; but are instances of the propriety of our conduct in making frequent and publick acknowledgments of our dependence upon the Diety.
\end{quote}
Letter by David in the Massachusetts Gazette (Mar. 7, 1788), reprinted in 4 The Complete Anti-Federalist, supra note 30, at 246, 247.
\item \textsuperscript{223} See Antieau, supra note 31, at 62–63.
\item \textsuperscript{224} See Robert T. Handy, A Christian America: Protestant Hopes and Historical Realities 18 (1971).
\item \textsuperscript{225} See Nathan O. Hatch, The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England 7–9 (1977); 1 McLoughlin, supra note 41, at 609. One of the most significant divisions between New Light ministers who stayed in the standing order and the revivalists who left the established churches was over the principle of voluntarism. As discussed above in supra note 164, New Light ministers in the established order generally envisioned a greater role for the church in preparing the sinner for grace, and they did not reject state support of their endeavors.
\item \textsuperscript{226} While New Light ministers, or New Divinity men, as they were also called, defended an evangelical form of piety in the established churches, it was not until the Second Great Awakening began in the closing years of the 18th century that their ministry was blessed with a resurgence of religious revivals. See Ahlstrom, supra note 43, at 415–16. The Baptists, by contrast, kept the flames of revival going continuously after the first Great Awakening throughout the 18th century, both in New England and the south. Id. at 375–76.
\end{itemize}
"spiritual tyranny" they associated with state control over churches, and they were also generally eager to protect the rights of conscience for dissenters. However, unlike strict separationists, they were not willing to let religion shift for itself without any government support. Behind their middle position lay profoundly different ideas about how religious faith is formed and sustained and the role of the community in this process. Those who supported mild establishments lacked Jefferson's faith in the power of reason to discover religious truth on its own as well as Madison's optimistic belief that humans are naturally religious. They also lacked the Baptists' faith that God would produce conversions directly without the mediating role of the institutionalized church. Enlightened and evangelical alike shared a strong sensitivity to the weakness of human nature and believed that the nurture and support of religious communities is essential to foster and sustain faith, particularly among the "common man" or "multitudes."

One of the most ardent groups supporting a mild establishment of religion was the New England clergy. The New Light, moderate Calvinist, and liberal wings were united in their belief that religion

228 For example, John Adams drafted the provision in the Massachusetts Constitution of 1780 which protected the rights of conscience, and he also supported the section that provided tax support for churches. For a discussion of Adams's role in the formation of the 1780 Massachusetts Constitution, see John Witte, Jr., "A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment, 41 J. CHURCH & ST. 213 (1999).
229 See, e.g., WITHERSPOON, supra note 124, at 213 (favoring public provision for the worship of God "so instruction may be provided for the bulk of common people, who would many of them neither support nor employ teachers unless they were obliged"); see also McLoughlin, supra note 44, at 294.
230 See, e.g., PHILLIPS PAYSON, A SERMON PREACHED BEFORE THE HONORABLE COUNCIL, AND THE HONORABLE HOUSE OF REPRESENTATIVES, OF THE STATE OF MASSACHUSETTS-BAY, IN NEW-ENGLAND, AT BOSTON MAY 27, 1778, reprinted in THE PULPIT OF THE AMERICAN REVOLUTION: POLITICAL SERMONS OF THE PERIOD OF 1776, at 323, 340 (John W. Thornton ed., Burt Franklin 1970) (1860) ("Let the restraints of religion once be broken down, as they infallibly would be by leaving the subject of public worship to the humors of the multitude, and we might well defy all human wisdom and power to support and preserve order and government in the state.").
231 The theological distinctions between the New Lights, moderate Calvinists, and liberals are discussed in AHLSTROM, supra note 43, at 403–05, and MAY, supra note 63, at 57–61. The moderate Calvinists or "Old Lights" were the heirs of the New England theology and traditions as they had gradually adjusted to changing circumstances in the late 17th and 18th centuries, and they opposed the revivalism of the Great Awakening which had challenged these developments. The New Lights, or New Divinity men or Neo-Edwardsians as they were also called, were the heirs of the Great Awakening in the established churches, and they based their doctrine on the thought of Jonathan Edwards, who was the chief apologist for the Awakening's experiential piety.
is essential to support republican government and that religion cannot survive without government support. As they defended the challenges of the Baptists, even the most enlightened revealed a profound distrust of human nature and a belief that men were too sinful to support religion on their own. For example, Phillips Payson, a liberal minister selected by the Massachusetts legislature to deliver the election sermon in 1778, defended the state's establishment on the grounds that the "restraints of religion" which are essential to preserve "order and government" would be "broken down . . . by leaving the subject of public worship to the humors of the multitude." Payson and the other supporters of the establishment were convinced that religion could not exist without public worship, religious instruction, and the supporting structures of the institutional churches, and they were certain that the common man would not attend to

The liberals or rationalist party dominant in Boston was heavily influenced by Enlightenment currents and made the greatest departures from the original Calvinism of the Puritan churches. The liberals were often called "Arminians" because of their belief in free will, and their assimilation of English rationalism gradually led them down the path to Unitarianism and Universalism. It is important to note that the moderate Calvinists were also influenced by Enlightenment thought, but not to the degree of the liberal wing.

232 See Hatch, supra note 225. Hatch argues that New England clergymen shared a common perspective on civil government, including the relationship between church and state. See id. at 7-9, 19; see also McLoughlin, supra note 41, at 609 (stating that "New Lights and Old Lights, Neo-Edwardsians and incipient Unitarians" all supported the continued tax support for religion in Article Three of the Massachusetts Constitution of 1780).

233 See 1 McLoughlin, supra note 41, at 597, 619; McLoughlin, supra note 42, at 63-64.

234 Payson, supra note 230, at 340. The religiously liberal Reverend Samuel West made a similar argument in defense of the tax support for religion provided for in Article 3 of the Massachusetts Constitution of 1780: "If there is no law to support religion, farewell meetinghouses, farewell ministers, and farewell all religion." 1 McLoughlin, supra note 41, at 619 (quoting Letter by Reverend Samuel West in the Independent Ledger (Apr. 17, 1780)).

235 See McLoughlin, supra note 42, at 152-53; see also 1 McLoughlin, supra note 41, at 593 (stating that New Englanders "had an inbred respect for the learned ministry and for the importance of religious training and worship which made them unwilling to risk their continued existence on the unenforceable goodwill of voluntarism").

For theological liberals like West and Payson, "the Christian worked out his salvation in society and not by some supernatural thunderbolt from heaven, some miracle which could transform a drunken wastrel into a saint instantly." 1 McLoughlin, supra note 41, at 625. Even New Light ministers in the standing order did not completely reject the role of institutional means and religious education in preparing the sinner for conversion, and this was one of the points of disagreement between the New Lights and the revivalists who left the standing order. See supra notes 164, 225. The moderate Calvinists were the heirs to the New England theology of the first half
these ministrations on his own. Supporters of Patrick Henry's general assessment bill in Virginia had a similar belief in the essential role for churches in forming faith and the unwillingness of the multitudes to support churches without external compulsion. As discussed above, the Virginia Bill Establishing a Provision for Teachers of the Christian Religion stated that "the general diffusion of Christian knowledge . . . cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge." Voicing his support for the general assessment in a letter to James Madison in 1784, Richard Henry Lee argues that

\[\text{[r]efiners may weave as fine a web of reason as they please, but the experience of all times shews Religion to be the guardian of morals—And he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support.}\]

In these sentiments, Lee and Henry were joined by numerous Anti-Federalists throughout the states who argued strenuously that the opinions of the people need to be "form[ed] . . . in favour of virtue of the 18th century, which had emphasized the role of the churches in nurture and training in preparation for grace. See supra notes 148–50 and accompanying text.

This belief that the religious community plays a critical role in shaping and sustaining faith is reflected in Article Three of the Massachusetts Constitution of 1780. The Massachusetts Constitution continued tax support for parish ministers although the elected ministers no longer needed to be members of the standing order and dissenters could apply their taxes to support ministers of their own choosing. See McLoughlin, supra note 42, at 146–48, for a discussion of the old establishment and the new system under Article 3. The preamble to Article 3 states that religion and morality can only be "generally diffused through a community . . . by the institution of the public worship of God and of public instructions in piety, religion, and morality." Mass. Const. of 1780, art. III, reprinted in 5 Sources and Documents of United States Constitutions 92, 93 (William F. Swindler ed., 1975). Many leading statesmen in New England followed the clergy in believing that public support for religion was necessary for forming and sustaining the faith of the people. For example, Robert Treat Paine was a strong supporter of Article 3, see I McLoughlin, supra note 41, at 604, and John Adams voted for the Article, see id. at 602 n.21. While Adams authored most of the Massachusetts Constitution of 1780, see id. at 602, he did not author Article 3, see id. However, he did support this provision. See id. at 607.

236 Bill Establishing a Provision for Teachers of the Christian Religion, supra note 130.

and religion"\textsuperscript{238} and that in this process religion cannot be left "to shift wholly for itself"\textsuperscript{239} without "publick protection."\textsuperscript{240}

Benjamin Rush, a leading citizen of Philadelphia, celebrated physician and social and political theorist, is a particularly good example of how religious views which emphasized the weakness of human nature and the role of the community in shaping faith led naturally to the support of mild establishments in the founding era. As the comparison between Madison and his teacher Witherspoon has illustrated, differences in theological outlook on these points can make a critical difference for views on church and state even among public figures who otherwise shared a great deal in their religious and political perspectives. Like Madison and Jefferson, Rush's religious views were influenced deeply by the Enlightenment.\textsuperscript{241} In his letters and writings, Rush favors a "spirit of inquiry"\textsuperscript{242} in religion, and "an enlightened and inquiring Christian[ity]."\textsuperscript{243} However, unlike Jefferson, Rush does not believe that reason is sufficient to attain religious truth on its own,\textsuperscript{244} and unlike Madison, Rush emphasizes the importance of religious communities in forming faith.\textsuperscript{245} In a letter to John Armstrong written in 1783, Rush argues that "[r] eligion is necessary to correct the effects of learning" and that religious education under the "pa-

\begin{enumerate}
\item[238] Letter by David in the \textit{Massachusetts Gazette}, \textit{supra} note 221, at 247.
\item[239] \textit{Id.} at 248.
\item[240] \textit{Id.} On Anti-Federalist views regarding the relationship between church and state, see Herbert J. Storing, \textit{What the Anti-Federalists Were For, in 1 THE COMPLETE ANTI-FEDERALIST, supra} note 30, at 3, 22–23, 64.
\item[241] \textit{See} Mora\textit{s}, \textit{supra} note 60, at 17.
\item[244] \textit{See} Rush, \textit{Autobiography, supra} note 243, at 334–35; \textit{Rush, Bible As a School Book, supra} note 243, at 127; Letter from Benjamin Rush to John Adams (Jan. 23, 1807), \textit{in 2 LETTERS OF BENJAMIN RUSH, supra} note 242, at 936, 936.
\item[245] \textit{See} Letter from Benjamin Rush to John Armstrong (Mar. 19, 1783), \textit{in 1 LETTERS OF BENJAMIN RUSH, supra} note 242, at 294, 294–95.
\end{enumerate}
trionage of particular [religious] societies" is "the surest way of producing a preference and constant attachment to a mode of worship." According to Rush, "[t]he weaknesses of human nature require" such education.

The influence of these religious views on Rush's conception of the relationship between church and state can be seen in his proposals for free public education. Rush was a fervent supporter of free public schools as a means of promoting the knowledgeable and virtuous populace required for free government. Rush was also convinced that Christianity was the best teacher of virtue, and given his views of how faith is formed, it is not surprising that he argued that "the only foundation for a useful education in a republic is to be laid in Religion." Rush's proposals for free public schools in his own state provide for religious instruction under the auspices of particular religious societies, and he advocated the use of the Bible as a school book in order to form a religious "habit" and "attachment" among the students. Rush expressly rejected Jefferson's view that religious study should be left to an age when reason is mature enough to make a judgment on its own, as well as Jefferson's position that the inculcation of religious dogmas in state-supported schools infringes on religious liberty. According to Rush, formation in a specific religious system is the best foundation for free inquiry in religious matters. The government supports for religion that Rush envisioned were very limited. However, they are significant when compared with the strict separationist positions of Jefferson and Madison, as are the theological differences which account for their disagreement.

246 Id., in 1 LETTERS OF BENJAMIN RUSH, supra note 242, at 294, 294–95.
247 Id., in 1 LETTERS OF BENJAMIN RUSH, supra note 242, at 294, 295.
248 See BENJAMIN RUSH, OF THE MODE OF EDUCATION PROPER IN A REPUBLIC (1798), reprinted in THE SELECTED WRITINGS OF BENJAMIN RUSH, supra note 243, at 87, 96.
249 See id. at 88–89.
250 See id. at 88.
251 Id. at 88.
252 RUSH, BIBLE AS A SCHOOL BOOK, supra note 243, at 118.
253 Id.
254 See RUSH, supra note 248, at 89.
255 On Jefferson’s views, see HEALEY, supra note 78, at 207. Jefferson was also a fervent supporter of free public education. See id. at 179.
256 See RUSH, supra note 248, at 89.
257 Indeed, in a letter to Thomas Jefferson in 1800, Rush writes that "I agree with you likewise in your wishes to keep religion and government independent of each Other . . . Christianity disdains to receive Support from human Governments." Letter from Benjamin Rush to Thomas Jefferson (Oct. 6, 1800), in 2 LETTERS OF BENJAMIN RUSH, supra note 242, at 824, 824.
As will be discussed below, when the accommodationists on the contemporary Court look to history to support their position, it is the numerous examples of government encouragement of religion in the founding era that they point to. On the federal level, they point to a number of practices that had also been followed by the states. For example, the accommodationists note that most of the nation's early presidents issued proclamations announcing days of thanksgiving, prayer, and fasting, and that the first Congress allocated funds for legislative chaplains. They also note that the first Congress re-adopted the Northwest Ordinance, which had been passed initially by the Continental Congress in 1787 and included a provision stating that in the Northwest Territory, "[r] eligion, morality, and knowledge, being necessary to good government shall forever be encouraged." As will be discussed further below, there are similarities between the theological assumptions underlying the contemporary accommodationist position and the religious views of those who supported limited government assistance for religion in the founding era. The most significant continuity is a recognition of the role of community, especially the public community, in shaping and fostering faith.

II. THEOLOGY

When the theological assumptions underlying the disagreements on the Court regarding religious expression by the state are examined below, there will be clear continuities between these assumptions and the views underlying similar positions in the founding era. For example, when separationists on the Court adopt the Jeffersonian or Baptist statement that religion thrives best where it is kept strictly separate from government, they often also affirm a similarly individualistic understanding of the nature of religious belief. Likewise, contemporary accommodationists who point to examples of government support for
religion in the founding era share the views of those who supported these mild establishments that community plays a critical role in forming and sustaining faith.

However, it would be a mistake to simply align the theological assumptions underlying separationist and accommodationist positions on the current Court with the assumptions underlying similar positions in the founding era. Two hundred years separate the contemporary situation from Jefferson’s Enlightenment belief in the power of reason to discover the truths of religion on its own or Madison’s view that the existence of God and a future state are self-evident propositions shared by all humans. While many of the Justices embracing separationist and endorsement positions have expressed an individualistic understanding of the nature of religious belief, it is not because they believe that reason provides a direct link between the individual and God. Nor do many of the Justices look to God to preserve religion through direct and miraculous conversion experiences. Similarly, while accommodationists recognize a critical role for the community in shaping and sustaining faith, it is not because they distrust a weak and sinful human nature, and they do not go as far as those who supported mild establishments in the founding era in affirming a pro-active role for the state in inculcating religion.

Examination of contemporary debates in academic theology regarding the nature of religious belief and how religious faith is formed and sustained will help to develop a fuller picture of the theological divisions on the Court. As noted in the Introduction, I am not claiming that there is a causal connection between these theological developments and the underlying theological views of the Justices. Indeed, the focus in this Part will be on theological developments in the Christian tradition, which is a viewpoint the Justices may or may not share. However, these contemporary theological debates can help to clarify shifts in religious viewpoint that have taken place in both the legal and theological spheres of thought, and the correlation between these shifts reflects the fact that both jurists and theologians exist in the same cultural milieu. Some of these shifts in thought tend to reinforce the theological assumptions underlying the strict separationist position in the founding era while other developments strongly challenge these assumptions and bear greater affinity with the assumptions of those who opposed separationism in the founding era.

Examining contemporary theological debates will also help to clarify the theological assumptions underlying the third strain in the Court’s contemporary case law, which is the endorsement approach developed by Justice O’Connor. While a number of the Justices who have embraced the endorsement test have expressed support for the
individualistic conception of religion which underlies the strict separationist position, this is not uniformly the case. Rather, the chief concern behind the endorsement test is that the protection of religion requires a recognition of the deeply pluralistic character of faith in modern American society and respect for all of the forms that religious faith can take as well as for those who do not adopt any religion. Many theologians in the 1990s have also emphasized the pluralistic character of religion, and for the growing number of theologians who embrace this perspective, the unity that they seek among religious viewpoints is one that respects and preserves their differences.

A. The Turn to the Subject in Modern Theology

The watershed that initiated the modern era in theology took place in the late eighteenth century when Immanuel Kant's revolutionary turn to the subject in philosophy cut off human reason from the knowledge of transcendent realities such as God. Whereas the rationalist Christians and deists of the eighteenth century believed that reason could discover at least the basic outlines of a natural theology, including the existence of a wise and beneficent God and a future state of rewards and punishments, Kant argued that any speculative knowledge regarding a sphere that transcends the world of space and time is impossible. According to Kant, our knowledge is limited to the realm of experience or "phenomena," which is necessarily shaped and structured by a priori categories of the human mind. Knowledge of "noumena," or things-in-themselves, is beyond human understanding as are supersensible objects such as God. For Kant, God becomes a regulative concept of the mind that helps to guide scientific inquiry by promoting the conception of nature as a systematic and unified whole, and God also functions as a postulate

261 Kant develops these ideas in Immanuel Kant, Critique of Pure Reason (Norman K. Smith trans., St. Martin's Press 1965) (1781). For Kant's critique of speculative theology, see id. at 495-531. For a good summary of Kant's arguments and their implications for later theology, see James C. Livingston, Modern Christian Thought from the Enlightenment to Vatican II, at 63-76 (1971).
262 See Kant, supra note 261, at 173-74; see also Livingston, supra note 261, at 65.
263 See Kant, supra note 261, at 82-83, 292-94, 529-30; see also Livingston, supra note 261, at 65. For Kant's use of the terms "noumena" and "phenomena," see Kant, supra note 261, at 257-75, 292-94.
264 Kant's understanding of God as a regulative idea of the mind is developed in his "Transcendental Dialectic" in the Critique of Pure Reason. See, e.g., Kant, supra note 261, at 550 ("[T]he concept of a highest intelligence is a mere idea, that is to say, its objective reality is not to be taken as consisting in its referring directly to an object (for in that sense we should not be able to justify its objective validity). It is only a
of moral reason.\textsuperscript{265} In neither case, however, is God something that we can know in Himself.\textsuperscript{266}

Kant’s major contribution to modern theology was not the reduction of the idea of God to a regulative concept of the mind or a postulate of moral reason but, rather, the impact of his thought on later theology. As Kant’s turn to the subject in philosophy demolished the foundations for speculative knowledge about God, he generated an equally revolutionary turn to the subject in theology.\textsuperscript{267} Friedrich Schleiermacher, who wrote a generation later and is widely regarded to be the “father” of modern theology,\textsuperscript{268} was the first to make this turn. Instead of conceiving of religion as a matter of speculative knowledge about God or even primarily a matter of ethics,\textsuperscript{269} Schleiermacher recast the essence of religion as “intuition,”\textsuperscript{270} “feeling,”\textsuperscript{271} or “experience.”\textsuperscript{272} At the root of all religious traditions, Schleiermacher found a common pre-reflective, pre-linguistic feeling of absolute dependence.\textsuperscript{273} This feeling of absolute dependence is located deep within the structures of the self\textsuperscript{274} and is an essential aspect of the human constitution.\textsuperscript{275} Schleiermacher describes this feeling as the consciousness that all our existence and all our activity is

\textsuperscript{265} Kant develops his understanding of God as a postulate of moral reason in his Critique of Practical Reason (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1788). See, e.g., id. at 103–05, 115–19; see also Livingston, supra note 261, at 68–70.

\textsuperscript{266} See Kant, supra note 265, at 114; Kant, supra note 261, at 550; Livingston, supra note 261, at 70.


\textsuperscript{268} See Ahlstrom, supra note 43, at 590; Thiemann, supra note 267, at 25; see also Lindbeck, supra note 267, at 21; Ronald F. Thiemann, Constructing a Public Theology: The Church in a Pluralistic Culture 128 (1991); Francis Schussler Fiorenza, Foundational Theology: Jesus and the Church 276 (1985).


\textsuperscript{270} Schleiermacher, Speeches, supra note 269, at 102.

\textsuperscript{271} Id.; Schleiermacher, Christian Faith, supra note 269, at 5–6, 11.

\textsuperscript{272} Schleiermacher, Christian Faith, supra note 269, at 67.

\textsuperscript{273} See id. at 16–17.

\textsuperscript{274} For Schleiermacher, religion proceeds from our “innermost” nature.

\textsuperscript{275} See Schleiermacher, Christian Faith, supra note 269, at 135, 144, 164.
dependent on a source outside ourselves. While for some individuals this experience is more pronounced than for others, it accompanies all of our activity and is never zero. Humanity is, therefore, fundamentally in relation to God. While different religious traditions express different "modifications of that common consciousness," as the experience of absolute dependence is combined with different sensory experiences to produce different religious emotions, underlying them all is the same experience of what Schleiermacher calls "God-consciousness."

Schleiermacher's location of the source of religion in a fundamental aspect of human experience exerted a dominant influence over academic theology for nearly two centuries as a host of theologians in the nineteenth and twentieth centuries have followed him in seeking to uncover a religious dimension to human experience. While contemporary theologians have referred to this tradition in theology by different names such as "experiential-expressivism," "correlation" theology, and "revisionist" theology, I will simply refer to it as "modern theology" to distinguish it from the "postmodern" or

276 See id. at 16.
277 See id.
278 See id. at 16–18.
280 See SCHLEIERMACHER, CHRISTIAN FAITH, supra note 269, at 28–29, 40, 46–47.
281 Id. at 47.
282 See THIEMMANN, supra note 268, at 128 (stating, in 1983, that "[n]o theologian has had a greater influence on the development of modern theological method than Friedrich Schleiermacher. Most 20th century theologians have followed his methodological lead, and those who have resisted his influence have, nonetheless, been absorbed in criticizing him"); LINDBECK, supra note 267, at 21 (stating that the "experiential-expressivist" tradition that derives from Schleiermacher continues to exert dominant influence over theology in 1984); FIORENZA, supra note 268, at 276–77 (asserting that the "correlation" method which has its roots in Schleiermacher is the dominant method in contemporary theology).

Schleiermacher's thoughts also had a formative influence on the field of phenomenology of religion, and Rudolf Otto's analysis of religion as originating in the experience of the holy, see RUDOLF OTTO, THE IDEA OF THE HOLY (John W. Harvey trans., Oxford Univ. Press, 2d ed. 1950) (1917), has had an important influence on a number of theologians who have followed in Schleiermacher's footsteps, see, e.g., PAUL TILlich, DYNAMICS OF FAITH 13 (1957) (drawing on Otto); DAVID TRACY, BLESSED RAGE FOR ORDER: THE NEW PLURALISM IN THEOLOGY 92–93 (Univ. of Chicago Press 1996) (1975) (noting his debt to Otto).
283 LINDBECK, supra note 267, at 21.
"postliberal" critique that will be discussed in the following Section. The most influential of the modern theologians in the twentieth century include the Roman Catholics Karl Rahner, Bernard Lonergan, and David Tracy, and the Protestants Paul Tillich and Schubert Ogden. These theologians have argued for the essential religiousness of humanity and have identified what they believe to be a common religious experience shared by all individuals.

For example, in *Blessed Rage for Order*, Tracy locates the religious dimension of human existence in certain "limit" experiences common to all humans. According to Tracy, in boundary situations such as anxiety, sickness, and death, and in ecstatic experiences such as intense joy and love, we experience a "limit-to" our existence, and these "limit" situations disclose an "ultimate horizon of meaning" or "limit-of" our existence which is gracious and trustworthy in character. For Tracy, the religious dimension of human existence is this "basic faith in the worthwhileness of existence, in the final graciousness of our lives," and this faith is "primordial and unconquerable." Tracy draws on the work of Schubert Ogden, who also argues that human existence is characterized by an "ineradicable confidence in the final worth of our existence," and both argue that the objective ground of this basic faith corresponds to the theistic concept of God.

For Rahner and Lonergan, the fundamental religious experience is not just a basic faith in God but, rather, the experience of God Himself. According to Rahner, human existence is characterized by a "transcendental experience" of subjectivity: at all moments of consciousness, we are present to ourselves and able to reflect on our finite

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286 Tracy, *supra* note 282. As discussed below, Tracy's thought has developed significantly since he published *Blessed Rage for Order*, and it would no longer be correct to fit his thought neatly into what I am calling modern theology. *See infra* note 451–57 and accompanying text.
287 Tracy, *supra* note 282, at 105–06.
288 Id. at 106.
289 Id. at 119.
290 Id. at 186.
292 See id. at 37, 42–43; Tracy, *supra* note 282, at 183–87. Thus, for Ogden, belief in God is "inescapable at the deeper level of our actual existence." Ogden, *supra* note 291, at 42; *see also* Tracy, *supra* note 282, at 186.
existence. At the same time, this transcendent experience of human subjectivity opens us up to the infinite horizon which grounds our being. Humanity is, thus, existentially “oriented” to the “ineffable mystery” which is God, and God communicates Himself in the mode of closeness. For Lonergan, too, humanity’s “thrust to self-transcendence,” which lies in its ability to “question[ ] the significance of its own questioning” and “reflect on the nature of reflection,” opens up humanity to the divine. The fulfillment of this capacity for self-transcendence is “being in love with God” or “being in love in an unrestricted fashion,” and God makes this fulfillment a possibility by giving the “gift of love for him” in a gracious experience available to all humans. For Tillich, as well, humans are “grasped by and turned to the infinite” by virtue of their ability to transcend their concrete existence and contemplate the infinite that lies beyond them. All individuals experience a “longing” for what is ultimate or an “infinite passion” for the infinite, and Tillich calls this universal state of being ultimately concerned “faith.”

What is significant about these theologians for the purposes of this discussion is not their different variations on the religious dimension of human experience but the fact that all of them argue that

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294 See id. at 58–61.
295 Id. at 52–53.
296 See id. at 119.
298 Id. at 103.
299 Id. at 101.
300 See id. at 103 (“There lies within [our] horizon a region for the divine, a shrine for ultimate holiness... The contemporary humanist will refuse to allow the questions to arise. But their negations presuppose the spark in our clod, our native orientation to the divine.”).
301 Id. at 105.
302 Id.
303 Id. at 109.
304 See id. (“God is good and gives to all men sufficient grace for salvation.”); id. at 361–62 (“God can be counted on to bestow his grace . . . .”).
305 Tillich, supra note 282, at 16.
306 See id. at 9, 17.
308 Tillich, supra note 282, at 9, 17.
309 Id. at 1. It is important to note that for Tillich, unlike Rahner and Lonergan, this experience does not contain an immediate awareness of the nature of the infinite which lies beyond us, and giving content to the ultimate is always a matter of “risk” requiring “courage.” Id. at 17.
humanity is innately religious and locate the origins of this religiousness in a universal experience deep within the individual self. Tracy calls the experience of basic faith "primordial" and "immediate," and Ogden finds it present "at the center . . . of selfhood." Rahner speaks of God's self-communication as something which occurs in the "ultimate depths of human existence," and for Lonergan it takes place in the "depth of [the] heart[]." Because the religious dimension of human existence is something which originates deep within the self, the religious experience begins as something "pre-reflective," "pre-conceptual," and "pre-thematic," and language and community flow from this prior experience rather than create it. One of the central roles of the religious community is to express what begins first within the interiority of the individual. For example, Tracy and Ogden both speak about religious communities as "re-presenting" in language and ritual the basic faith that is part of human nature. While both believe that the story of Jesus Christ is the best expression of this faith, other religious traditions also express the same faith. For Rahner and Lonergan, the history of religion is conceived of as a history of humanity's expression and interpretation of God's original revelation within the interior of the self.

310 Tracy, supra note 282, at 66.
311 Id.
312 Ogden, supra note 291, at 194.
313 Rahner, supra note 293, at 24; see also id. at 12, 17, 57, 139.
314 Lonergan, supra note 297, at 113.
315 See, e.g., Tracy, supra note 282, at 47; Schubert M. Ogden, The Task of Philosophical Theology, in The Future of Philosophical Theology 55, 57–58 (Robert A. Evans ed., 1971); Ogden, supra note 291, at 40; Rahner, supra note 293, at 44, 52, 132.
316 See, e.g., Tracy, supra note 282, at 47; Ogden, supra note 291, at 57–58; see also Lonergan, supra note 297, at 107 ("God's love first is described as an experience and only consequently is objectified in theoretical categories.").
317 See, e.g., Tracy, supra note 282, at 47; Ogden, supra note 315, at 57–58; Rahner, supra note 293, at 52. Lonergan writes,

Before it enters the world mediated by meaning, religion is the prior word
God speaks to us by flooding our hearts with his love. That prior word
pérains, not to the world mediated by meaning, but to the world of immediacy,
to the unmediated experience of the mystery of love and awe.
Lonergan, supra note 297, at 112.
318 See Ogden, supra note 291, at 202–03; Tracy, supra note 282, at 221.
319 See Ogden, supra note 291, at 202–03; Tracy, supra note 282, at 222–23.
320 Ogden writes that the various religions of humanity are "one and all expressions or re-presentations of a yet deeper faith that precedes them." Ogden, supra note 291, at 33–34.
321 See Rahner, supra note 293, at 140–41, 153–54; Karl Rahner, Christianity and the Non-Christian Religions, in 5 Karl Rahner, Theological Investigations 115, 131 (Karl-H. Kruger trans., Darton, Longman & Todd 1966) (1962); Karl Rahner, Observa-
In many respects, the turn to the subject in modern theology marks a dramatic shift from the understandings of religion that lay behind the strict separationist position in the founding era. Religion is no longer conceived of primarily as knowledge which can be attained through reason as Jefferson and Madison believed, nor does God reach down and enlighten the mind through an experience of supernatural grace. Kant cut off these connections between God and the individual (at least as far as academic theologians were concerned) and the locus of the divine-human connection shifts to an experience deep within the self. However, while this shift changed the theological landscape dramatically, it does not undermine the theological assumptions underlying the strict separationist position but, rather, reinforces them. Religion remains in its origins a matter between God and the individual although now the direct encounter between God and humanity is built into the structures of the self. Religious communities are not necessary to form faith but, rather, flow naturally from the religious dimension in common human experience. The forms of religious expression may change and may be more or less accurate, but humanity is at all times "homo religiousus."

Indeed, one of the early critiques in the “postliberal” challenge to modern theology is the privatized, individualistic view of religion that it supports. When the origins of religion are located in individual experience, religious communities take on secondary importance and can be viewed as merely “optional aids in individual self-realization” or multiple “purveyors” of “symbols of transcendence” to

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322 See Lindbeck, supra note 267, at 20–21; Fiorenza, supra note 268, at 276–77.
323 Ronald Thiemann has used this term to describe modern theology’s understanding of the innately religious character of human nature. See Thiemann, supra note 268, at 91; Thiemann, supra note 267, at 3.
324 The postliberal challenge will be discussed more fully in the following Section. See infra Part II.B.
326 Lindbeck, supra note 267, at 23.
327 Id. at 126.
328 Id.
meet what begin as individual religious quests. Religious communities, in this view, become essentially the voluntary associations of like-minded individuals envisioned by strict separationists in the founding era.

Actually most modern theologians have a far more nuanced understanding of the role of religious communities than the postliberal critique would suggest. On the one hand, many modern theologians emphasize that the social nature of humanity requires the outward expression of faith and intercommunication within a community: those who respond to their native religious orientation naturally seek fellowship with one another, and the essence of Christianity also demands a corporate form. Furthermore, communities not only express the inner religious experience in outward form, but they also play an important role in reinforcing this religious dimension. For example, Tracy and Ogden speak of the role of religious language in "reassuring" faith in those times when the "fleeting" nature of religious experience or the challenge of difficult circumstances may lead this faith to be "forgotten" or "threatened." Tracy goes even further to suggest that particular religious stories, symbols, or images may also provide individuals with tangible and concrete possibilities

329 See id. at 22, 126.
330 See id. at 22 (stating that "the structures of modernity" that experiential expressionism reflects "press individuals to meet God first in the depths of their souls and then, perhaps, if they find something personally congenial, to become part of a tradition or join a church"). Kaufman writes,

A three-staged model seems to be presupposed. First, there is the raw experience of the individual as the foundation of all speaking, thinking and acting. Second, the individual reflects upon or thinks about this experience. And, third, he or she may finally choose to communicate that experience and reflection to other persons through language, participate in a ritual, or take up a role in an institution. We have here a picture of the completely private self living out and experiencing its life, with language and other forms of social interaction indispensable only at the third stage of communication . . . .

Kaufman, supra note 325, at 6.
331 See Rahner, supra note 293, at 323, 347; Rahner, supra note 321, at 120; Lonergan, supra note 297, at 113.
332 See Lonergan, supra note 297, at 113, 118; Schleiermacher, Speeches, supra note 269, at 163-66; Schleiermacher, Christian Faith, supra note 269, at 27, 30, 532-33.
333 See Rahner, supra note 293, at 330, 343; Schleiermacher, Christian Faith, supra note 269, at 359-61, 478.
334 Ogden, supra note 291, at 32; Tracy, supra note 282, at 135.
335 Tracy, supra note 282, at 134.
336 Id. at 215; see also Ogden, supra note 291, at 32.
337 Tracy, supra note 282, at 135; see also Ogden, supra note 291, at 32.
for living in accordance with faith that they might not have been able to imagine if left to themselves. For Rahner and Lonergan, God's revelation of Himself is not limited to an inner experience of the self but is also present in God's outward word in the history of Israel and especially in Jesus Christ, whose life, death, and resurrection makes explicit what is implicit in God's inward call. Insofar as the church is the bearer of this outward word and the historical continuation and representation of Christ, it cannot be understood solely as an association of like-minded individuals. Rather, the church also has a critical role in "communicating" a message that cannot be fully understood without God's special revelation and in providing an authoritative "norm" for humanity's religious dimension.

Perhaps the greatest role for religious communities in supporting faith is envisioned by Schleiermacher himself. While Schleiermacher argues that the same feeling of absolute dependence underlies all forms of piety, particular religious experience varies from religion to religion as this feeling attaches to different sensory experiences to produce different religious emotions, and religious communions arrange and organize these religious emotions in different ways. In Christianity, all emotions are related to the redemption accomplished by Jesus; for Schleiermacher, this means that Christians experience the influence and communication of Jesus's sinless perfection as relieving the obstruction of their God-consciousness, which is an evil condition that all individuals feel to some degree. The Christian experience of redemption is not possible without the influence of Jesus, and after His death, the role of communicating Jesus's sinless perfection is taken on by the church. The church not only hands on

338 See Tracy, supra note 282, at 208–09. Similarly, Lonergan speaks of the importance of the "word of tradition that has accumulated religious wisdom." Lonergan, supra note 297, at 113.
339 See Lonergan, supra note 297, at 113, 119; Rahner, supra note 293, at 157–58; Rahner, supra note 321, at 118, 131; Rahner, supra note 321, at 14–15.
340 See Lonergan, supra note 297, at 361.
341 See Rahner, supra note 293, at 322, 348.
342 Rahner expressly rejects such an understanding of the church. See id. at 345, 347–48.
343 Lonergan, supra note 297, at 361–62.
344 Rahner, supra note 293, at 344; see also Rahner, supra note 321, at 125–26.
346 See id. at 29, 50.
347 See id. at 52.
348 See id. at 54–57. By Jesus's "sinless perfection," Schleiermacher means that Jesus had an "absolutely potent" and unobstructed God-consciousness. Id. at 367.
the "picture" of Jesus that is found in the Bible, but also communicates His sinless perfection in the new corporate life of grace that His influence makes possible. Thus, for Schleiermacher, the specifically Christian experience of piety is not possible without the mediation of the Christian community, and for Tillich as well, the experience of ultimate concern needs language and community to give it specific content.

However, even for Schleiermacher and Tillich, as for the others, the role that communities play in fostering and sustaining faith is very different from the type of formation envisioned by supporters of mild establishments in the founding era. Religious communities do not form a weak and sinful human nature in favor of religion. Rather, human nature begins with a divine orientation which will inevitably express itself in communal forms without external prodding or support. While religious communities, in turn, reinforce humanity's religious potential and some can even elevate it to levels that could not be achieved alone, the process is not one of formation so much as evocation. Schleiermacher speaks of the church as "arousing," "awakening," or "stimulating" faith. For Rahner, the church does not proclaim something "absolutely unknown" or new but expresses "something which [the] person has already attained or could already have attained in the depth of his rational existence." It communicates, in Lonergan's words, a word "congruent" with the gift of love already "within us." In Tillich's terminology, it proclaims a message whose power lies in its ability to provide the "answers" to the "questions" implied in human existence. Thus, as for Madison, humanity has an innate propensity to religion which naturally seeks social forms, and all individuals have within themselves the capacity to recognize what is true in the messages that they hear. Religion will thrive when

349 Id. at 363.
350 See id. at 364-65. Schleiermacher emphasizes that "since Christian piety never arises independently and of itself in an individual, but only out of the communion and in the communion, there is no such thing as adherence to Christ except in combination with adherence to the communion." Id. at 106.
351 See TILLICH, supra note 282, at 23-24, 118, 121. For Tillich, the truest form of faith is the one whose symbols most closely express what is truly ultimate while also containing a self-negating element that recognizes that no concrete symbol can be confused with the ultimate. See id. at 97.
352 SCHLEIERMACHER, CHRISTIAN FAITH, supra note 269, at 69.
353 Id. at 71.
354 Id. at 367.
355 RAHNER, supra note 321, at 131.
356 LONERGAN, supra note 297, at 113.
357 See 1 TILLICH, supra note 307, at 64.
it is kept strictly separate from government because individuals will naturally seek and be able to identify on their own whatever support they need for religious inclinations that are an inescapable and ever-present part of their existence.

B. The Primacy of the Community in the Postliberal Challenge

While the modern approach to theology that has its roots in the work of Schleiermacher remained the dominant approach in academic theology throughout most of the twentieth century, this method came under vigorous attack beginning in the 1980s. This challenge has become known as "postliberal" theology, and postliberal theologians have argued that modern theology fundamentally misunderstands the nature of religion and the relationship between individual experience and communities in fostering and sustaining faith. For postliberal theologians, religion is not something which originates deep within the self as an experience common to all humans. Rather, religion is essentially a communal phenomenon, and it is religious communities that make religious experience possible by socializing their members into particular traditions and world views.

George Lindbeck and Hans Frei are two of the leading figures in postliberal theology, and they played the greatest role in developing the postliberal position as it emerged in the 1980s.358 In his seminal book on The Nature of Doctrine,359 Lindbeck draws upon scholarship in cultural anthropology, sociology of knowledge, and philosophy360 to

358 See Placher, supra note 285, for a good discussion of their work and the postliberal challenge to modern theology as it developed in the 1980s. For further discussion, see also William C. Placher, Unapologetic Theology: A Christian Voice in a Pluralistic Conversation 18–20, 161–63 (1989).
359 Lindbeck, supra note 267.
360 See id. at 20. The scholarship that Lindbeck draws upon includes Clifford Geertz's work on cultural anthropology, see Clifford Geertz, The Interpretation of Cultures (1973) (especially chapters on "Thick Description: Toward an Interpretative Theory of Culture" and "Religion as a Cultural System"), Ludwig Wittgenstein's philosophy and, in particular, his understanding of "language games," see Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans., 3d ed. 1968); the work of the philosopher Peter Winch, see, e.g., Peter Winch, Ethics and Action (1972) (especially his essay on Understanding a Primitive Society); Peter Winch, The Idea of a Social Science and Its Relation to Philosophy (1958); Peter Winch, Language, Belief and Relativism, in 4 Contemporary British Philosophy: Personal Statements 322 (H.D. Lewis ed., 1976), and Peter Berger's work on the sociology of knowledge, see, e.g., Peter L. Berger, The Sacred Canopy: Elements of a Sociological Theory of Religion (1967); Peter L. Berger & Thomas Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (1966). For further discussion of the sources that postliberals draw upon, see Placher, supra note
argue that religions resemble languages or cultures and their correlative ways of life. Lindbeck describes religions as "comprehensive interpretive schemes" or "cultural and/or linguistic framework[s] which "shape[] the entirety of life and thought." These schemes usually include myths or narratives and rituals, and like an "external word," these practices "mold" the experience of the self and its world rather than reflect a pre-existing experience. Thus, people do not become religious by tapping into a religious dimension that exists as a pre-reflective or pre-thematic experience in the depths of the self. Rather, people become religious by being "socialized" into a religious community and by "interioriz[ing] a set of skills by practice and training." There is, for Lindbeck, no primordial religious experience without this process of socialization and because religions have different interpretive frameworks, religious experience will vary from religion to religion.

Many theologians have followed Lindbeck in understanding religion as a cultural-linguistic system that makes religious experience possible rather than as something which grows out of an innate relationship to the divine. Frei's work in the 1980s was deeply influenced by Lindbeck's approach, and one of his most significant
contributions to the development of postliberal theology was his integration of a similar understanding of religion with his earlier work on Biblical hermeneutics to produce an account of the way that the Biblical texts function in the Christian community. According to Frei, in the Christian framework, the Biblical texts are the central element around which the rest of its features are organized. Historically most theologians read the Bible as a "realistic narrative". In other words, the meaning of the Bible was equivalent with the story itself, and the narrative world depicted in the Bible was understood as the only real world in which the reader must "fit himself" and his experiences. While this changed for theologians in the eighteenth century, Frei argues that the narrative reading of the Bible continues to be the customary way that the text is interpreted in the Christian community. Modern theologians misunderstand the function of the text when they search for its meaning in some common religious experience underlying its language. For members of the Christian community, it is the text itself which gives the content for their religious life and shapes their world, not an innate religious experience which is only secondarily expressed in the words of the text. In postliberal thought. See Placher, supra note 358, at 20, 155 (noting his sympathies with postliberalism); Placher, supra note 285, at 416 (same).

371 Lindbeck and Frei both exerted a mutual influence on each other's work. While Frei's later work on Biblical hermeneutics and theology was heavily influenced by Lindbeck, his earlier work on Biblical hermeneutics was one of the chief inspirations for Lindbeck's method. See William C. Placher, Introduction to Theology and Narrative, supra note 370, at 3, 3.

372 See Frei, supra note 370, at 147-48; see also Lindbeck, supra note 267, at 80, 84, 116.


374 See id. at 1-3; see also Hans W. Frei, Theology and the Interpretation of Narrative: Some Hermeneutical Considerations, in Theology and Narrative, supra note 370, at 94, 103-04.

375 For an account of why this change occurred, see Frei, supra note 373. Especially with the influence of the Enlightenment in the 18th century, the meaning of the Bible became detachable from the story itself. See id. at 6. Modern theology continues this trend by locating the meaning of the Bible in the religious experience it represents. See Frei, supra note 370, at 127-29.

376 See Frei, supra note 374, at 110; Frei, supra note 370, at 118, 144-45, 147-48.

377 See Frei, supra note 370, at 124-30.

378 See id. at 145-47. As discussed above, most modern theologians have a more nuanced understanding of the role of language and community in shaping and supporting faith than the postliberal critique would suggest. Religious language and communities not only express a prior religious experience, but they reinforce it, and, for some modern theologians, they may also provide the proper norm for under-
Lindbeck’s words, the “text . . . absorb[s] the world, rather than the world the text.”

Frei emphasizes that the narrative reading of the Bible is not the only possible interpretation of the text, nor does the authority of Scripture derive first of all from some “mysterious inherent properties” of the text. Rather, the authority of the Bible derives from the central function that it plays within the religious community, and the meaning that it has for the reader will depend upon the sense that has become “second nature to the members of the community.” Thus, the Bible cannot provide a vehicle for a direct encounter between God and the individual as it did for Backus and Leland. Meaning is not something in the text which is illuminated by the Spirit of God in a personal conversion experience, nor is it something that can be extracted by autonomous rational faculties as for Jefferson. Rather, the community is necessarily involved as it directs the individual to read the Bible and provides critical guidance regarding its meaning. For postliberal theologians, access to God always involves the mediation of the community.

The postliberal understanding of religions as communally shaped frameworks for understanding reality has led to the charge that postliberal theologians are “radical relativists.” One form that this

379 LINDBECK, supra note 267, at 118.
380 See FREI, supra note 325, at 86; Frei, supra note 370, at 122.
381 FREI, supra note 325, at 57.
382 David Kelsey, another theologian in the postliberal tradition, was the first to develop this argument in DAVID H. KELSEY, THE USES OF SCRIPTURE IN RECENT THEOLOGY 97–98 (1975). Frei adopts a similar position in his later work, see, e.g., FREI, supra note 325, at 57, as do a number of other postliberals, see, e.g., STANLEY HAUERWAS, A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC 55 (1981) (drawing on Kelsey); Tanner, supra note 370, at 62 (drawing on Kelsey). As will be discussed further below, Tanner’s recent work has recently departed in significant ways from postliberalism. See infra notes 426–32 and accompanying text.
383 FREI, supra note 374, at 104 (quoting CHARLES M. WOOD, THE FORMATION OF CHRISTIAN UNDERSTANDING 43 (Trinity Press 1993) (1981)). Frei follows Wood on this point, see FREI, supra note 374, at 104, 115 n.13; FREI, supra note 325, at 15, as do other postliberal theologians, see, e.g., Tanner, supra note 370, at 62–63 (“Similarly, the plain sense of scripture is not [an inherent] property of those texts that happen to function as scripture for the Christian community. . . . The plain sense . . . [is] what a participant in the community automatically or naturally takes a text to be saying on its face insofar as he or she has been socialized in a community’s conventions for reading that text as scripture.”).
384 See PLACHER, supra note 358, at 163–66, for a discussion of this charge. Lindbeck also discusses and defends postliberal theology against the charge of relativism. See LINDBECK, supra note 267, at 128–32.
charge has taken is the accusation of “Wittgensteinian fideism.” If each religion is a separate cultural-linguistic system or, to use Wittgenstein’s terminology, a separate “language game,” then there can be no way to judge between them, and truth can only be something internal to the particular religious system. While postliberals do draw upon Wittgenstein’s understanding of language games in developing their understanding of religion as cultural or semiotic systems, and some of the other scholars who have influenced them tend in the direction of Wittgensteinian fideism, postliberals are not themselves Wittgensteinian fideists. All of the central figures in postliberal theology have asserted the compatibility of their views with making truth claims about the Christian world view. They argue that the mistake of their critics is to believe that truth can be found through universal standards of rationality or experience that are independent of particu-


386 For a brief discussion of Wittgenstein’s understanding of “language games,” see Placher, supra note 358, at 58.

387 Kai Nielsen articulated this critique in his famous article Wittgensteinian Fideism, 42 PHILOSOPHY 191 (1967). See Placher, supra note 358, at 57–61, for a good discussion of Nielsen’s description of Wittgensteinian fideism as well as some of the scholars who have been identified by Nielsen and others as Wittgensteinian fideists.

388 Indeed, both Lindbeck and Frei use the term “language game” to describe religious systems. See Frei, supra note 325, at 13; Lindbeck, supra note 267, at 33.

389 For example, Lindbeck draws upon the work of Peter Winch, see Lindbeck, supra note 267, at 20, who was the object of Nielsen’s critique, see Placher, supra note 358, at 57–61 (discussing Winch’s work and Nielsen’s critique), and he also draws on Paul Holmer’s work on theology and Wittgenstein, see Lindbeck, supra note 267, at 28 n.28, which has strong affinities with the Wittgensteinian fideist position, see Placher, supra note 285, at 408 n.35.

390 See Placher, supra note 285, at 408–10, for a defense of postliberalism against this charge. Frei distinguishes the position of Karl Barth, whose theology was a formative influence on his own thought, from the Wittgensteinian fideist position in Frei, supra note 325, at 46–55.

391 See, e.g., Lindbeck, supra note 267, at 68–69 (“[N]othing in the cultural-linguistic approach . . . requires the rejection (or the acceptance) of the epistemological realism and correspondence theory of truth, which, according to most of the theological tradition, is implicit in the conviction of believers that when they rightly use a sentence such as “Christ is Lord” they are uttering a true first-order proposition.”); Frei, supra note 370, at 144 (stating that postliberal theology does not “preclude inquiry into either the fact or the character of possible truth claims involved in the literal reading of the Gospels”); Thiemann, supra note 267, at 93–94 (asserting that postliberal theology is consistent with making historical and ontological truth claims); Placher, supra note 358, at 117 (“Those who admit they argue out of a tradition—as I have been claiming Christians should—can nevertheless believe in the truth of their claims: truth not just for them but for everyone.”).
lar historical communities. For postliberals, humans all "stand within traditions," and truth is something which can be attained only in and through particular religious communities. People do not reason to religion as Jefferson envisioned, nor do they find it deep within the self or as the result of a direct revelation from God to the individual. Rather, they learn it, and thus, it is only in the context of particular religious communities that it makes sense to talk about religious truth.

Postliberals do not exclude a role for "ad hoc apologetics" in defending the truth of religious claims. For example, Lindbeck argues that religions can be tested for their "assimilative powers" or, in other words, their "ability to provide an intelligible interpretation in [their] own terms of the varied situations and realities adherents encounter," and some may be found wanting. However, religions can-

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392 See, e.g., Lindbeck, supra note 267, at 129–30; Placher, supra note 358, at 19, 34–35, 55, 123.
393 Placher, supra note 358, at 12.
394 Lindbeck writes that religious sentences "acquire enough referential specificity to have first-order or ontological truth or falsity only in determinate settings," Lindbeck, supra note 267, at 68, and truth claims "cannot be made except when speaking religiously, i.e., when seeking to align oneself and others performatively with what one takes to be most important in the universe by worshiping, promising, obeying, exhorting, preaching," id. at 69. For additional information, see also Ronald F. Thiemann, Religion in Public Life: A Dilemma for Democracy 171 (1996) ("The important fact to note here is that all moral reflection finds its natural home in particular communities of practice and discourse . . . ."), Stanley Hauerwas, The Peaceable Kingdom: A Primer in Christian Ethics 1 (1983) ("All ethical reflection occurs relative to a particular time and place.").
395 Frei introduced this term in an essay on Karl Barth. See Hans W. Frei, Eberhard Busch's Biography of Karl Barth, reprinted in Frei, supra note 325, at 147, 161. The term reappears throughout postliberal thought with its meaning varying somewhat depending upon the particular context and user. See, e.g., Lindbeck, supra note 267, at 131; Placher, supra note 358, at 167; William Werpehowski, Ad Hoc Apologetics, 66 J. Religion 282 (1986).
396 Most, however, give greater emphasis to the role of theology in "redescribing" the faith, see, e.g., Frei, supra note 325, at 81; Thiemann, supra note 267, at 72, and for some of those who share postliberal inclinations, redescription is the best form of apologetics, see Placher, supra note 358, at 134–35.
397 Lindbeck, supra note 267, at 131; see also Bruce D. Marshall, Absorbing the World: Christianity and the Universe of Truths, in Theology and Dialogue: Essays in Conversation with George Lindbeck 69, 78–79 (Bruce D. Marshall ed., 1990) [hereinafter Theology and Dialogue] (expanding on Lindbeck's discussion of "assimilative powers"). According to Marshall, one of the virtues of using "assimilative powers" as a criterion of truth is that this criterion can be acceptable to both Christians and those outside the Christian community. See id. Many postliberals argue that it is only possi-
not be constructed through reason or experience, and apologetics must always begin with a particular tradition. Similarly, postliberals do not deny that God may play an active role in shaping religious identity and drawing people to faith. However, God accomplishes this by working in and through religious communities not outside of or prior to them.

The implications of postliberal theology for thinking about the proper relationship between religion and government are potentially diverse. Certainly postliberal theology undercuts the theological assumptions that supported strict separationism in the founding era as well as the assumptions that continue to reinforce it in modern theology. Religion for the postliberal is an essentially communal phenomenon, and socialization into a religious community is how faith is formed and sustained. There is no direct link between God and the individual in either reason or converting grace which can be counted on to sustain faith without the support of religious communities. Nor is there an innate religious dimension to human experience which will ensure that individuals will seek whatever communal support they do need. To be sure, humans will probably always require interpretive frameworks to give meaning and direction to their lives, but these frameworks could be secular and there is no inherent relationship between the individual and God that will guarantee a religious perspective.

It does not follow, however, from the essentially communal nature of religious faith that state aid or recognition is needed to sup-
port religious communities. Those who defended mild establishments in the founding era not only believed that faith requires formation in a religious community, but they also tended to believe that human nature was too sinful and weak to sustain religious communities without state assistance. By contrast, some of the leading figures in the postliberal tradition have argued that religious communities can thrive well, and even better, where church and state are completely separate. For example, Stanley Hauerwas, who is a religious ethicist in the postliberal tradition, argues that a "sense of separateness" from the state and larger society is necessary to preserve the "distinct identity of the church as an "alternative polity" to modern liberal culture. Hauerwas believes that too close a union between church and state endangers the integrity of the Christian community, and he expressly rejects the view that the church should seek to justify itself by what it can do for state and society. In Hauerwas's view, the church should not reject the world, but it can best serve society where it maintains its independence as a "contrast model' for all polities that know not God." Lindbeck has argued that a sense of separation, or what he calls "sociological sectarianism," is inevitable if the church is to survive in an increasingly secular society. According to Lindbeck, as society

401 Hauerwas expressly adopts the label "postliberal" and extends Lindbeck's methodology to the field of religious ethics. See HAUERWAS, supra note 325, at 1.
402 HAUERWAS, supra note 382, at 2.
403 Id. at 1.
404 Id. at 86.
405 See id. at 1, 74, 83.
406 See id. at 10, 85; see also HAUERWAS, supra note 325, at 1.
407 HAUERWAS, supra note 382, at 84; see also HAUERWAS, supra note 325, at 12 ("[T]he church's social ethics is first and foremost found in its ability to sustain a people who are not at home in the liberal presumptions of our civilization and society.").
409 The following discussion will be based largely on a series of articles that Lindbeck wrote in the 1960s and 1970s as well as The Nature of Doctrine. In these articles, Lindbeck predicted the thorough secularization of society, see Lindbeck, Ecumenism, supra note 408, at 4–7; Lindbeck, Sectarian Future, supra note 408, at 228, and he argued that the sociological sectarianism that would be necessary for Christianity to survive in such an environment would be good for the churches as well as society at large, see infra notes 413–15 and accompanying text. As discussed in infra note 415, Lindbeck has had second thoughts about whether the end of cultural Christianity will be good for society even if society will benefit from revitalized Christian communities. Lindbeck now also holds out the possibility that society will not become
becomes more thoroughly secularized and religious beliefs and language are banished from the public realm, people who do hold religious views will have to separate themselves sociologically from the surrounding culture and form close-knit groups of mutual support and fellowship.410 Lindbeck is optimistic about this development for Christianity, and he envisions a future in which Christianity thrives as a "strongly deviant minority, unsupported by cultural convention and prestige,"411 but nourished from within by strong "communal enclaves."412 Like Hauerwas, Lindbeck does not believe that separation will be harmful to religion. To the contrary, he expects that it will revitalize Christian communities413 and provide a model for the rest of society.414 Thus, for both Hauerwas and Lindbeck, religion will not only survive where there is a strict separation of church and state, but it will thrive.415


410 See Lindbeck, Ecumenism, supra note 408, at 5, 8; Lindbeck, Sectarian Future, supra note 408, at 229; Lindbeck, supra note 267, at 78, 133–34.

411 Lindbeck, Sectarian Future, supra note 408, at 227.

412 Lindbeck uses the term "communal enclaves" in The Nature of Doctrine. Lindbeck, supra note 267, at 127. In his earlier work, he speaks of "sectarian enclaves." Lindbeck, Ecumenism, supra note 408, at 15. For Lindbeck's optimism that Christianity will survive in this form, see id. at 5–6, and Lindbeck, Sectarian Future, supra note 408, at 237.

413 See Lindbeck, supra note 267, at 134; Lindbeck, Sectarian Future, supra note 408, at 237, 239. Lindbeck's hope is for an interdenominational, transcultural fellowship of Christian groups that will cross national boundaries. See Lindbeck, Ecumenism, supra note 408, at 16–17; Lindbeck, Sectarian Future, supra note 408, at 239. For a discussion of Lindbeck's most recent work on these "intercontinental and interconfessional communal networks," see Lindbeck, supra note 409, at 496. Lindbeck speaks of this vision as an "Israel-like view of the church." Id.

414 See Lindbeck, supra note 267, at 127; Lindbeck, Ecumenism, supra note 408, at 15–17. See David H. Kelsey, Church Discourse and Public Realm, in THEOLOGY AND DIALOGUE, supra note 397, at 7, for a refutation of the charge that the sectarianism envisioned by Lindbeck is equivalent to isolationism. According to Kelsey, Lindbeck sees the Christian sects of the future as engaged in the public realm as "creative minorities." Id. at 14 (quoting Lindbeck, Ecumenism, supra note 408, at 9); see also id. at 19, 28. For an example of this charge, see James M. Gustafson, The Sectarian Temptation: Reflections on Theology, the Church and the University, in 40 Catholic Theological Society of America, Proceedings of the Annual Convention 83 (George Kilcourse ed., 1985)

415 It is important to note that in his most recent writings on this issue, Lindbeck is no longer so optimistic that the end of cultural Christianity will be good for society. Lindbeck worries that even if the church will thrive in such an environment, he "find[s] [himself] thinking that traditionally Christian lands when stripped of their historic faith are worse than others." Lindbeck, supra note 409, at 495.
Not all postliberals share Lindbeck or Hauerwas's view that the separation of the church from the larger culture is good for religion or good for society. For example, Ronald Thiemann argues that Christians and others with strong religious convictions should view themselves as full participants in public life and bring their particular traditions to bear in this engagement. 416 While William Placher approves of a "modest dose of sectarianism," 417 he also believes that it is important for Christians to seek common ground with nonchristians on public issues, 418 and for both Placher and Thiemann, those with strong religious convictions should recognize that they may have something to learn as well as to give to the larger society. 419 Others have criticized Lindbeck and Hauerwas's position for resting on the false assumption that it is even possible to separate religious belief systems from larger cultural influences. 420 Because religious individuals interact with those who do not hold strong religious views in a variety of settings, they are constantly exposed to alternative ways of construing reality, and sociological separation from the larger culture is not possible. 421 In this view, religious and nonreligious world views will necessarily influence one another. 422

If, in fact, separation of religious belief systems from larger cultural influences is neither possible nor desirable, then the postliberal understanding of the nature of religious belief and how faith is formed and sustained suggests that a strict separation of church and state will harm religion. In the postliberal view, the survival of religion depends on healthy religious communities whose symbols, rituals, and values can function as an integral part of the individual's conduct and thought. If religious belief systems no longer function as the central interpretative schemes within which individuals understand their lives, then religion will wither and die. A strict separation of religion from

416 See Thieman, supra note 268, at 19, 23–25; see also Thieman, supra note 394, at 169–73.
417 Placher, supra note 358, at 169.
418 See id. at 167.
419 See id. at 147 ("[A] nother reason for pursuing serious discussion on any topic is the possibility that I might be wrong, and the discussion might help me to recognize my error."); see also Thieman, supra note 268, at 23 ("[E] ntrace into the public sphere is filled with genuine risk, including the possibility that some of the [religious] community's most basic convictions might have to be reformed or even jettisoned.").
420 Gustafson made this argument in one of the early critiques of postliberalism. See Gustafson, supra note 414, at 90–91. As will be discussed further below, other theologians with roots in postliberal theology have been voicing a similar criticism in recent years. See infra notes 426–50 and accompanying text.
421 See Gustafson, supra note 414, at 90–91.
422 See id.
government should not harm religion where the state is small. In that case, religious beliefs and values can still permeate and shape the bulk of one's existence even if religious symbols and language are removed completely from the governmental sphere. However, as the state grows larger and occupies a greater space within the individual's larger cultural universe, the removal of religion from this aspect of public life may threaten the survival of religion by reducing its relevance to one's life. To use Lindbeck's phrase, in that case, the Bible will no longer "absorb the world" but the world will absorb the Bible. Even if religion survives, it will become increasingly secularized, as permitting secular, but not religious, messages in the governmental sphere unfairly weights the inevitable exchange and mutual influence of religious and nonreligious belief systems in favor of the secular.

Lindbeck argues that religions will not be harmed by their exclusion from the public sphere as long as religious individuals receive the support that they need through close-knit fellowships of mutual support. Lindbeck might be correct if religious communities were physically separated from the rest of the populace as the Amish or Hasidic Jews, but neither Lindbeck nor Hauerwas envisions such physical isolation. In other cases, however, the boundaries between religious and nonreligious belief systems will necessarily be porous, and if religion is excluded from a significant portion of the individual's life, its continuing relevance will be threatened. This is especially the case where the state assumes a role in transmitting values to and forming the character of the next generation as in the operation of public schools. However, it will also be true where the state plays a role in celebrating the important events in the lives of its citizens but can only celebrate those events, or those portions of events, which are secular in nature. The argument developed here is not that the state must play a pro-active role in supporting religious communities; few theologians would take the position of those in the founding era who expected government to affirmatively aid religion. Rather, the claim is that without some acknowledgment or recognition in the governmental sphere of the central role that religion plays within many people's

423 See Lindbeck, supra note 267, at 118, for this famous phrase. See also text accompanying note 379, for further discussion of Lindbeck's use of this phrase.

424 See Lindbeck, Sectarian Future, supra note 408, at 231 (stating that "ghetto-like enclosures similar to those of the Pennsylvania Amish or Hasidic Jews" are incompatible with the Christian mission to serve all nations); see also HAUERWAS, supra note 325, at 1 ("I have no interest in legitimating and/or recommending a withdrawal of Christians or the church from social or political affairs.").
lives, the exchange that will inevitably take place between religious and nonreligious belief systems will not be a fair one.

C. Theology in the 1990s

The debates between those in the modern tradition of theology and the postliberals took place largely in the 1980s. The aftermath of these debates has been a very different theological landscape in which the modern perspective has diminished in importance and some of the fundamental insights of the postliberal theologians have been taken in new directions. While the 1980s generated discussion on a wide range of issues over the past decade, this Section will discuss two developments which are especially significant for the issues in this Article.

The first of these developments has been in the area of postliberal theology. While the postliberal understanding of religion as a fundamentally communal phenomenon has gained an increasing number of adherents, a number of theologians in the 1990s are criticizing the first generation of postliberals for what they believe is a far too static understanding of religion. These theologians agree with the basic postliberal insight that religions are like cultures which shape life and thought and give structure to human experience. However, they argue that neither religions nor cultures are self-contained or coherent wholes into which individuals are simply socialized or trained in a passive way. Rather, religious systems are constantly undergoing a process of change and development as their members struggle over different possible interpretations of their basic texts, symbols, and practices, and as religious systems interact with outside influences. For example, Kathryn Tanner, whose work grows out of the postliberal tradition, has emphasized the essential "porousness" of religious systems. According to Tanner, religions are always in in-

425 For example, one of these issues has been the nature and task of theology, including both its relevance to the larger cultural environment in which it takes place and its connection to the traditions out of which it speaks.
428 See, e.g., Tanner, supra note 284, at 152 (stating that boundaries between Christian and nonchristian ways of life are "fluid and permeable"); id. at 108 (asserting that there can be no "sharp cultural boundary" between religious and other ways of life).
teraction with one another and with nonreligious ways of life,\textsuperscript{429} and thus, the identity of a religious community will necessarily be "impure and mixed, the identity of a hybrid that always shares cultural forms with its wider host culture and other religions."\textsuperscript{430} While Lindbeck has argued that there is an enduring doctrinal "core" to the Christian faith that remains constant even as other elements within the framework change,\textsuperscript{431} Tanner argues that there is no unchanging core and that even a religion's most central beliefs are open to outside influence and development.\textsuperscript{432}

For Tanner, the fact that one cannot separate or preserve Christian beliefs from change is a good thing. Tanner is concerned that any attempt to preserve an enduring core of Christian beliefs and practices from change may lead to a confusion of what is necessarily a human product with the truth that it endeavors to witness to.\textsuperscript{433} Tanner

\textsuperscript{429} See id. at 113.

\textsuperscript{430} Id. at 114.

\textsuperscript{431} See LINDBECK, supra note 267, at 82. Lindbeck and other postliberal theologians have always recognized that religions undergo change and development. They have, however, tended to believe that there is an underlying doctrinal "core" or "internal logic" to the Christian faith that remains constant even as the first order beliefs and practices these doctrines regulate change. See, e.g., id. (stating that the "doctrinally significant grammatical core" of a religion stays the same even as the first order claims which these doctrines regulate will change as the system interacts with "the shifting worlds that human beings inhabit"); FREI, supra note 325, at 2 (advocating a "descriptive" method in theology that seems to "articulate the 'grammar,' or 'internal logic,' of first-order Christian statements"); THIEMANN, supra note 267, at 22 (asserting that the goal of theology is to "understand more fully and more critically the Christian faith in order that the community might better exemplify the Christian identity to which it has been called"); Placher, supra note 358, at 135 ("Christian theology needs to take the form that Frei sees in Barth: a description of the world as seen from a Christian perspective that draws what persuasive power it has from the coherence and richness of the whole.").

While basic beliefs may change, such change should be slow if the basic framework is to remain stable. See THIEMANN, supra note 394, at 134; cf. PLACHER, supra note 358, at 149 ("Serious dialogue indeed requires openness to change, but it also demands a sense of how significant changing one's faith would be."). For Tanner, by contrast, change is part of the very essence of religious and other cultural systems, and she envisions Christianity more as a "community of argument" than a relatively stable set of beliefs and practices. See TANNER, supra note 284, at 154.

\textsuperscript{432} See TANNER, supra note 284, at 114–15, 138–39.

\textsuperscript{433} See id. at 136–38, 149–51.
ner does believe that Christians and members of other religions can proclaim truths of universal significance, but truth should not be identified with any particular historical practice or formulation. All religious claims must be provisional, and truth is better served where communities remain open to correction from outside as well as to diverse points of view within the community.

Other theologians from outside the postliberal tradition have also found the postliberal insight into the communal nature of religion and its resemblance to a cultural system to be valuable, but they have done so with Tanner’s reservations. For example, Delwin Brown describes religious traditions as one type of “cultural negotiation.” Cultures are not static, coherent wholes but processes of “negotiation” in which identities are “constantly sought, achieved, threatened, subverted, revised, and . . . replaced.” Religious traditions are the negotiation of identity within a canon of stories, myths, doctrine, symbols, and rituals, and like Tanner, Brown emphasizes that the border separating a religious tradition from surrounding cultures is “exceedingly porous” and that even the canon itself is open to change. According to Brown, change and development within religious traditions are good things because without them the traditions would suffer from “stifling uniformity” and become a “tomb.” For Linell Cady, openness to change is also necessary to ensure that religious communities and traditions best reflect truth. Cady approves of Lindbeck’s understanding of religion as a cultural-linguistic framework, and she also agrees that the historically and socially conditioned character of all human reflection means that truth is not something which can be achieved by the individual alone but is, rather, something which is found through communities. However, like Tanner, Cady emphasizes that truth should never be identified

434 See id. at 69.
435 See id. at 136.
436 See id. at 150.
437 See id. at 150–51.
438 See id. at 154–55, 174–75.
439 BROWN, supra note 426, at 67, 114.
440 Id. at 66.
441 See id. at 77.
442 Id. at 26; see also id. at 116.
443 See id. at 78.
444 Id. at 87–88.
445 Id. at 116. Brown writes that “creativity, imagination, construction [are] inescapable, and . . . [they are] good . . . .” Id. at 141.
446 See Cady, supra note 427, at 59.
447 See id. at 78.
with any particular communal consensus.\textsuperscript{448} All such consensuses are necessarily limited and provisional,\textsuperscript{449} and thus, the pursuit of truth requires a commitment to inquiry and debate which is open to all perspectives.\textsuperscript{450}

The work of Tanner, Brown, and Cady builds on the earlier arguments of those who have criticized Lindbeck and Hauerwas for believing that it is possible or desirable to preserve the separateness of religious belief systems from infiltration by the surrounding secular culture. If the boundaries of religious belief systems are inherently permeable, the separation of religion from the larger culture is not possible, and if truth is better served by an openness to outside influence, separation is not desirable. This exchange between religious and nonreligious world views is to be welcomed, but the exchange must presumably be a fair one. To the extent that a strict separation of religion from government unfairly weights the process of exchange in favor of the secular, it can lead to the dominance of the religious by the secular and, furthermore, can impede the progress of truth by marginalizing religious points of view.

Another development in the 1990s which is significant for the issues in this Article has been the decreasing influence of the modern perspective in theology together with its claim that all humans share a common religious experience which places them in an innate relationship to the divine. In the debates in the 1980s over the nature of religious experience, postliberalism was the victor.\textsuperscript{451} Even the heirs of the modern tradition now place an increasing emphasis on the particularity of religious experience,\textsuperscript{452} and most theologians would agree with the postliberals that human experience and knowledge is shaped in significant ways by the traditions and cultures within which people live.\textsuperscript{453} Tracy's more recent work reflects this "post-modern" shift among theologians outside the postliberal camp. While Tracy has not expressly repudiated his claim in \textit{Blessed Rage for Order} that

\begin{itemize}
\item \textsuperscript{448} See id.
\item \textsuperscript{449} See id. at 80.
\item \textsuperscript{450} See id. at 79–80.
\item \textsuperscript{451} See Thiemann, \textit{ supra} note 394, at 162 (asserting that nonfoundationalism "has gained widespread acceptance in both philosophical and theological circles"); Marshall, \textit{ supra} note 397, at 88 (stating that foundationalist approach underlying modern theology is "being increasingly repudiated in contemporary theology, not only by the postliberals, for whom it is clearly uncongenial, but also among theologians with strong revisionist or liberal commitments as well").
\item \textsuperscript{452} See W. Clark Gilpin, \textit{A Preface to Theology} 156–57 (1996).
\item \textsuperscript{453} See id.
\end{itemize}
theology can investigate common religious experience,\textsuperscript{454} his focus in recent years has been on the particularities of religious traditions,\textsuperscript{455} and he now argues that it is through these particularities that truth is found.\textsuperscript{456} Tracy also places a new emphasis on the fundamental differences among religious traditions, and he has argued that there is "no single essence, no one content of enlightenment or revelation, no one way of emancipation or liberation, to be found in all that plurality."\textsuperscript{457}

Many other contemporary theologians have gone even further than Tracy in rejecting the notion of a common religious experience and emphasizing the diversity of religious experience and traditions. For these theologians, religious experience and traditions are "radically" pluralistic.\textsuperscript{458} For example, Sallie McFague argues that all human experience is "embodied,"\textsuperscript{459} which means that it is "radically concrete"\textsuperscript{460} and varies with the particularity of one's own physical existence as well as with one's cultural, economic, racial, and gender situation.\textsuperscript{461} Gordon Kaufman's recent work also emphasizes the

\textsuperscript{454} See Placher, supra note 358, at 155. Indeed, Tracy has expressly claimed that he has not abandoned his prior position. See David Tracy, Defending the Public Character of Theology, 98 Christian Century 350, 352 (1981).

\textsuperscript{455} Tracy's more recent focus has been on what he calls "systematic" as opposed to "fundamental" theology. While fundamental theologies seek to "provide arguments that all reasonable persons . . . can recognize as reasonable," systematic theologies "have as their major concern the re-presentation, the reinterpretation of what is assumed to be the ever-present disclosive and transformative power of the particular religious tradition to which the theologian belongs." David Tracy, The Analogical Imagination 57 (1981). Blessed Rage for Order, Tracy argues, was an exercise in fundamental theology, see Tracy, supra note 454, at 352, and his later work focuses on systematics, see id.

\textsuperscript{456} See, e.g., David Tracy, Particular Classics, Public Religion, and the American Tradition, in Religion and Public Life: Interpretations and Explorations 115, 118-21, 123-24 (Robin W. Lovin ed., 1986) (arguing that classic works of religion are highly particular in both origin and expression, but have public effects); Tracy, supra note 454, at 353.

\textsuperscript{457} David Tracy, Plurality and Ambiguity: Hermeneutics, Religion, Hope 90 (1987).


\textsuperscript{459} McFague, supra note 458, at 86.

\textsuperscript{460} Id.

\textsuperscript{461} See id. at 87.
"magnificent diversity" of human life. For Kaufman, religious traditions are "imaginative constructions" by which humans seek to orient themselves to the "ultimate mystery within which our existence falls." The different traditions which humans have constructed are "enormously diverse and diffuse." Kaufman sees no common perspective that underlies them all, and he recognizes that not all world views need be religious.

Theologians who emphasize the radical particularity of religious experience do not necessarily reject efforts to seek unity among these different perspectives, but the unity that they seek is one that respects and retains difference. For example, Kaufman argues that the recognition of diversity should lead to a deep "respect for every expression of the ultimate mystery of things," and he develops a model of theology as an open conversation which includes all interested voices and the great diversity of perspectives that they bring. McFague also advocates a "spirit of collegiality" in theology that is inclusive of a broad range of perspectives and experiences, and in her recent book on The Body of God, she promotes her model of the universe as the body of God as furthering a sense of commonality and unity that is not characterized by sameness but by respect for difference and diversity. For Walter Lowe, the application of deconstructionism to theology and the insights it brings can also help to "set [us] on a common footing with our fellow human beings," open space for the "free play of human activity in all its creaturely variety," and free creation to be what it is: "various, many-faceted, a festival of innocent difference."

This shift in contemporary theology to emphasizing the particularity and diversity of religious experience can, but does not need to,
support an individualistic understanding of religion and, thereby, reinforce the theological assumptions underlying strict separationism in the founding era. The more important implication of this development for understanding the relationship between religion and government lies, however, in its recognition of the pluralistic character of religion. As will be further developed in the following section, a similar understanding of religion as inherently pluralistic lies behind the endorsement approach advocated by Justice O'Connor and embraced by a number of other Justices. Where religious experience is seen as necessarily diverse and equal respect for all perspectives is an important goal, it is natural to follow Justice O'Connor in limiting religious expression by the state to those forms of expression which do not unfairly endorse one religion over another or religion over nonreligion.

III. Divisions on the Court

In this Part, the historical analysis and contemporary theological debates discussed above will be used to help clarify the differing theological assumptions which underlie the divisions in the Court's recent jurisprudence regarding religious expression by the state. As noted in the Introduction, the Court's current jurisprudence in this area began to take shape in 1983 with its decision in *Marsh v. Chambers*,477 and since that time, three general positions have emerged among the Justices. They include a separationist position, the endorsement approach, and accommodationism. Disagreements among the Justices, particularly among separationists and supporters of the endorsement approach, on the one hand, and accommodationists on the other, have often been bitter and intense, and one of the most important sources of disagreement is over which approach is best for religion. All of the Justices defend their position as best for religion, and while their opponents suspect them of disingenuousness and the Justices repeatedly accuse one another of hostility to religion or religious liberty, their opinions make clear that each faction does, in fact, care deeply about religion. What they disagree about is their theological assumptions regarding the nature of religious belief, how it is formed and sustained, and what is required for its protection. This Part will endeavor to promote greater understanding of the divisions on the Court by laying out where the Justices' theological differences lie.

A. The Positions of the Justices

In order to clarify the theological divisions which underlie the Court's disagreements, it is first necessary to begin with a brief overview of the case law in this area and the different positions that have emerged among the Justices. Over the past sixteen years, the Court has decided four cases directly addressing the scope of permissible religious expression by the state. The first of these cases was Marsh, which addressed the constitutionality of legislative chaplains paid by the state. The plaintiff in Marsh was a member of the Nebraska Legislature who objected to the legislature's practice of opening its sessions with a prayer by a chaplain compensated with public funds. In an opinion written by Justice Burger, the Court held that the practice of the Nebraska Legislature did not violate the Establishment Clause. Justice Burger's opinion reflects an accommodationist approach which he and Justice Kennedy elaborate more fully in later cases. Justice Brennan wrote a separationist dissent joined by Justice Marshall, and Justice Stevens also wrote a short dissenting opinion.

A year later, in Lynch v. Donnelly, the Court decided the first of its holiday display cases. At issue in Lynch was the constitutionality of a crèche which the City of Pawtucket, Rhode Island, included as part of its annual Christmas display. The City's display also included a variety of secular symbols of Christmas, such as a Santa Claus house, reindeer, candy-striped poles, a Christmas tree, carolers, as well as a clown, an elephant, and a teddy bear. In another opinion written by Justice Burger, the Court found that the inclusion of the crèche in the holiday display did not violate the Establishment Clause. Justice O'Connor wrote a concurring opinion laying out her endorsement approach. Justice Brennan wrote a dissenting opinion reflecting both separationist and endorsement elements, and he was joined by Justices Marshall, Blackmun, and Stevens. Justice Blackmun wrote a short dissenting opinion joined by Justice Stevens.

Two additional holiday displays were considered by the Court five years later in County of Allegheny v. ACLU. Both displays were located on public property in the downtown area of Pittsburgh. The first was a crèche donated by a Roman Catholic organization and dis-

478 See id. at 784–85.
480 See id. at 670–71.
481 See id. at 671. The display also included hundreds of colored lights and a large banner reading "SEASONS GREETINGS." Id.
483 See id. at 578 (plurality opinion).
played on the Grand Staircase of the Allegheny County Court-
house. No other figures or decorations were included in the
display except for the County's addition of poinsettia plants around
the fences surrounding the display and its placement of two small
Christmas trees behind each of the two endposts of the fence. The
second display was a Chanukah menorah placed outside the City-
County Building next to a Christmas tree and a sign saluting liberty.
The menorah was owned by a Jewish organization but was stored and
erected annually by the City. The Court held that the crèche vi-
olated the Establishment Clause but the menorah was constitutional.
Justice Blackmun wrote a part majority, part plurality decision relying
primarily on Justice O'Connor's endorsement test. Justices Marshall,
Brennan, O'Connor, and Stevens joined Justice Blackmun's opinion
regarding the crèche. Justice O'Connor joined the judgment of the
Court regarding the menorah, but she disagreed with Justice Black-
mun's application of the endorsement test and defended her own in-
terpretation in a concurring opinion. Justice Brennan wrote an
opinion arguing that both displays were unconstitutional. His opin-
ion combined both separationist and endorsement elements and was
joined by Justices Marshall and Stevens. Justice Stevens also wrote an
opinion with both separationist and endorsement elements, and he
was joined by Justices Marshall and Brennan. Justice Kennedy de-
fended accommodationism in an opinion dissenting from the Court's
decision regarding the crèche and concurring in the judgment re-
respecting the menorah, and he was joined by Justices Rehnquist, White,
and Scalia.

The Court's final case addressing religious expression by the state
was Lee v. Weisman in 1992. Weisman addressed the constitutionality
of inviting clergy members to deliver prayers at public school gradu-
ation ceremonies. The accommodationists were divided in Weisman.
Justice Kennedy wrote the majority opinion arguing that the practice
placed impermissible coercive pressures on students to participate in
the prayers. Justice Scalia wrote a dissent arguing that the prayers

484 See id. at 578, 579, 580.
485 See id. at 580.
486 See id. at 578. The sign included the Mayor's name and was entitled "Salute to Libery." Id. at 582. Beneath the title were the following words: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." Id.
487 See id. at 587.
489 See id. at 580.
490 See id. at 592–98.
were a permissible accommodation of religion, and he was joined by Justices Rehnquist, Thomas, and White. Justice Blackmun wrote a concurring opinion with strong separationist elements and was joined by Justices Stevens and O'Connor. Justice Souter wrote a concurrence using the endorsement test and was joined by Justices Stevens and O'Connor.

1. Separationism

The separationist strain in the Court's jurisprudence appears in all of these cases. The chief exponent of the separationist position in the first three of the Court's cases was Justice Brennan. In his opinions, he was joined consistently by Justice Marshall, usually by Justice Stevens, and sometimes by Justice Blackmun. Justice Stevens's own opinions in this area also reveal consistently separationist views, though he has never articulated his position with the level of detail and elaboration present in Justice Brennan's opinions. While Justice Blackmun was not a consistent separationist, he joined Brennan's separationist dissent in *Lynch* and also authored a concurrence with strong separationist elements in *Weisman*. Justice Ginsburg is relatively new to the Court and did not participate in any of the Court's cases addressing religious expression by the state, but a short dissenting opinion in *Capitol Square Review and Advisory Board v. Pinette* suggests that she would also support the separationist position.

While there are certainly nuances which distinguish the views of these Justices from one another, there are unifying themes among their opinions which mark the general contours of the separationist position. Like the separationists in the founding era whom they draw upon for historical support, the separationists on the Court view religion and government as two separate "spheres" or "functions".

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491 515 U.S. 753 (1995). The question in *Capitol Square* was whether an administrative agency of the State of Ohio had violated the Establishment Clause by permitting the Ku Klux Klan to erect an unattended cross on a state-owned plaza surrounding the Statehouse. See id. at 757–59. Justice Ginsburg argued that in the absence of a sturdy disclaimer, the cross violated the Establishment Clause. See id. at 817–18 (Ginsburg, J., dissenting). She left open the question of whether a cross with a sturdier disclaimer could withstand Establishment Clause challenge. See id. at 818. In her opinion, Ginsburg cited *Everson* for the principle that the "aim of the Establishment Clause is . . . to uncouple government from church." Id. at 817 (citing *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947)). Ginsburg also cited with approval Kathleen Sullivan's argument that the Establishment Clause requires the "affirmative establishment of a secular public order." Id. at 817 (citing Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. Cm. L. Rev. 195, 197–214 (1992)).

which should not be permitted to “interfere” with each other or be “mixed” together. The separationists also frequently invoke Thomas Jefferson’s famous metaphor of a “wall of separation” between church and state, and they repeat the statements of Madison, Jefferson, and the Baptist separationists that religion will thrive better where church and state are kept strictly separate. Most of the separationists on the Court have mixed their commitment to separationism with other principles as well. For example, Justice Brennan has affirmed the importance of both strict separation and neutrality as the two underlying principles of the Establishment Clause. Furthermore, all of the separationists have also combined their separation’s purpose... was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.” (quoting Everson, 330 U.S. at 31–32 (Rutledge, J., dissenting)); Weisman, 505 U.S. at 606 n.8 (“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.” (quoting McCollum v. Board of Educ., 333 U.S. 203, 212 (1948)));

493 See Weisman, 505 U.S. at 606 (Blackmun, J., concurring) (“Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate.” (quoting JEREMIAH S. BLACK, Religious Liberty, in ESAYS AND SPEECHES OF JEREMIAH S. BLACK 51, 53 (Chauncey F. Black ed., New York, D. Appleton & Co. 1885))); Marsh, 463 U.S. at 806 (Brennan, J., dissenting) (stating that religious “function[s]” should be left to “the people themselves and to those the people choose to look to for religious guidance” (quoting Engel v. Vitale, 370 U.S. 421, 435 (1962))); County of Allegheny v. ACLU, 492 U.S. 573, 653 n.14 (1989) (Stevens, J., concurring in part and dissenting in part) (same).

494 See, e.g., Allegheny, 492 U.S. at 645 (Brennan, J., concurring in part and dissenting in part).

495 See, e.g., Weisman, 505 U.S. at 606 (Blackmun, J., concurring) (“The mixing of government and religion can be a threat to free government, even if no one is forced to participate.”).

496 See Weisman, 505 U.S. at 600–01 (Blackmun, J., concurring); Marsh, 463 U.S. at 802 (Brennan, J., dissenting); see also Capitol Square, 515 U.S. at 797, 814 (Stevens, J., dissenting).

497 See Weisman, 505 U.S. at 608–09 (Blackmun, J., concurring); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 259 (1963) (Brennan, J., concurring) (“[T]he Establishment Clause embodied the Framers’ conclusion that government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other.”); see also Marsh, 463 U.S. at 821–22 (Brennan, J., dissenting) (stating that “strict separation of religion and state” does not “rob[] the nation of its spiritual identity”; it “invigorate[s] both the ‘spirit of religion’ and the ‘spirit of freedom’”).

tionist position with the endorsement test discussed below. However, what unites these Justices and defines their separationist approach is the belief that one of the central purposes of the Establishment Clause is, in Justice Ginsburg's words, to "uncouple government from church."

The separationists on the Court recognize that the separation of church and state cannot be absolute and that some contact is necessary "if government is not to adopt a stilted indifference to the religious life of the people." However, separationists define the permissible forms of contact very narrowly. For example, in his dissent in *Marsh*, Justice Brennan argues that the permissible involvements are "quite specific" and that separationism is the baseline rule where these exceptions do not apply. In both *Marsh* and *Lynch*, Brennan lists some permissible forms of involvement between religion and government. In the area of religious expression by the state, government may recognize the religious beliefs and practices of the American people as an aspect of the country's history and culture by teaching about religion in comparative religion classes in public schools, including religiously-inspired materials in classes on history and literature, and displaying religiously-inspired artifacts in a museum setting. In addition, religious practices or symbols which have lost any significant religious meaning may be used by government to

499 See infra text preceding note 535.
500 *Capitol Square*, 515 U.S. at 817 (Ginsburg, J., dissenting) (citing *Eversen v. Board of Educ.*., 330 U.S. 1, 16 (1947)). Justice Brennan also expresses the position well when he states that government has "no role" in safeguarding America's religious heritage. *Lynch*, 465 U.S. at 725 (Brennan, J., dissenting).
501 *Lynch*, 465 U.S. at 714 (Brennan, J., dissenting); see also *Marsh*, 463 U.S. at 809 (Brennan, J., dissenting).
502 *Marsh*, 463 U.S. at 809 (Brennan, J., dissenting).
503 See *Lynch*, 465 U.S. at 714-17 (Brennan, J., dissenting); *Marsh*, 463 U.S. at 809-12 (Brennan, J., dissenting). While Brennan suggests in *Marsh* that his list is exhaustive, see *Marsh*, 463 U.S. at 809 (Brennan, J., dissenting), in *Lynch* Brennan states that he does not intend to offer a "comprehensive approach" for addressing the extent to which government may permissibly acknowledge religion in its activities, *Lynch*, 465 U.S. at 715 (Brennan, J., dissenting).
505 See *Lynch*, 465 U.S. at 712 (Brennan, J., dissenting); see also *Schempp*, 374 U.S. at 300 (Brennan, J., concurring).
serve secular purposes.\textsuperscript{507} As possible examples of such practices, Brennan gives the designation of "In God We Trust" as our national motto, references to "God" in the Pledge of Allegiance, and the celebration of Thanksgiving. These practices, Brennan argues, serve to solemnize public occasions, inspire commitment to meet national challenges, or otherwise serve patriotic goals, and they do so without retaining any significant religious content or meaning.\textsuperscript{508} According to Brennan, neither the legislative prayers in \textit{Marsh} nor the crèche in \textit{Lynch} fit within any of these categories. Legislative prayer is a religious act which retains its religious significance,\textsuperscript{509} and the clergy who offer these invocations are "not museum pieces."\textsuperscript{510} Likewise, the crèche in \textit{Lynch} is a religious symbol,\textsuperscript{511} and it has neither lost its religious meaning\textsuperscript{512} nor is it being displayed in a museum setting as a religiously-inspired artifact.\textsuperscript{513} In \textit{Allegheny}, the fact that both the crèche and menorah are religious symbols was enough, in Brennan's view, to decide the case: government display of religious symbols in its holiday displays necessarily violates the separation of church and state even if other secular symbols are included in the display.\textsuperscript{514} For Brennan, government may celebrate the secular aspects of a holiday with both religious and secular meaning, but it may not celebrate the religious aspects.\textsuperscript{515}

Justice Stevens defends a similar position in \textit{Allegheny} when he argues that the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.\textsuperscript{516} As for Brennan, the baseline rule for Stevens is separation: religion and government both do better when there is a wall of separation between them and each is confined to its respective

\textsuperscript{507} See \textit{Lynch}, 465 U.S. at 716–17 (Brennan, J., dissenting); \textit{Marsh}, 463 U.S. at 818 (Brennan, J., dissenting); see also \textit{Schempp}, 374 U.S. at 303–04 (Brennan, J., concurring).
\textsuperscript{508} See \textit{Lynch}, 465 U.S. at 715–17 (Brennan, J., dissenting).
\textsuperscript{509} See \textit{Marsh}, 463 U.S. at 797, 811, 820 (Brennan, J., dissenting).
\textsuperscript{510} \textit{Id.} at 811.
\textsuperscript{511} See \textit{Lynch}, 465 U.S. at 711 (Brennan, J., dissenting).
\textsuperscript{512} See \textit{id.} at 708.
\textsuperscript{513} See \textit{id.} at 712–13.
\textsuperscript{514} See County of \textit{Allegheny} v. ACLU, 492 U.S. 573, 637, 643 (1989) (Brennan, J., concurring in part and dissenting in part).
\textsuperscript{515} See \textit{Lynch}, 465 U.S. at 710–11 (Brennan, J., dissenting).
\textsuperscript{516} See \textit{Allegheny}, 492 U.S. at 650 (Stevens, J., concurring in part and dissenting in part).
sphere. It would, however, be "absurd" to exclude all references to religion from government expression, and Stevens cites Brennan's example of religious paintings in a museum. The presumption is, however, one of unconstitutionality, and religious symbols may only be used in contexts where the message conveyed is a secular one.

2. The Endorsement Test

The second approach that the Justices have used for evaluating religious expression by the state is the endorsement test. Justice O'Connor was the first to articulate this approach in her concurrence in *Lynch* and she has elaborated upon this approach in a number of later cases. For Justice O'Connor, the purpose of the Establishment Clause is not to make a complete separation between religion and government. In a country with large numbers of religious people, the interests of church and state will frequently intersect, and the Establishment Clause does not preclude government from recognizing the role that religion plays in the lives of Americans and taking it into account in making laws and policy. What it prohibits is making adherence to religion relevant in any way to a person's standing in the political community. The Establishment Clause is violated whenever government practices "endorse" one religion over another, religion over nonreligion, or nonreligion over religion. According to O'Connor, such endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and


518 See Allegheny, 492 U.S. at 652–53 (Stevens, J., concurring in part and dissenting in part). Stevens also uses the example of a depiction of Moses with the Ten Commandments on a courtroom wall. Such a depiction would be permissible if Moses was surrounded by other great lawgivers but not if he was surrounded by other great proselytizers. See id.

519 See id. at 652–53.


521 For example, O'Connor further explained her approach one year after *Lynch* in *Wallace v. Jaffree*, 472 U.S. 38, 69–70 (1985), and she also provided further clarification in her concurrences in *Allegheny*, 492 U.S. at 623–37 (O'Connor, J., concurring in part and concurring in the judgment), and *Capitol Square*, 515 U.S. at 772–83 (O'Connor, J., concurring in part and concurring in the judgment).

522 See Jaffree, 472 U.S. at 69 (O'Connor, J., concurring in the judgment).

523 See Allegheny, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment); Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment).

524 See Jaffree, 472 U.S. at 69 (O'Connor, J. concurring in the judgment); Lynch, 465 U.S. at 687 (O'Connor, J., concurring).

525 See Jaffree, 472 U.S. at 69 (O'Connor, J., concurring).
an accompanying message to adherents that they are insiders, favored members of the political community." Government violates the Establishment Clause when its purpose is to endorse religion or when its practices have that effect regardless of purpose. Government policies which have the effect of advancing religion are permissible as long as the intent or effect is not to endorse.

For O'Connor, the endorsement test is compatible with religious expression by the state as long as the purpose and effect of the expression are not to endorse religion. Thus, government may include symbols with religious significance in holiday displays as long as the setting and context of the overall display makes clear that the government does not intend to endorse the religious significance of the symbol. O'Connor argues that the crèche in *Lynch* was constitutional because its inclusion with numerous other purely secular symbols of Christmas makes clear that the purpose of the display is not to endorse Christianity but, rather, to "celebrat[e] . . . a public holiday with traditional symbols." Likewise, O'Connor approves of the menorah in *Allegheny* because its placement next to the Christmas tree and sign saluting liberty conveys a "message of pluralism and freedom of belief during the holiday season." Although the menorah is a religious symbol which retains its religious significance, the setting of the menorah in the overall display does not endorse Judaism but, rather, conveys a message of tolerance and freedom to choose one's belief, religious or not. The problem with the crèche in *Allegheny* was that the central religious symbol of Christmas was placed alone in the county courthouse, and in this setting, the effect of the crèche was to endorse Christianity.

For O'Connor, other forms of religious expression which do not endorse religion over nonreligion are also permissible. According to O'Connor, while the legislative prayers at issue in *Marsh* were undeniably a religious exercise, they serve the largely secular purposes of solemnizing public occasions and expressing confidence in the future, and their longstanding existence and nonsectarian nature negates any

527 See id. at 690.
530 Id. at 693 (O'Connor, J., concurring).
532 See id. at 635-36 (O'Connor, J., concurring in part and concurring in the judgment).
message of endorsement.\textsuperscript{533} Similarly, the longstanding "history and ubiquity" of other government acknowledgments of religion in American life, such as the printing of "In God We Trust" on our coins, the celebration of Thanksgiving, and the opening of court sessions with "God save the United States and this honorable Court," negate any message of endorsement.\textsuperscript{534} Unlike Brennan, O'Connor does believe that these longstanding practices must have an entirely secular meaning in order to pass constitutional muster as the government does not endorse the religious significance that they retain.

While Justice O'Connor argues that her endorsement test is consistent with government use of symbols or other forms of expression which retain a religious meaning as long as the overall context does not endorse, other Justices who have adopted her endorsement approach have interpreted this test much more strictly to exclude most, if not all, such forms of religious expression. The endorsement test has had broad appeal on the Court, and it has been adopted by a number of other Justices. Justice Souter uses the endorsement approach in his concurrence in \textit{Weisman}, Justice Blackmun used it in his opinion in \textit{Allegheny}, and consistent separationists such as Brennan and Stevens have also used it in conjunction with their separationist approach. While Justice Breyer has never authored an opinion using the endorsement analysis, and he did not participate in any of the Court's cases addressing religious expression by the state, he has joined opinions using the endorsement test in other areas of the Court's Establishment Clause jurisprudence.\textsuperscript{535} Justice Blackmun's opinion in \textit{Allegheny} illustrates well a narrower interpretation of the endorsement test. Whereas Justice O'Connor emphasizes that government speech need not be stripped of all religious significance to be constitutional, Justice Blackmun argues that the endorsement approach demands a "secular state."\textsuperscript{536} According to Blackmun, government expression which is not confined to the secular necessarily discriminates among citizens on the basis of their beliefs.\textsuperscript{537} Thus, Justice Blackmun agrees with Justice Brennan that the government

\begin{footnotes}
\item 533 See id. at 630-31; see also id. at 625; Lynch, 465 U.S. at 692-93 (O'Connor, J., concurring).
\item 534 See \textit{Allegheny}, 492 U.S. at 630-31, 625 (O'Connor, J., concurring in part and concurring in the judgment); Lynch, 465 U.S. at 692-93 (O'Connor, J., concurring).
\item 535 Justice Breyer joined two opinions using the endorsement test in \textit{Capital Square Review & Advisory Board v. Pinette}, 515 U.S. 753 (1995). They were written by Justices O'Connor and Souter. See infra notes 756-76, for a discussion of the issues in \textit{Capital Square}.
\item 536 \textit{Allegheny}, 492 U.S. at 610.
\item 537 See id. at 610-12.
\end{footnotes}
cannot celebrate the religious aspects of a holiday with religious and secular meaning but must limit its celebration to the secular aspects. See id. at 611–12.

For Blackmun, the menorah in Allegheny is constitutional because its setting next to a secular symbol of Christmas and a sign saluting liberty confines the celebration of Chanukah to its secular aspects. See id. at 617–20 (Blackmun, J., plurality opinion).

While Blackmun recognizes that the menorah is a religious symbol, he argues that the City did not have available a purely secular symbol for Chanukah, and that in its context, the meaning of the menorah was secular. Both Christmas and Chanukah are celebrated as secular holidays, and the symbols represent "a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition." See id.

While O'Connor's interpretation of the endorsement test leaves considerable room for religious expression by government, the trend among many of the Justices has been in favor of a stricter interpretation of the test. In addition to Blackmun, Justice Souter has also indicated that he favors a narrow interpretation of the test. In his concurrence in Weisman, he suggests that the logic of the endorsement test requires striking down not only obvious endorsements of religion like graduation prayers, but also longstanding acknowledgments of religion such as presidential religious proclamations and the religious invocations at Thanksgiving that O'Connor approves of. According to Justice Souter, these traditions are "pallid zone worlds apart" from official prayers at graduation, but they are, nevertheless, endorsements of religion. Justice Souter's suggestion that even these ubiquitous and minor acknowledgments of religion violate the Establishment Clause seems to fulfill Justice Kennedy's prophecy in Allegheny that the endorsement test, if "applied without artificial exceptions for historical practice," would invalidate most traditional government practices recognizing the role of religion in American

538  See id. at 611–12.
539  See id. at 617–20 (Blackmun, J., plurality opinion).
540  See id. at 618.
541  See id. at 617–20.
542  Id. at 618. By contrast, O'Connor argues that Chanukah need not be characterized as a secular holiday or the menorah given a secular meaning to avoid government endorsement. See id. at 634 (O'Connor, J., concurring in part and concurring in the judgment).
544  Id. It is unclear whether Souter would actually favor striking down such longstanding acknowledgments of religion. He suggests that he might permit such "trivial" practices to stand regardless of their religious import. Id.
545  Allegheny, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).
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life, from Thanksgiving Day proclamations, to references to God in the Pledge of Allegiance and the use of "In God We Trust" in the national motto. 546

Justices Souter and Blackmun’s approach to the endorsement test moves very close to that of the separationists on the Court, for whom the application of the endorsement test becomes almost indistinguishable from their separationist position. For example, in Lynch, Justice Brennan argues that any use of symbols which retain a religious meaning in a holiday display makes minority groups feel like outsiders, 547 and thus, he reaches the same result with the endorsement approach that he does with his separationist arguments. Justice Stevens adopts a similar position in Allegheny. While Stevens does not deny that the menorah may convey a message of pluralism and freedom, this possibility is not enough to overcome the strong presumption of unconstitutionality which attaches to the government display of religious symbols on public property. 548 For Stevens, where the government uses an unquestionably religious symbol like a menorah in a holiday display, the effect is almost certainly to be endorsement. 549 He and Justice Brennan both share the view that it is the menorah which gives religious significance to the tree rather than the tree which secularizes the menorah. 550

3. Accommodationism

The third position that has emerged in the Court’s case law is accommodationism. 551 Whereas several Justices have supported both separationism and the endorsement approach, accommodationists consistently object to both of these positions, and the most bitter debates on the Court have taken place between accommodationists, on the one hand, and those who support separationism or the endorsement test on the other. The accommodationist approach began to emerge with Justice Burger’s opinions in Marsh and Lynch, but was laid out most clearly by Justice Kennedy in his opinion in Allegheny. 552 Accommodationists argue that both the endorsement test and separa-

546 See id. at 670–73.
548 See Allegheny, 492 U.S. at 654–55 (Stevens, J., concurring in part and dissenting in part).
549 See id. at 654.
550 See id.; id. at 641–42 (Brennan, J., concurring in part and dissenting in part).
551 See supra note 11 on the use of the term “accommodationism.”
552 Accommodationism has antecedents in some of the Court’s earlier case law. Both Burger and Kennedy draw support for the accommodationist position from the
tionism afford too narrow a scope for religious expression by the state. The Establishment Clause does not erect a wall of separation between church and state, nor does it prohibit all government speech endorsing religion. According to Justice Kennedy, religious expression by the state which "recogniz[es]," "accommodat[es]," "acknowledges," "take[s] note" of, and even "support[s]", the central role that religion plays in American society is permissible as long as the government does not coerce individuals to participate, engage in proselytizing, or give direct aid to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." Permissible acknowledgments include "celebrat[ing]" the religious as well as the secular aspects of the holiday season with the type of displays in Lynch and Allegheny. While the permanent display of a large Latin cross on the roof-top of a city hall would be an impermissible form of proselytizing, none of the displays considered by the Court "represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion." Burger makes a similar point about the legislative prayers in Marsh. They do not represent an effort to proselytize, but are, rather, "simply a tolerable acknowledgment of beliefs widely held among the people of this country." While separationists on the Court trace their approach to the separationist principles of James Madison, Thomas Jefferson, and the Baptist tradition, accommodationists point to the numerous historical practices and longstanding traditions which are consistent with their views, and they emphasize that many of these practices can be traced back to the founding

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554 See Allegheny, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).
555 Id. at 657.
556 Id.
557 Id.; see also Lynch, 465 U.S. at 677.
559 Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).
560 See id. at 659.
561 See id. at 661.
562 Id. at 659 (quoting Lynch, 465 U.S. at 678).
563 Id. at 663.
564 See id. at 661.
565 Id. at 664.
567 Id. at 792.
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Kennedy cites Thanksgiving Day proclamations and the employment of legislative chaplains, both of which can be traced to the First Congress, as well as references to God in the Pledge of Allegiance and national motto. Burger also includes presidential proclamations of a “National Day of Prayer” each year and the commemoration of Jewish Heritage Week.

In Weisman, the accommodationists divided over whether prayers offered in connection with official public school graduation ceremonies violate the Establishment Clause. The central dispute was over whether the prayers impermissibly coerced participation of the graduates. Kennedy wrote the majority opinion arguing that coercive pressures were present. Justice Scalia wrote a dissent joined by the other accommodationists emphasizing the longstanding tradition of prayers at public school graduations and arguing that only pressures backed by threat of penalty violate the Establishment Clause’s prohibition against state coercion. It is significant to note that Kennedy’s opinion uses some separationist language that appears to be at odds with his opinion in Allegheny. While Weisman is the Court’s most recent decision addressing religious expression by the state, such separationist language has not reappeared in any of Kennedy’s later opinions under the Establishment Clause, which are generally consistent with the accommodationist approach.

B. An Individualistic Conception of Religious Belief

For the separationists on the Court, the confidence that religion will thrive best where it is kept separate from government can be explained in part by a recurring tendency to understand religion in individualistic terms. When the Justices repeat Madison’s statement that religion flourishes best where it is separate from government, they

569 See Allegheny, 492 U.S. at 671–73 (Kennedy, J., concurring in the judgment in part and dissenting in part).
572 See id. at 635–36 (Scalia, J., dissenting).
573 See id. at 640–42.
574 For example, Kennedy states that the Establishment Clause is designed to protect religion from “government interference,” id. at 589 (Kennedy, J.), and “state intervention,” id. at 591, and that “[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission,” id. at 589.
575 See, e.g., id. at 608 (Blackmun, J., concurring).
rarely examine the theological assumptions upon which Madison's statement rests. Nor do they examine the theological foundations of Baptist separationism when they cite Roger Williams's view that strict separation protects religion as well as government.\textsuperscript{576} There are, however, significant continuities between the theological assumptions which underlie the separationist views of the founding era and the separationist position on the modern Court. Like the separationists in the eighteenth century, the opinions of the Court's separationists are laced with statements that suggest an individualistic understanding of religion.

Justice Brennan expresses this understanding well in \textit{Marsh} when he describes religion as a "private matter for the individual, the family, and the institutions of private choice."\textsuperscript{577} This statement, which Brennan repeats a year later in a funding case under the Establishment Clause,\textsuperscript{578} echoes the view of Jefferson, Backus, and Leland that religion is a matter between the individual and God and that religious communities are best understood as organizations of like-minded individuals rather than as formative institutions. Many of the early separationists on the Court from \textit{Everson} through the 1960s expressed a similarly individualistic understanding of religion. Religion is for Justice Rutledge the "kingdom of the individual man and his God,"\textsuperscript{579} for Justice Douglas "an individual experience,"\textsuperscript{580} and for Justice Clark an "intensely personal"\textsuperscript{581} matter. Justice Black is quoted most frequently in the Court's recent case law. In both \textit{Marsh} and \textit{Lynch}, Justice Brennan repeats Justice Black's statement that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."\textsuperscript{582} Most of the separationists on the Court recognize a role for the guidance and instruction of religious communities, but like Madison, their statements frequently envision these communities as flowing from rather than forming the religious


\textsuperscript{579} Everson v. Board of Educ., 330 U.S. 1, 57–58 (Rutledge, J., dissenting).


\textsuperscript{581} United States v. Seger, 380 U.S. 163, 184 (1965).

choices of individuals. Justices Stevens and Brennan express this view well when they repeat Justice Black's description of religion as something which is best left "to the people themselves and to those the people choose to look to for religious guidance."\(^5\)83

These recurring statements in the Court's contemporary jurisprudence and their antecedents in earlier separationist opinions depict an understanding of religion as something which has its origins in the individual and is sustained primarily through individual choices rather than community formation. Churches and other religious communities are "institutions of private choice" and their leaders individuals whom the "people choose to look to for guidance," not vehicles for socialization. Consistent with this view is the emphasis among separationists that what is most essential for protecting religion is not reinforcing its communal manifestations in the public sphere through government-sponsored symbols or other acknowledgments of religion but, rather, protecting the religious choices of individuals. In an opinion frequently noted for its individualistic understanding of religion,\(^5\)84 Justice Stevens argues in Wallace v. Jaffree\(^5\)85 that the purpose of the First Amendment is "to curtail the power of Congress to interfere with the individual's freedom to believe, to worship and to express himself in accordance with the dictates of his own conscience";\(^5\)86 it is the "individual's freedom of conscience [that is] the central liberty . . . unif[y]ing the various Clauses in the First Amendment."\(^5\)87 Stevens repeats the familiar argument in the founding era that the only "religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."\(^5\)88 Stevens recognizes that some peo-

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586 Id. at 49 (emphasis added).

587 Id. at 50 (emphasis added).

588 Id. at 53. For similar arguments in the founding era, see Backus, supra note 160, at 198 ("[I]n Christ's kingdom each one has an equal right to judge for himself . . . [The church's jurisdiction] is only by voluntary consent; for Christ will have no pressed soldiers in his army.") ; Jefferson, supra note 45, at 77; Madison, supra note 1, at 299.
ple may not choose religion and that religious faith is not inevitable.\textsuperscript{589} However, he certainly does not expect religion to disappear or be harmed when it is left to the individual, and in his view, individual religious freedom is the only foundation for authentic religious faith.

Other separationists on the Court have also emphasized the central role of the First Amendment in protecting the religious choices of individuals. While Justice Stevens is not among them, many of the separationists on the Court have argued that the Free Exercise Clause should be construed to provide affirmative protection for individual religious freedom not only where laws intentionally infringe on religious practices but also where the burden is the result of a neutral law of general applicability.\textsuperscript{590} The debate about whether the Free Exercise Clause should be construed to require individual exemptions from neutral laws of general applicability or whether it is only a guarantee against intentional discrimination has been a central issue in Free Exercise Clause case law and in constitutional scholarship.\textsuperscript{591} Prior to its decision in \textit{Employment Division v. Smith}\textsuperscript{592} in 1990, the Court had routinely interpreted the Free Exercise Clause to require individual exemptions from neutral laws where these laws prohibited conduct compelled by religious belief (or prescribed conduct prohibited by religious belief)\textsuperscript{593} or where a law conditioned the receipt of

\textsuperscript{589} See Jaffree, 472 U.S. at 52–53.
\textsuperscript{590} Justice Ginsburg's vote with the majority in \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997), suggests that she shares Justice Steven's opinion that the Free Exercise Clause does not require exemptions from neutral laws of general applicability which burden individual free exercise. Most of the supporters of the endorsement approach have joined the other separationists in arguing that the Free Exercise Clause does require such exemptions. The exception is Justice Souter, who is undecided on the issue, see id. at 565 (Souter, J., dissenting), but has indicated that he is leaning in favor of exemptions, see id. (“I have serious doubts about the precedential value of the \textit{Smith} rule and its entitlement to adherence.”); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 575–76 (1993) (Souter, J., concurring in part and concurring in the judgment) (arguing that there appears to be a strong historical argument for exemptions).
\textsuperscript{592} 494 U.S. 872 (1990).
\textsuperscript{593} See Wisconsin v. Yoder, 406 U.S. 205 (1972).
an important benefit on conduct prohibited by an individual's religion (or denied the benefit because of conduct mandated by religious belief). Where such a burden was present, enforcement of the law against the individual religious objector was only permissible if the government justified the application of the law as the least restrictive means of achieving a compelling state interest. Many of the separationists on the Court have been the most eloquent defenders of the Court's pre-Smith case law, and while the pre-Smith Court rejected most claims for exemptions outside of the unemployment compensation context, it was usually over strong dissents by Marshall, Brennan, and Blackmun, who repeatedly emphasized the critical role of the First Amendment in protecting individual religious liberty. According to these Justices, the First Amendment is designed to give religious beliefs and practices special protections that other personal preferences do not receive, and in Lynch and Marsh, Brennan argued that one of the few permissible involvements between church and state is to facilitate the opportunities for individuals to practice their religion even when such accommodation is not required by the Free Exercise Clause. When the Court reversed its course in Smith, most of the Court's separationists joined Justice O'Connor in condemning the Court's reversal as "incompatible with our Nation's fun-

595 See Thomas, 450 U.S. at 718; see also Hobbie, 480 U.S. at 141; Sherbert, 374 U.S. at 406.
596 In Sherbert, the Court held that the South Carolina Employment Security Commission violated the Free Exercise Clause when it denied unemployment compensation to a Seventh-Day Adventist who had lost her job because she refused to work on Saturdays. Prior to Smith, the Court followed Sherbert in all of its cases addressing claims for unemployment compensation. Similar exemptions were upheld in Frazee, 489 U.S. at 829, Hobbie, 480 U.S. at 136, and Thomas, 450 U.S. at 707.
598 See Goldman, 475 U.S. at 525 (Blackmun, J., dissenting) ("If the Free Exercise Clause of the First Amendment means anything, it must mean that an individual's desire to follow his or her faith is not simply another personal preference, to be accommodated by government when convenience allows."); id. at 514 (Brennan, J., dissenting) ("Mere personal preferences in dress are not constitutionally protected. The First Amendment, however, restraints the Government's ability to prevent an Orthodox Jewish serviceman from, or punish him for, wearing a yarmulke."); Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly-held beliefs do not.").
damental commitment to individual religious liberty 600 and inconsistent with the "preferred position" 601 that religious liberty occupies in the Constitution.

While accommodationists frequently accuse separationists of hostility to religion, 602 the opinions of the Court's separationists make clear that the accusation is not true. The accommodationists and separationists do not disagree over the importance of religion and its protection; the disagreement is over the nature of religious belief and what is required for its protection. Separationists see no harm where religious expression is removed from the government sphere. Religion and religious communities will thrive on their own. The state's role is to protect independent religious choices and to permit individuals to build and support religion on their own. It is by protecting the rights of minorities "against quiet erosion by majoritarian social institutions" 603 that religion is preserved, not by acknowledging, taking note of, or otherwise supporting the beliefs of the majority through government expression.

While the discussion above reveals considerable continuities between the understanding of religion prevalent among separationists in the founding era and the views of contemporary separationists, there are also significant differences between their views, and recognizing these differences is critical for fully understanding why contemporary separationists have tended to view religion as an individual or personal matter and why they believe that government interference with religious matters is not only unnecessary but inappropriate. For Jefferson and Madison, religious belief was understood primarily as a matter of knowledge, and the link between God and the individual was located in humanity's rational faculties. For Backus and Leland, it is not reason that provides the link between God and the individual, but the direct action of God. Religion remains in significant part a matter of knowledge, but it is the Spirit of God that enlightens the mind to understand the truths of Scripture. For most contemporary separationists, on the other hand, religion has its source neither in reason nor in the direct action of God, and it is not fundamentally a matter of knowledge. For example, Justice Stevens describes religion as "the realm ... where knowledge leaves off, and where faith be-

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601 Id. at 895.
603 Goldman, 475 U.S. at 524 (Brennan, J., dissenting).
gins,"\(^{604}\) and Justices Brennan and Blackmun have also argued that religion is not a matter of reason but faith.\(^{605}\) Thus, unlike Jefferson, contemporary separationists do not expect religion to thrive without state support because the human mind will be freed to discover truth through reason, nor do they believe like Madison that the basic truths of religion are self-evident propositions shared by all humans. While separationists on the Court speak of religion as a matter of faith, their understanding of religion also differs in significant ways from the views of the evangelical Baptists. Unlike the Baptists, they tend to see religion as something distinct from knowledge, and they do not expect religion to thrive without state support because they envision the separation of church and state paving the way for the direct work of God in personal conversion experiences. Thus, while many of the statements made by the Court's separationists emphasize the individualistic nature of religious belief and the secondary role of religious communities in the formation of faith, the origins of religion, in their view, are neither rational nor evangelical. Likewise, while separationists on the Court repeatedly draw upon separationists in the founding era as historical support for their confidence that religion thrives best where it is separate from the state, the reason for their confidence lies neither in the strength of humanity's rational faculties nor in the power of God.

When the statements of contemporary separationists supporting an individualist conception of religion are examined in light of the developments in modern theology discussed above, it becomes clear that what they have in mind when they think of religion is less the type of knowledge envisioned by eighteenth-century separationists than


Indeed it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concerns of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

\(\text{Id.} \) (footnote omitted).
the kind of religious experience envisioned by modern theologians.606 Experiential language describing religion is prevalent in the opinions of the Justices. As noted above, Justice Brennan quotes twice from Justice Black's statement that religion is "too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."607 Brennan also refers to religion as "sacred matters,"608 and Blackmun describes it as a "sacred enterprise."609 Early separationists used similar language. According to Black, religion is a "holy field,"610 a "sacred area,"611 and religious choice should be as "free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells."612 These statements suggest that for today's separationists, religion is a capacity for the sacred built into human experience, something related more to feeling than to knowledge as well as something deeply personal and individual in its origins. As for the modern theologian, religion is not a product of rational investigation or the miraculous work of God, but rather a dimension of human existence that begins within the self but can be expected to express itself naturally in religious communities. While the Justices occasionally speak of these communities as merely associations of like-minded individuals or the "optional aids in individual self-realization"613 criticized by postliberals, more often they recognize, as

606 It is interesting to note that the period of ascendancy of modernism in theology corresponds roughly to the period when separationist views had their greatest influence on the Court. The separationist position held the greatest sway among the Justices from the time of the Court's decision in Everson until the 1980s. In the 1980s, the strength of separationism on the Court began to wane, and in the early 1990s, a number of the Court's leading separationists retired from the bench. See Ira C. Lupu, The Lingering Death of Separationism, 62 GEO. WASH. L. REV. 230 (1994), for a discussion of the decreasing influence of separationism on the Court beginning in the 1980s. As noted above, modernism in theology was the dominant approach in theology until the 1980s when it was challenged by postliberalism and its influence among theologians diminished significantly. While it is possible that this correspondence is just a coincidence, it is more likely that both separationists and modern theologians were influenced by similar trends of thought regarding religion that were prevalent in American society during this period.


611 Id.

612 Id. at 319.

613 LINDBECK, supra note 267, at 23.
most modern theologians do, that religious communities play a role in reinforcing faith and guiding the faithful. However, like modern theologians, they are confident that humanity's natural religious orientation will ensure that individuals will seek whatever communal guidance or support they need without external prodding.

The similarities between the separationist understanding of religion and modern theology extend to the language that they use to describe religious experience. The Court's description of religion as a "holy field" or "sacred enterprise" which is deeply "personal" in origin resonates with Schleiermacher's early reference to religious feelings as "holy feelings"\(^{614}\) arising from a "holy instinct"\(^{615}\) located in the "innermost part of humanity."\(^{616}\) Phenomenologists of religion who have followed Schleiermacher in understanding religion as something which originates in experience have also described this religious dimension to human existence as an experience of the "sacred"\(^{617}\) or the "holy,"\(^{618}\) and both Lonergan and Tillich have drawn in particular upon Rudolf Otto's discussion of religious experience as an experience of the holy.\(^{619}\)

It is clear that the separationists on the Court do not expect every individual to follow a religious path, and they probably would not agree with modern theologians that religious experience is an essential aspect of the human constitution and present in all individuals. Furthermore, with the exception of a single decision embracing Tillich's understanding of religion as "ultimate concern" in the 1960s,\(^{620}\) there is no evidence that the Justices envision a common form of religious experience underlying the various religious traditions. Certainly they do not attempt the type of precise definition of religious experience that has been the work of modern theologians. However, they do view religion as something which is, in its essence and all its forms, sacred, holy, personal, and special, and it is for this reason that government intervention in religious matters is inappropriate. Mixing the holy with mundane matters of government and politics is an

\(^{614}\) Schleiermacher, Speeches, supra note 269, at 92, 168.
\(^{615}\) Id. at 86.
\(^{616}\) Id. at 164.
\(^{618}\) See Otto, supra note 282, at 4–7.
\(^{619}\) See Tillich, supra note 282, at 12–16; Lonergan, supra note 297, at 106.
"unhallowed perversion" of religion,\textsuperscript{621} an "intrusion into sacred matters,"\textsuperscript{622} that "risk[s] secularizing and demeaning the sacred enterprise"\textsuperscript{623} and "degrad[ing] religion."\textsuperscript{624} State involvement in religion does not harm religion because it blocks the progress of reason, frustrates the work of God, or even impedes the discovery of truth; rather, its harm is that it demeans and compromises the sacred dimension of human life. Thus, Brennan objects to the legislative prayers in \textit{Marsh} because they trivialize what for many is "serious theological business."\textsuperscript{625} Similarly, government appropriation of the menorah in \textit{Allegheny} for a secular celebration of the holiday season or to send a message of pluralism or freedom is "offensive to those whose religious beliefs are not bound up with their attitude toward the Nation" and an "interference in religious matters precluded by the Establishment Clause."\textsuperscript{626} Stevens argues that devout Christians may be offended by the "commercialization"\textsuperscript{627} of the crèche in \textit{Allegheny}, and in \textit{Lynch}, he joins Blackmun in calling the use of the crèche in the Pawtucket display a "misuse of a sacred symbol."\textsuperscript{628} Nor do contemporary separationists believe that religion requires government support or recognition. While religious experience may not be a universal experience present in every individual, it is prevalent enough to ensure that religion will be an ever-present characteristic of human existence and societies in general. None of the separationists view any danger to religious faith by its separation from the governmental sphere but, rather, expect separation to "reinvigorate" it.\textsuperscript{629} In Justice Stevens's


\textsuperscript{624} Engel v. Vitale, 370 U.S. 421, 431 (1962) (stating that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion"), quoted in Lee v. Weisman, 505 U.S. 577, 606 n.8 (1992) (Blackmun, J., concurring), and in Lynch, 465 U.S. at 698 (Brennan, J., dissenting).

\textsuperscript{625} Marsh, 463 U.S. at 819 (Brennan, J., dissenting).

\textsuperscript{626} County of Allegheny v. ACLU, 492 U.S. 573, 645 (1989) (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{627} Id. at 651 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{628} Lynch, 465 U.S. at 727 (Blackmun, J., dissenting); see also id. at 712 n.19 (Brennan, J., dissenting) ("Many Christian commentators have voiced strong objections to what they consider to be the debasement and trivialization of Christmas through too close a connection with commercial and public celebrations.").

\textsuperscript{629} See Marsh, 463 U.S. at 821–22 (Brennan, J., dissenting). Brennan writes,
words, religion "never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." 630

C. The Separated Community

The discussion above examines the recurring statements in separationist jurisprudence which emphasize an individualistic understanding of religious belief. It is certainly true that part of what accounts for the separationist confidence that religion thrives best where it is kept distinct from the state is a tendency to view religion as something deeply personal in its origin rather than as something shaped and formed in religious communities. There are, however, other currents in separationist thought which do emphasize the importance of communities in shaping faith. Justice Brennan is an example of a separationist who is highly sensitive to both the individual aspects of religious faith as well as its corporate dimensions. Justice Blackmun also acknowledges the critical role of religious communities in sustaining faith in his concurrence in *Weisman*, and several of those who have followed a strict interpretation of the endorsement test also share this view. However, while these Justices are aware of religion’s important communal dimensions, like Lindbeck, they do not believe that religious communities require government aid or recognition for support, and like Hauerwas, they argue that religious communities thrive best where they are separated from the state.

Recognition of the important role that religious communities play in forming and shaping faith is seen most clearly in Justice Brennan’s opinions. While Justice Brennan frequently describes religion in terms that are very individualistic, at other times he manifests a deep awareness of the communal aspects of religion, and nowhere is this more evident than in his opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*. 651 In a

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concurrence joined by Justice Marshall, Justice Brennan expressly states that for many individuals, religion has indispensable communal elements and that these elements further the religious development of individuals by forming the context within which they realize and exercise their faith.\textsuperscript{632} Citing Karl Barth, a Swiss theologian whose work in the first half of the twentieth century was one of the most influential theological sources for postliberal theology,\textsuperscript{633} Brennan states that “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.”\textsuperscript{634} Thus, religious communities are not just associations of like-minded individuals that grow secondarily from the choices of autonomous individuals, nor do they merely reinforce or evoke a religious experience that is already present deep within the self. Rather, they can also function as the source of shared traditions and shared beliefs which give content to the individual’s religious life that could not be achieved alone. The question in \textit{Amos} was whether the exemption of religious organizations from Title VII’s prohibition against religious discrimination in employment violated the Establishment Clause.\textsuperscript{635} According to Brennan, \textit{Amos} involved the rights of both individuals, whose religious freedom is burdened by the exemption, as well as the rights of religious organizations, whose ability to define their own mission is furthered by the exemption.\textsuperscript{636} While these rights are in tension, they are also deeply related because the important communal dimension to religious belief and practice means that the “furtherance of the autonomy of religious organizations often furthers individ-

\textsuperscript{632} See id. at 341–42 (Brennan, J., concurring in the judgment).

\textsuperscript{633} See Placher, supra note 285, at 394.


\textsuperscript{635} Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on “race, color, religion, sex, or national origin.” Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e–2(a) (1994). Section 702 of the Act provides that Title VII “shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000e–1(a).

\textsuperscript{636} See Amos, 483 U.S. at 340–42 (Brennan, J., concurring in the judgment).
ual religious freedom as well. Brennan’s answer to the question in Amos was to balance these rights and permit a limited exemption for religious organizations in the nonprofit context, where employment decisions are most likely to involve religious activities essential for community self-definition.

In Amos, Brennan agreed with the majority that permissible involvements between church and state include not only endeavors to relieve burdens on individual free exercise but also efforts to protect religious communities from state interference. Brennan’s solicitude for the protection of religious organizations is also clear from his decisions in the Free Exercise context and in cases addressing intrachurch disputes. In the Free Exercise context, Brennan has joined with Marshall and Blackmun in arguing that the First Amendment not only permits, but sometimes requires, exemptions from neutral laws that burden religious communities. Brennan makes this argument most forcefully in Lyng v. Northwest Indian Cemetery Protective Ass’n. Lyng involved a Free Exercise challenge to the federal government’s plan to build a road through a portion of a national forest held sacred by three Indian tribes and used by them as an integral part of their religious worship and rituals. Brennan emphasized that religion for these Native Americans is not an individual matter but an inherently communal and site-specific enterprise. According to Brennan, the Free Exercise Clause protects not only the religious choices of individuals whose beliefs and practices are burdened by neutral government laws, but also communal ways of life which are threatened by government action. In Brennan’s view, the government’s road violates the Free Exercise Clause because it would make the practice of the Indians’ religion impossible and destroy their way of life. In support of his argument, Brennan cites the Court’s earlier decision in Wisconsin v. Yoder, which exempted the Amish from Wisconsin’s compulsory education laws on the grounds that the application of the laws would threaten the survival of their religious community and way of

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637 Id. at 342.
638 See id. at 342–46.
640 See id. at 459 (Brennan, J., dissenting).
641 See id. at 460–61.
642 See id. at 466.
643 See id. at 460–61, 466–68.
644 See id. at 466–67 (drawing support from Wisconsin v. Yoder, 406 U.S. 205 (1972)). Brennan joined the Court’s decision in Yoder.
645 Yoder exempted Amish children from compulsory school attendance after the completion of the eighth grade.
life without being justified by a sufficiently compelling state interest. In cases dealing with intrachurch disputes, Brennan has also argued that the government must be careful not to interfere with the practices of religious communities. When courts resolve these disputes, they must do so in a way that does not involve them in questions of church doctrine or polity, and when a case turns on a question of church doctrine, courts must defer to the highest tribunal in the church organization. According to Brennan, government interference into religious controversies presents “the hazards... of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”

646 See Yoder, 406 U.S. at 218, 235 (discussing the threat to the Amish communities).

647 See id. at 214–36 (discussing lack of a sufficiently compelling government interest to justify the threat); see also id. at 237–38 (White, J., with Brennan & Stewart, JJ., concurring) (“I join the opinion and judgment of the Court because I cannot say that the State’s interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.”).


650 Hull, 393 U.S. at 449; see also Milivojevich, 426 U.S. at 710 (quoting Hull, 393 U.S. at 449); Maryland & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (same). For some of the Justices, Brennan’s opinions in the intrachurch dispute area are not sufficiently protective of religious communities. In the Court’s most recent case involving an intrachurch dispute, see Jones v. Wolf, 442 U.S. 595 (1979), the Justices divided sharply over whether courts must defer to the resolution of the dispute reached by the highest tribunal in the church to consider the controversy or whether the First Amendment also permits courts to resolve intrachurch disputes using “neutral principles of law.” In an opinion written by Justice Blackmun and joined by Justice Brennan, the Court held that while courts must always defer to the highest tribunal of a hierarchical church on questions of church doctrine or polity, courts may resolve property disputes using ordinary principles of trust and property law where doing so would not involve the court in ecclesiastical controversies. See id. at 602–04. According to the Court, the virtues of the neutral-principles approach are that courts will not become entangled in ecclesiastical questions and churches can use the appropriate trust provisions and reversionary clauses to specify what will happen to church property in the event of an internal dispute. See id. at 603–04. While Justice Brennan had spoken approvingly of the neutral-principles approach in his opinion in Hull, 393 U.S. at 449, and supported the approach in his concurrence in Sharpsburg, 396 U.S. at 370, prior to Wolf, the Court had always resolved the disputes it addressed by deferring to the highest tribunal of the church to consider the matter. See, e.g., Milivojevich, 426 U.S. at 710; see also id. at 711 (Scalia, J., concurring) (same).
Justice Brennan is not the only justice with separationist leanings who has recognized the importance of the communal dimension of faith and sought to protect this dimension from state interference. While Brennan's opinions certainly contain the most developed discussions of religious community and probably also the greatest sensitivity to the role of community in religious life, Justice Blackmun has also expressly recognized that religious communities play an important role in sustaining faith, and like Brennan, he has argued that one of the purposes of the First Amendment is to protect the religious community. In his concurrence in *Weisman*, Blackmun argues that "strong religious communit[ies]" are crucial for the survival of religion as well as religious liberty, and that the Establishment Clause "guarantees" such communities.

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vicich, 426 U.S. 696; Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952); Waston v. Jones, 80 U.S. (13 Wall.) 679 (1872). The dissent in *Wolf* argued that the First Amendment requires such deference and that the neutral-principles approach would result in impermissible state interference with church polity and undermine the right of church members to establish their own forms of church governance to settle internal disputes. See *Wolf*, 443 U.S. at 610–14, 616–18 (Powell, J., dissenting). The majority disagreed and argued that the neutral-principles approach facilitates the autonomy of church organizations by permitting churches to specify in legally cognizable terms how they would like intrachurch disputes resolved. See id. at 603–04, 606. While the dissent accused Justice Brennan and other supporters of the neutral-principles approach of not being sufficiently protective of religious communities, Douglas Laycock has correctly observed that all of the Justices in *Wolf* "agreed unanimously on the goal of church autonomy"; what they disagreed about was how best to achieve this goal. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1395 (1981).

651 Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring); see also id. at 609.

652 Id. at 606. On the other hand, in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), Justice Blackmun joined Justices Stevens and Ginsburg in a concurrence that appears to place limits on their concern for the welfare of religious communities.

The question in *Kiryas Joel* was whether the state of New York had violated the Establishment Clause by creating a special school district for the village of Kiryas Joel. See id. at 690. All of the residents of Kiryas Joel are members of a strict form of Judaism known as Satmar Hasidim. See id. at 690–91. With the exception of children requiring special education services, all of the Satmar children attend private religious schools. See id. at 691. Prior to the Court's decisions in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997), and *Aguilar v. Felton*, 473 U.S. 402 (1985), overruled by Agostini, 521 U.S. at 203, disabled children received special education services at an annex to one of the community's private schools. See *Kiryas Joel*, 512 U.S. at 692. When this type of arrangement was held unconstitutional in *Ball* and *Aguilar*, Satmar children who needed special education services were forced to attend public schools, and they experienced considerable
However, for both Brennan and Blackmun, the way that the state protects religious communities is not to give them aid or recognition but, rather, to stay out of their affairs and allow them to develop on their own free from government interference. While Brennan is very solicitous to protect religious communities from outside interference, he countenances very little government aid for these communities either in the form of monetary support or supportive religious expression by the state. Brennan’s opposition to proactive state support for religious organizations is illustrated well by his decision in Texas Monthly, Inc. v. Bullock. Texas Monthly involved an Establishment Clause challenge to a provision in the Texas Tax Code which exempted religious publications from the payment of sales tax but not emotional trauma and fear in adjusting to the non-Satmar world. See id. The state legislature created the special school district for Kiryas Joel to address these problems, and the function of the district was to provide secular special education services to Satmar children. See id. at 693–94. While the Court recognized that the Constitution permits states to relieve burdens on free exercise, see id. at 705–06, it held that, in this case, the method chosen by the New York legislature violated the Establishment Clause principle of neutrality, see id. at 703–07. According to the Court, the New York legislature had provided the Satmar community with a special benefit without guaranteeing that similarly situated religious groups would receive the same relief. See id. at 703–04; see also id. at 716–17 (O’Connor, J., concurring in part and concurring in the judgment).

In a concurrence joined by Justices Blackmun and Ginsburg, Justice Stevens also argued that the special school district impermissibly provided “affirmative[] support[]” for the self-segregation of the Satmar community and their children from the outside world. Id. at 711 (Stevens, J., concurring). Rather than merely exempting the community from a burdensome general rule as the Court did for the Amish in Yoder, the New York law was “[a]ffirmative state action in aid of segregation.” Id. at 711–12. Justice Stevens’s argument that the Establishment Clause prohibits the government from affirmatively supporting religious separatism does not necessarily imply a lack of concern for the welfare of these types of religious communities. As discussed further below, Justice Brennan believes that the state is prohibited from proactively aiding religious communities even while it has a strict constitutional duty to refrain from interference with them. See infra text accompanying notes 653–56. However, while Justice Brennan’s opinions reveal a strong concern with protecting minority religious communities and their distinctive ways of life, Justice Stevens’s opinion seems far less sympathetic to those communities where they adopt a process of community formation and education that minimizes contact with outsiders. Justice Stevens uses strong words to describe the effort of the Satmar community to “isolat[e]” and “shield” its children “from associating with their neighbors” and, thereby, to “cement” their attachment to the faith and “increase[] the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith.” Id. at 711.

653 For an argument that Brennan and others on the Court have not gone far enough in recognizing and protecting the communal dimensions of religion, see Glendon & Yanes, supra note 584.

similar nonreligious publications. The Court struck down the provision and Brennan wrote a plurality opinion joined by Marshall and Stevens. According to Brennan, because the sales tax did not place a significant burden on religious organizations, the special benefit that the exemption conferred on religious organizations was an "unjustifiable award[] of assistance to religious organizations." Justice Blackmun made a similar argument about the crèche in Allegheny. According to Blackmun, the placement of the crèche in the Allegheny County Courthouse did not relieve a government burden on individual Christians or Christian communities. Christians "remain free to display crèches in their homes and churches." Likewise, in his concurrence in Weisman, Souter argues that prayers at official public school graduations are not necessary to relieve a government burden on religious individuals and communities. Those who "invest this rite of passage with spiritual significance . . . may express their religious feelings about it before and after the ceremony," and they "may even organize a privately sponsored baccalaureate" with others who share their views. Souter does not dispute the importance of community expressions of faith at graduation time, nor does Blackmun deny the importance of communal displays of religious symbols during the holiday season. What they object to is the government becoming involved in such expression. When there is no specific burden on religious activity, government support for religious communities becomes impermissible endorsement at the expense of religious minorities and nonbelievers.

Thus, while separationists such as Brennan and supporters of a strict interpretation of the endorsement test such as Souter and Blackmun have recognized that religious communities play an important role in fostering and sustaining faith, the religious community that they envision is essentially a separated community. It is a strictly private organization whose independence and autonomy are protected against state interference, but whose activities receive no other recognition or support from the government. For accommodationists, re-

655 See id. at 5.
656 Id. at 15 (quoting Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment)).
658 Id.
660 Id.
661 Id.
662 See id. at 629–30; Allegheny, 492 U.S. at 612.
moving religion from the government sphere and relegating it to a strictly private realm evidences hostility to religion.663 For the separationist and the strict interpreter of the endorsement test, "nothing could be further from the truth."664 Like Lindbeck, they do not believe that religious communities need support or recognition from the state in order to flourish. In Justice Souter's words, the graduation prayers at issue in Weisman were a "gratuitous largesse."665 Students and families with strong religious commitments "have no need for the machinery of the State to affirm their beliefs."666 Similarly, for Blackmun, the crèche in Allegheny served only to "gratif[y]" the "desire" of Christians who "wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas."667 It was not necessary to protect religion. Neither Blackmun nor Souter sees any harm to religion from restricting religious communities and their expressions to a private sphere.

Furthermore, separationists and strict interpreters of the endorsement test are convinced that religious communities will not only survive without support or recognition from the state but that they will thrive better without such assistance. Like Hauerwas, they argue that too close a union between government and religion compromises the integrity of the religious community and threatens its independence. In Brennan's words, "too close a proximity" between church and state "creates real dangers of 'the secularization of a creed.'"668 Justices Blackmun and Souter speak of the "taint" of a "corrosive secularism."669 For Justice Stevens, there is a risk of "compromis[ing] [the] religious mission."670 In Weisman, Blackmun explains that the way that the Establishment Clause guarantees strong religious communities is precisely by ensuring that they are separate from the state.671

663 See Allegheny, 492 U.S. at 655, 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).
664 Id. at 610 (Blackmun, J.).
665 Weisman, 505 U.S. at 629 (Souter, J., concurring).
666 Id.
667 Allegheny, 492 U.S. at 612.
671 See Weisman, 505 U.S. at 606 (Blackmun, J., concurring).
He argues that "[w]e have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular."^672

**D. The Importance of the Public Community**

When separationists speak of religion, they often describe it in individualistic terms. While many separationists do recognize a role for communities in shaping and forming faith, and this recognition is shared by strict interpreters of the endorsement test, it is a separated community that they envision. Both assumptions support their view that a secular state will not harm religion but, rather, will protect religion by ensuring its independence and autonomy from the "demeaning effects of [the] governmental embrace."^673 When accommodationists accuse their opponents of hostility to religion, it is because they disagree with these underlying theological assumptions about the nature of religion and what is required for its protection. For accommodationists, religion is something deeply communal in nature, and they believe that it will be harmed, not helped, if it is separated from the state in a private sphere.

In his dissent in *Weisman*, Justice Scalia directly challenges the individualistic conception of religion. According to Scalia, religion is not, "as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room."^674 Scalia's characterization of the position of his opponents is certainly overdrawn. None of the Justices believe that religion is an entirely solitary affair. However, Scalia's objections to his opponents and the discussion that follows do reveal an important difference between them. While separationists have tended to see religion as something deeply personal in nature, and they have joined strict interpreters of the endorsement test in viewing religious communities as something which can and should be separated from the concerns of government, Scalia argues that religion cannot be confined to a distinct compartment in the individual's life. Nor is it something which begins in the individual and only expresses itself secondarily in communal forms. Rather, for Scalia, as for the postliberal theologian, religion is an essentially communal phenomenon which functions as a comprehensive framework or world view that shapes the entirety of one's life and thought. As a communal framework for viewing all aspects of life, religions necessarily will involve matters that

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^672 Id. at 609.
^673 Id. at 627 (Souter, J., concurring).
^674 Id. at 645 (Scalia, J., dissenting).
concern the governmental sphere, and expressions of religion in "public culture,\textsuperscript{675} such as public worship at graduations, are a natural part of religious life. According to Scalia, public worship reflects the fact that

[for most believers [religion is not a purely private matter]. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations."\textsuperscript{676}

Thus, public expressions of religious faith, including religious expression by government bodies, are essential if religion is not to be stunted by being artificially confined to a private sphere.\textsuperscript{677}

In \textit{Allegheny}, Justice Kennedy argues that government acknowledgment and recognition of the central role that religion plays in American life is not only a natural reflection of the religiosity of its citizens, as well as a pervasive part of American history and traditions, but also essential for the survival of religion. According to Kennedy, if government cannot recognize and take note of the important place that religion plays in the lives of its citizens, "acknowledgment [of] only the secular, to the exclusion" of the religious will work a "detriment" to religion.\textsuperscript{678} Justice Kennedy's discussion in \textit{Allegheny} provides the most detailed explanation for why the accommodationists believe that the exclusion of religious symbols and language from the government sphere harms religion. However, Kennedy's discussion remains very brief, and examining his statements in light of postliberal theology and the developments that have grown out of

\begin{footnotes}
\item[675] Id. at 646.
\item[676] Id. at 645.
\item[677] It is interesting to note that while accommodationists are very sensitive to the communal dimension of religion, they seem less sensitive to its more individual aspects. Whereas most of the Court's separationists and supporters of the endorsement test have argued that the Free Exercise Clause should be construed to require exemptions from neutral laws which burden individual free exercise, all of the Court's current accommodationists have taken the opposite position. They argue that the Court's pre-\textit{Smith} case law "court[ed] anarchy," \textit{Employment Div. v. Smith}, 494 U.S. 872, 888 (1990), and that exemptions from neutral laws should be left to the political process, \textit{see id.} at 890. For further discussion of this issue and the positions of the other Justices, see \textit{supra} notes 590–601 and accompanying text.
\item[678] County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).
\end{footnotes}
postliberal theology in the 1990s can help to clarify where his concerns lie.

According to Kennedy, if government expression can acknowledge only the secular, the removal of symbols and language with religious meaning from the government sector will "send [...] a clear message of disapproval" of religion.679 The harm to religion will be especially great where there is a large public sector. As the "modern administrative state" expands to occupy an ever-growing place in the lives of its citizens, "it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality."680 With respect to Justice Blackmun's position that government should be permitted to celebrate only the secular aspects of a holiday with both religious and secular meaning, Kennedy argues that such "enforced recognition of only the secular aspect would signify ... callous indifference toward religious faith ... not neutrality but a pervasive intent to insulate government from all things religious."681 The separationists and strict interpreters of the endorsement test do not intend a message of disapproval or hostility towards religion when they argue that the state should be secular and that the role of safeguarding America's religious heritage belongs solely to religious individuals and their communities and not to government. However, Kennedy is arguing that the absence of religious language from the government sphere will send such a message, and that the effect of this message will be to disadvantage religious views and beliefs. Removing religion from government expression will not, in Kennedy's view, serve to strengthen its independence and authority but, rather, to unfairly weaken its influence and role in American life.

Behind Kennedy's claims that removing religion from government expression sends a message of disapproval of religion and unfairly weakens its role in American life are a number of assumptions that he shares with the postliberals. Like the postliberals, Kennedy sees religion as an essentially communal phenomenon. Religious faith is not guaranteed by an innate capacity for the sacred or any other direct connection between the individual and the divine which can be expected to sustain faith without the supporting language and traditions of religious communities. Rather, faith depends upon religious communities and on the vitality and relevance of their symbols and traditions. Where the vitality of religious language and its rele-

679 Id.
680 Id. at 657–58.
681 Id. at 663–64.
vance to the lives of believers is undermined, religion will be harmed. Secondly, Kennedy agrees with theologians in the 1990s who argue that religious belief systems cannot be separated from the influences of the surrounding culture but, rather, are open to change from the outside, including from the messages sent by government. Religious communities are necessarily part of the larger public community within which adherents live, and what happens in the larger public culture will have an effect on religion. For Kennedy, these two assumptions mean that the exclusion of religion from an ever-growing government sector will harm religion. Justice Kennedy's position is similar to the argument developed above in Part II regarding the implications of postliberal theology for church-state relations. As a pervasive public sector touches the lives of its citizens in numerous ways and occupies a significant part of the individual's larger cultural universe, removing religious expression from this aspect of public life will send a message of disapproval or indifference to religion, and the effect will be to marginalize the role of religion in the lives of adherents and undermine its central place in American life. Religious symbols and language, which only have a place within the private sphere of home and church and receive no reinforcement from the larger public community which also shapes the individual's experience and beliefs, lose their relevance for the lives of believers. It is difficult for religious belief systems to function as the central interpretative frameworks for understanding the world and for guiding one's life and decisions where the religious community and its language and symbols are separated and compartmentalized in a private sphere.

Permitting only secular and not religious messages in the government sphere can also have the effect of secularizing as well as marginalizing religion. For example, where the government celebrates only the secular and not the religious aspects of a holiday that has both meanings, the effect will be to advance the secular interpretation over the religious one. For separationists and strict interpreters of the endorsement test, it is the inclusion of religious symbols in government holiday displays that risks secularizing the religious dimensions of the holiday and commercializing what should remain sacred and holy and, thus, distinct from the mundane sphere of government. For accommodationists, on the other hand, it is the absence of these religious symbols that risks eclipsing the religious aspects of the holiday season and secularizing the celebration of the holiday.

It is of no comfort to Kennedy that separationists and strict supporters of the endorsement test allow a narrow place for religious symbols in government expression where these symbols have a secular import, such as the display of religious symbols in a museum setting or
the use of religious language which has lost its religious meaning. To
the contrary, allowing government to use religious symbols and lan-
guage only where they have lost significant religious meaning or
where they are used for nonreligious purposes is to disadvantage
those for whom religion is not just a matter of history or culture but
also a way of life. Because Kennedy believes that a consistent inter-
pretation of the endorsement test will lead inevitably to the secular state
envisioned by Justice Blackmun, he does not address Justice
O'Connor's vision of a limited place for language with religious mean-
ing which does not endorse religion. However, Kennedy clearly be-
lieves that the Establishment Clause is consistent with language that
endorses religion as long as it does not proselytize or coerce participa-
tion, and his objections to Justice O'Connor's position would be simi-
lar to those he makes against separationism and the strict
interpretation of the endorsement test. To permit the government to
endorse secular events and traditions in American culture but not reli-
gious ones is to disadvantage religion, and to permit the government
to celebrate events with a dual meaning in a way that negates any en-
dorsement of their religious significance is to risk eclipsing this reli-
gious significance and secularizing their content.

Thus, Kennedy clearly disagrees with Lindbeck and Hauerwas's
view that the separation of religion from the state is beneficial to reli-
gion. For Kennedy, the state is part of the larger public community in
which religious individuals live, and what happens in the government
sector will necessarily influence religion. When the government is
large and its expressions confined mostly to the secular, the effect will
be to diminish the importance of religion in the lives of its adherents
and to exert a secularizing influence on the larger society.

Justice Stewart made a similar argument in 1963 in his dissent in
School District of Abington Township v. Schempp. The Court in Schempp
held that the practice of opening the public school day with readings
from the Bible and recitation of the Lord's Prayer violated the Estab-
lishment Clause. It is not clear how many, if any, of today's accommoda-
tionists would support Stewart's position regarding the
constitutionality of Bible reading in the public schools. Given his rea-
soning in Weisman, Justice Kennedy would probably argue that such
religious exercises place coercive pressures on students to participate,
and other accommodationists may also have reasons for disapproving
of the practices in Schempp. However, the reasoning that Justice Stew-
art gives for his position provides a very clear and concise expression
of the type of concerns that underlie the contemporary accommoda-

tionist position. The Court in *Schempp* defended its decision on the grounds that Bible readings impermissibly advanced religion in violation of the requirement of government neutrality toward religion.\(^6\) For Justice Stewart, it was removing religion from the public school day that violated the principle of neutrality:

> It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion.\(^7\)

Stewart's argument, like Kennedy's, is that where the state occupies a large part of the individual's life, the exclusion of religious expression from this sector will place religion at an "artificial and state-created disadvantage."\(^8\) The separated religious community in the context of the modern administrative state is, in this view, inherently disadvantaged.

In Justice Blackmun's view, Justice Kennedy and the accommodationists are "would-be theocrats"\(^9\) who would like to see the state express an "allegiance" to their religious views.\(^10\) The crèche in *Allegheny* is, for Blackmun, nothing but the "gratification" of such a desire.\(^11\) Justice Souter expresses a similar view regarding the graduation prayers at issue in *Weisman*. They were, he suggests, "brought... into the ceremony 'precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities.'"\(^12\) In both cases, there was no identifiable burden on religious practices, and thus, the government's expressions were merely a "gratuitous lar-

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683 *See id.* at 222–26.
684 *Id.* at 313 (Stewart, J., dissenting).
685 *Id.*
686 *Allegheny*, 492 U.S. at 611.
687 *Id.* at 611–612.
688 *Id.* at 612.
Just as the accommodationists unfairly accuse their opponents of hostility to religion, Justice Blackmun and Justice Souter's interpretation of the accommodationists' position distort their views. While the accommodationists draw historical support for their position from the numerous examples of government encouragement of religion in the founding era and share the view of those who favored these mild establishments that religious communities and language play a critical role in shaping and fostering faith, their concerns are, in fact, quite different. Contemporary accommodationists do not believe that people are too sinful and weak to sustain religious communities without public provision for religion, nor do they go as far as those who supported mild establishments in the founding era in affirming a proactive role for the state in inculcating religion. Their desire is also not to have government proclaim an "allegiance" to religion. Rather, what they envision is a limited role for the state in acknowledging and recognizing the central place that religion already plays in American society. For the accommodationist, these acknowledgments are not intended to promote religion but, rather, to preserve religion from encroachment by a pervasive secular state. If government cannot take note of the central role that religion plays in American society, religion will be at an unfair disadvantage. Thus, when Justice Souter calls graduation prayers a "gratuitous largesse," he shows that he misunderstands the concerns that underlie the accommodationist position. Government expression acknowledging America's religious heritage is not a gratuitous largesse for the accom-

690 Weisman, 505 U.S. at 629.

691 Some accommodationists have argued that nonpreferential state support for religion (i.e., support that treats all sects equally and does not prefer one over the other) is consistent with the Establishment Clause, but this argument does not appear in the Court's cases addressing religious expression by the state, and the accommodationist argument is not the same as the argument for nonpreferential aid to religion. For opinions arguing that nonpreferentialism is consistent with the requirements of the Establishment Clause, see Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting) (holding that the Establishment Clause was not intended to prohibit nondiscriminatory aid to religion), and Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 855 (1995) (Thomas, J., concurring) (finding "much to commend" the "view that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others"), and see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 401 (1993) (Scalia & Thomas, JJ., concurring in the judgment) ("As for the asserted Establishment Clause justification, I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect.").
moderationists; it is the only way that the state can be truly fair to religious views.

E. The Pluralistic Nature of Religion

As the discussion above demonstrates, many of the theological divisions on the Court relate to different understandings about how religious faith is formed and sustained and the role of the individual, the religious community, and the larger public community in this process. The disagreements among the Justices regarding religious expression by the state result, in large part, from the fact that the Justices have differing ideas about how religious faith is fostered and sustained and, thus, different ideas about what position best protects religion. There is, however, an additional source of disagreement among the Justices regarding the nature of religion and the requirements for its protection, and this area of disagreement lies behind the objections of the supporters of the endorsement test to the accommodationist position. For the supporters of the endorsement test, religion is viewed as something deeply pluralistic in character. The protection of religion requires a respect for this deeply pluralistic nature of religion and the fair and equal treatment of all religious adherents as well as those without religious commitments. Accommodationists, on the other hand, are less sensitive to the differences among religious views and traditions, and they place less emphasis on the fairness concerns that are critical to the endorsement position.

As discussed above, supporters of the endorsement test differ substantially over how they interpret and apply the test. For those who interpret the test strictly, very little religious expression by the state is permissible and the Establishment Clause demands a secular state. Their position moves very close to that of the separationists, whose application of the endorsement test becomes almost indistinguishable from their separationist position. By contrast, Justice O'Connor would allow much more room for religious expression by the state, and she certainly does not envision the separated religious community advocated by the separationists and strict interpreters of the endorsement test. Justice O'Connor recognizes that the concerns of religion and government will necessarily overlap and that there must be some room for government acknowledgment of religion. However, while they disagree about when religious expression amounts to en-

692 See Jaffree, 472 U.S. at 69 (O'Connor, J., concurring in the judgment).
693 See Allegheny, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment); Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment).
endorsement, all supporters of the endorsement test are united in the view that government may not engage in religious expression which endorses religion over nonreligion or one religious group over another. In their view, one of the central, if not the central, purposes of the Establishment Clause is to prohibit government from making adherence to religion relevant in any way to a person's standing in the political community by sending a message to nonadherents that they are outsiders.

When Justice O'Connor first articulated the endorsement test in Lynch and Wallace v. Jaffree, her primary concern appeared to be to protect religious minorities and nonbelievers from coercive pressures by the state. Supporters of the endorsement test continue to argue that the test protects the interests of religious liberty, but their primary concern has shifted, and they now emphasize that the endorsement test is necessary to respect the religious pluralism and diversity in American society. In Allegheny, Justices Blackmun, O'Connor, and Stevens all argue that the Establishment Clause forbids the government from showing favoritism to religion and among religions, and that such a prohibition is necessary to respect the diversity of religious views in America. In Justice O'Connor's words, "We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all." Where government shows favoritism to particular beliefs, it does not "adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."

Behind the endorsement test lies a picture of religion as a deeply pluralistic affair. Supporters of the endorsement test share the views of the growing number of theologians in the 1990s who are emphasizing the fundamental differences among religious experiences and traditions and the wide range of forms that religious beliefs can take. Few Justices have ever denied the fact of religious pluralism in American society, and even the separationists whose understanding of religion resembles the experiential view of the modern theologians rarely follow modern theologians in believing that there is a common reli-

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694 For O'Connor, prohibiting government endorsement is the central purpose behind the Establishment Clause at least where religious expression by the state is concerned. For separationists who have used the endorsement test, separation remains a distinct and independent value.

695 See Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in the judgment).

696 See Allegheny, 492 U.S. at 628 (O'Connor, J., concurring in part and concurring in the judgment).

697 Id. at 627.

698 Id. at 628.
gious experience underlying all religious traditions. For the separationist, the "holy field" and "sacred enterprise" of religion has always been a pluralistic one. However, the widespread adoption of the endorsement test on the Court in the past fifteen years reflects a new emphasis on religious differences as well as a new insistence that protecting religion requires respecting and protecting this diversity. Like the theologians in the 1990s who have sought to promote a sense of unity and commonality among all persons that respects and retains religious difference, supporters of the endorsement test envision a political community in which all individuals, religious minorities and nonbelievers alike, are treated equally and their differences respected and preserved. For the supporters of the endorsement test, this requires limiting religious expression by the state to those forms of expression which do not endorse one religion over another or religion over nonreligion. Official messages approving of religion over nonreligion or endorsing one particular sect over another would not be fair to dissenters who are entitled to equal standing in the political community.

Thus, fairness to believers and nonbelievers alike is the primary concern that lies behind the endorsement test. The endorsement test, by itself, is not about separating religion from government, though separationists who have adopted the endorsement approach also embrace separation as a distinct and independent value. Nor is the endorsement test about preserving religion from the demeaning influences of a secular state, though it may also mean that for its strict interpreters. Rather, it is about treating all members of the American political community equally. For Justice O'Connor, the crèche in Allegheny is not unconstitutional because it is the misuse of a sacred symbol which threatens to commercialize the holiday or otherwise interfere with the sanctity of religion. It is unconstitutional because it signals favored treatment for Christians and leaves other members of the larger community out.699 The same is true for Justice Blackmun.700 For Justice Souter as well, the primary problem with the grad-

699 See id. at 626–27.
700 See Allegheny, 492 U.S. at 611–12 (Blackmun, J.).

For both O'Connor and Blackmun, the menorah is constitutional because its placement negates any message of endorsement. For Blackmun, the menorah's proximity to the Christmas tree and sign saluting liberty secularizes its meaning and "convey[s] the city's secular recognition of different traditions for celebrating the winter-holiday season." Id. at 620 (plurality opinion); see also supra notes 539–42 and accompanying text. For O'Connor, the menorah is not secularized, but its inclusion in the display sends a message of pluralism and freedom. See supra notes 531–32 and accompanying text. Expressing his separationist views, Justice Brennan criticizes both Black-
Fostering Harmony Among the Justices

Evaluation prayers in *Weisman* is that they favor religion over nonreligion and endorse the majority faith at the expense of minorities and nonbelievers. Justices Souter and Blackmun also speak about the "taint" of a "corrosive secularism" where government interferes with religion, and this concern is shared by separationists such as Justices Brennan and Stevens. However, the endorsement test itself is primarily about fairness to all religious believers and nonbelievers.

Accommodationists argue that the removal of all government expression endorsing religion will harm religion by marginalizing religious language and beliefs and reducing their relevance to the lives of adherents. Supporters of the endorsement test clearly do not believe that prohibiting speech endorsing religion will have such an effect, and their disagreement with accommodationists on this point can be traced to differing views regarding the role that the public community plays in sustaining faith. They also argue that accommodationists unfairly misrepresent their intentions when they accuse them of hostility to religion. Justice Blackmun responds that "Justice Kennedy ... misperceive[s] a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion." Justice Stevens has a similar response: "Far from 'border[ing] on latent hostility toward religion,' . . . [the] careful consideration of context gives due regard to religious and nonreligious members of our society." For supporters of the endorsement test, it is the accommodationists who show a callous disregard for religion and O'Connor for allowing the state to appropriate the menorah to serve its secular ends. Such an appropriation is offensive to believers and an unconstitutional interference into religious matters. See *Allegheny*, 492 U.S. at 644–45 (Brennan, J., concurring in part and dissenting in part); see also *supra* note 626 and accompanying text. As noted above in Parts III.B–C, Justice Blackmun also has separationist tendencies and has expressed the concern that state interference in religion degrades religion and risks the "taint" of a "corrosive secularism." See *supra* notes 623–24, 628, 669, 671–72 and accompanying text. Indeed, in his dissent in *Lynch*, Blackmun argues that Pawtucket has "misuse[d] [the] sacred symbol" of the crèche by "relegat[ing] [it] to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part." *Lynch* v. Donnelly, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting). However, Blackmun does not display similar concerns in *Allegheny* when he permits the state to use the menorah in conjunction with the Christmas tree as "a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition." *Allegheny*, 492 U.S. at 618 (plurality opinion).


*Allegheny*, 492 U.S. at 610.

Id. at 653 (Stevens, J., concurring in part and dissenting in part) (quoting id. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part)).
gion by ignoring the pluralistic character of religion in American society. To some extent, the charges of the supporters of the endorsement test are correct. Accommodationists do misunderstand their intentions. Both accommodationists and supporters of the endorsement test care deeply about religion. Where they differ is their understanding of the nature of religious belief and what is required for its protection. For supporters of the endorsement test, religion is inherently pluralistic and protecting religion requires that religious differences be respected and preserved. Accommodationists are less sensitive to the pluralistic nature of religion, and fairness to all religious traditions is not their central concern. Justice Kennedy’s response to those who might disagree with the Judeo-Christian religious traditions celebrated by the displays in Allegheny highlights these differences between accommodationists and supporters of the endorsement test. According to Kennedy,

The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.  

For supporters of the endorsement test, it is not enough that religious minorities and nonadherents can pass by if they disagree with religious speech by the government. Where religion is concerned, government must show a scrupulous fairness.

It is, however, inappropriate to suggest that accommodationists demonstrate a callous disregard for the concerns which motivate supporters of the endorsement test. Accommodationists are also concerned about fairness issues, but they believe that the problem lies with removing religious language from the government sphere and the disadvantage that such a removal causes to religion. Accommodationists are concerned with fairness to religion, and supporters of the endorsement test are concerned with fairness among religious adherents, particularly religious minorities and nonbelievers. Both factions on the Court have legitimate concerns. The purpose of the following Part will be to try to develop an approach that respects and balances both of these concerns as well as the other differences which divide the Justices.

704 Id. at 664 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Scalia makes a similar response regarding the graduation prayers in Weisman, 505 U.S. at 638 (Scalia, J., dissenting) (“[M]aintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate . . . .”).
IV. Fostering Harmony Among the Justices

By clarifying the theological divisions which underlie the Court's disagreements regarding religious expression by the state, the preceding section sought to promote greater understanding among the Justices. This Part seeks to reconcile them by proposing an approach that takes into account their various concerns. All of the Justices have important insights regarding the nature of religious belief. While the different factions on the Court tend to emphasize different aspects of religious belief and, thus, different requirements for its protection, all identify something important about religion which their opponents tend to overlook.

Religion certainly is, in important respects, the communal phenomenon envisioned by postliberal theologians and the Court's accommodationists, and they are correct to emphasize that religious communities play a critical role in forming and shaping faith. While Jefferson envisioned religious investigation as an individual enterprise beginning in adulthood, most people encounter religion far earlier in life and their understanding of religion is colored and shaped by the traditions of which they are a part. Nor is Jefferson's vision even feasible. Religious faith is not something arrived at through the autonomous power of human reasoning but is, to a large degree, something learned from the belief systems which one encounters in one's relationships with others. Modern theologians also assume too much when they suggest that all individuals share a common religious experience in the interior of the self. Humanity's ability to transcend its own concrete existence through its capacity to reflect upon reflection and question its own questioning does suggest an openness to the divine and a potential for a relationship to God, as do the limit experiences which drive us to consider what is beyond our finite existence. However, to assert, as modern theologians do, that everyone shares an innate experience of God's loving self-communication, the experience of love for God, or confidence in the worthwhileness of our own existence is to overlook the role that religious communities play in helping to develop this trust and showing individuals how to recognize the sacred and holy dimension to their lives. The Justices who also suggest that individuals have a natural, though perhaps not universal or identical, relationship to the sacred deep within the self which will seek on its own whatever communal supports that it needs make the same mistake. The increasing secularization of modern society demonstrates that without the formative structures of religious language and traditions, humanity is not, in fact, homo religious. On their own, individuals can as easily give a secular interpretation to
their lives and experiences as a religious one, and the sacred dimension to life may not be obvious to the unaided eye. For the eighteenth-century Baptist, it is the direct action of God that opens the eye of the sinner to understand the divine truths contained in Scripture, and community instruction and nurture need not be involved. However, as postliberals note, between God and the Bible, there is the community which carries the Bible as its authoritative text and which guides the individual in how to read it. God may be involved in the process of coming to faith and understanding Scripture (and I believe that He is), but the community is never absent from this connection.

If, however, separationists in the founding era and modern theologians in the present have neglected the important communal dimension to faith, postliberal theologians have not fully recognized its individual aspects. While religious belief begins in communities, for most believers it does not end there, and faith is not simply a process of being trained and socialized into a particular religious world view. When the Baptists reacted to the carefully constructed system of training, preparation, and covenant-owning in the churches of the New England standing order, what they found missing was an awareness of the direct role of God in the process of salvation and the personal encounter between God and the individual. The Baptist rejection of the important role of communities in nurturing and shaping faith was certainly an overreaction, but their insight into the deeply personal nature of faith was not. For most believers, living within a religious tradition means appropriating its norms and practices in a uniquely personal way. Religious belief becomes real for individuals when they accept the values and norms of a religious tradition as their own, and faith is the personal struggle to understand and apply these guiding principles to the unique circumstances of one's own life. For many, this process of personal appropriation is one that is guided by a God who is directly present in their lives. For most, it is also a process which involves critical thought and inquiry. Justices Brennan, Stevens, and Blackmun suggest that religion is only a matter of faith and not reason. While what is accepted by faith certainly exceeds the bounds of what one can know through reason, and there are experiential elements to faith that relate more to feeling than to knowledge, faith is not irrational or disconnected from knowledge. Jefferson, Madison, and others deeply influenced by the Enlightenment in the founding era were correct to see rational inquiry as an important aspect of religious belief, and they were right to reject an understanding of religion as the acceptance of traditional opinions without question-

705 See supra notes 604–05 and accompanying text.
ing or investigation. However, for most believers, faith has never been something divorced from inquiry or investigation. Faith is often preceded by deep thought and questioning, and religious belief is understood as the best answer to these questions. Nor does the process of critical inquiry ever end in the lives of most believers, but it continues as they seek to understand their faith more fully and to explain it to others. Benjamin Rush understood the relationship between community formation and personal inquiry well when he argued that formation in a specific religious system is the best foundation for a process of free inquiry that enables the individual, and the larger community, to come closer to the truth.

Thus, the relationship between the individual and the community in the formation of faith is best understood as a dialectical process. Humanity's ability to transcend its own concrete existence and its experiences in "limit" situations do suggest a fundamental openness to the divine and a capacity for faith, but religious communities and traditions play an important role in providing the content for this faith and making people aware of the religious dimension to their lives. On the other hand, humanity's openness to the divine and the faith that fills it always remain something deeply personal in nature. Individuals not only appropriate religious traditions in uniquely personal ways, but this process of appropriation can lead individuals, and through them larger communities, beyond the bounds of their existing understandings. Through the guidance of God or critical inquiry, but usually both, the saint and the rebel are part of the process by which traditions change and develop. Also critical to this process is the interaction of belief systems with other religious communities as well as nonreligious world views. Theologians in the 1990s are correct to emphasize that religious belief systems are necessarily in interaction with outside cultures and are open to change from the outside. They are also correct that belief systems have much to learn from outside influences, and that truth is better served by an openness to these influences. Kathryn Tanner and Linell Cady's argument that truth should not be identified with any particular historical understanding of religious beliefs and practices and that the meaning of even core religious beliefs remain provisional may be questioned by many religious believers. However, the idea that there is room within all religious traditions to learn from each other and to develop a fuller understanding of the truth that they embody should not be.

Few believers would deny the pluralistic nature of religion, and in spite of the efforts of modern theologians to identify a core religious experience which underlies all religious traditions, theologians in the 1990s and the Justices who support the endorsement test are correct
to note that there are fundamental differences between them. However, while religious pluralism is undeniable and the divisions between traditions are sometimes very deep, religious pluralism is not radical. For most religious believers, the traditions that they embrace tell them something true about themselves, the world, and God, and they embrace these traditions because of their power to explain their fundamental experiences as human beings. When Saint Augustine writes that “you have made us for yourself and our heart is restless until it rests in you,” he is expressing the common feeling among believers that their convictions match the deepest yearnings of their heart and the true goal of human existence. The fact that religious traditions have this power to explain human experience and to open one’s eyes to a dimension to existence that is at once novel and surprising but also familiar and recognizable suggests that behind religious pluralism there is a common truth about humanity which all traditions seek and understand in part. Thus, humanity is homo religious, if not in fact then in potential, and it is this potential unity among all individuals that enables individuals from different religious traditions to converse with and learn from one another. Religious pluralism reflects the fact that a full understanding of the truth towards which believers strive lies beyond them and is now glimpsed only in part and “in a mirror dimly.” However, religious pluralism also promotes truth by providing individuals and communities with new insights that can enhance their own understanding. Respecting religious pluralism is, therefore, not only a command of fairness, but is also critical to the pursuit of truth. As Cady and Tanner argue, dialogue and conversation that is inclusive of all religious voices promotes truth better than separating oneself off in one’s own religious community. Cady and Tanner emphasize the provisionality of all religious claims. I would emphasize the truths that they all contain, but the lesson is the same. All believers benefit from entering into dialogue with each other and remaining open to the contributions that others can make. Secular voices in the larger society also have something to add. Hauerwas is certainly correct that religious communities can provide important “contrast models” to the secular world, but they also have something to learn as well as to give. It is through the interaction of the individual and the community, reason and inspiration, religious traditions and the larger cultural world, that humanity’s capacity for faith is filled and individuals and communities come closer to the truth. For many believers,

707 1 Corinthians 13:12.
this is the process by which God brings the individual and the world closer to Himself.

The description above of how religious faith is formed and sustained and how religious pluralism is related to this process is not intended to be a definitive explanation of the nature of religious belief. There will, no doubt, be readers who disagree with various aspects of my formulation. However, the sketch I have offered seeks to reflect a common sense view of religious belief that accords with how most religious believers experience their faith. On the one hand, this sketch is designed to show that religion certainly is both an individual and communal phenomenon as well as a deeply pluralistic affair and that all the Justices have recognized important aspects of the nature of religious belief. As will become clearer below, it is also designed to show where the Justices may not fully understand how religion functions in the lives of believers and what it means for individuals to accept a religious tradition "by faith."

Thus, all of the factions on the Court have important insights regarding the nature of religious belief as well as legitimate concerns regarding its protection. When separationists emphasize the deeply personal nature of religious belief, they identify something fundamental to faith. While individuals do not come to faith on their own and communities are integral to the process of religious formation, faith remains something very personal and unique to the individual, and it involves a dimension of life which is sacred, holy, and special. Separationists are correct to worry that mixing this dimension with mundane matters of government may "demean[] the sacred enterprise." When Justice Stevens objects to the commercialization of the crèche in Allegheny and Justice Brennan objects to the appropriation of the menorah to send a political message, they correctly observe that government is easily tempted to use religion for its own secular purposes and that religious expression by the government may distort and demean the sacred meaning that religious language and symbols carry for many individuals. Likewise, when they affirm the important role that religious communities play in fostering and sustaining faith, separationists and strict interpreters of the endorsement test are correct to fear that the integrity of religious communities may be compromised by too close a union between religion and government.

However, the Court's accommodationists are also correct that separating religious communities off into a private sphere will harm religion. Religious communities are necessarily in interaction with the larger public culture and open to change from outside influences.

Where religious language and symbols are removed from a pervasive government sector, there is a danger that the vitality and relevance of religious language and traditions will be undermined and the process of exchange between religious and nonreligious belief systems weighted in favor of the secular. The interaction of religious belief systems with the larger culture is to be welcomed, but the process of exchange must be a fair one. The entire community is impoverished by the marginalization of religious perspectives and the contributions they can make.

However, supporters of the endorsement test are also correct to emphasize the pluralistic nature of religion and to defend the fair treatment of religious minorities and nonbelievers. If the price of preserving the vitality of religion in American life is religious expression by the government that endorses religion over nonreligion or one religious sect over another, the important value of fairness to all members of the political community is violated, and the contributions that minorities can make to public culture will be marginalized. Fairness to all religious adherents as well as nonbelievers is not only necessary to respect the religious diversity in American society, but is also critical for promoting truth.

Balancing all of these concerns is difficult to square with any significant role for religious expression by the government. Some scholars have suggested that at least some of these concerns can be met by more inclusive religious expression by the government. For example, Michael McConnell envisions religious expression by the government which “mirror[s]” the makeup of American culture as a whole, and he suggests that such broadly inclusive expression will answer accommodationist concerns regarding the marginalization of religion, meet Justice O’Connor’s concerns regarding the fair treatment of religious minorities and nonbelievers, and ensure that government expression does not distort or otherwise alter the religious life of the people.  

According to McConnell, if government expression mirrors the culture as a whole, the “influence and effect of government involvement would be nil: the religious life of the people would be precisely the way it would be if the government were absent from the cultural sphere.” In McConnell’s view, if “members of minority religions (or other cultural groups) feel excluded by government symbols or
speech, the best solution is to request fair treatment of alternative traditions, rather than censorship of more mainstream symbols.

McConnell's approach has much to recommend it, but in practice it will be unable to adequately address the concerns of separationists and supporters of the endorsement test. Ensuring that government expression accurately mirrors the religious life of an increasingly diverse American public will be no easy task, and even in communities with the best of intentions, majority religions will almost certainly be overrepresented. Even if all religious and nonreligious voices are fairly represented, separationists will still be concerned that government use of religious language and symbols will involve dangers of secularization and politicization. The separationist concern is that religious expression by the government always risks demeaning the sacred enterprise where the government uses symbols and language that retain a religious meaning. They point to the commercialization of the crèche in Lynch, the politicization of the menorah in Allegheny, and the trivialization of the prayers in Marsh. In Allegheny, Justice Brennan suggests that trying to "lump the ritual objects and holidays of religions together" in a broadly inclusive holiday display will present additional dangers. In Brennan's view, such displays distort the meaning of particular religious symbols and offend believers for whom such an eclectic display diminishes the distinctiveness of their own traditions. Many scholars have voiced similar concerns. Douglas Laycock expresses these concerns well when he argues that religious expression by the government will be "theologically and liturgically thin" and "politically compliant." Even in tolerant communities, he fears that "efforts to be all-inclusive inevitably lead to desacralization, to the least common denominator, to a secular incarnation with plastic reindeer, to Christmas and Chanukah mushed to-

711 Id.
712 For similar arguments, see Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 72 (1997) ("[I]f government were free to praise or condemn religion, celebrate religious holidays, or lead prayers or worship services, government could potentially have enormous influence on religious belief and liturgy. Government is large and highly visible; for better or worse, it would model one form of religious speech or observance as compared to others."); Ira C. Lupu, To Control Faction and Protect Liberty: A General Theory of the Religion Clauses, 7 J. CONTEMP. LEGAL ISSUES 357, 370 (1996) (stating that there is "no neutral way for government" to celebrate religious holidays).
714 See id. at 644-45.
gether as the Winter Holidays.”

McConnell certainly does not have desacralized, watered-down religious speech in mind, and indeed, he specifically objects to government expression which would “tame[ ], cheapen[ ], and secularize[ ]” religion. However, the separationists and strict interpreters of the endorsement test are correct to fear that religious expression by the government always carries the danger of such secularization. When the government uses religious symbols and language, it can only try to mirror the religious life of the people. It does not share the faith that motivates believers and ensures that their speech will be genuine, and the temptations to tame, commercialize, and politicize religious speech are always present. Policing these temptations and their distorting effects may be just as difficult as ensuring that government expression fairly represents all religious adherents and nonbelievers.

While more inclusive religious expression by the government will not address the concerns of all the Justices, their divisions can be reconciled by an approach that focuses on protecting and accommodating robust private religious expression in the public sphere rather than on accommodating religion through government expression. Where sufficient opportunities for private religious expression in the public sphere exist and religious individuals and groups take advantage of these opportunities to participate actively in public life, religious language and symbols will remain an integral part of public life without the dangers associated with government interference in religious matters and the unfairness associated with government endorsement of religion. Government-operated speech fora present some of the best venues for the public presentation of religious and other views, and as long as religious groups have equal access to them, they can use these fora to participate fully in public debate and to keep religious symbols and ideas alive in public life. As will be discussed further below, government-operated speech fora include “traditional public fora” such as streets and public parks as well as other fora designated by the government for expressive purposes or more limited public use. Because of the large role that the governmental sector plays in the lives of Americans, the state should continuously seek to


717 McConnell, supra note 709, at 127.

718 The Court has distinguished between three types of government-operated speech fora. They include “traditional public fora,” “designated public fora,” and
open up additional avenues for private expression and debate. Opening up spaces for private expression will be particularly important in settings where the government plays an especially large role in structuring and regulating the lives of its citizens, such as in the public schools or where religious speech might otherwise be disadvantaged by the predominance of secular government expression. As long as these efforts to accommodate private religious expression do not favor religious speech over nonreligious speech and any avenues for debate are available on an equal basis to religious and nonreligious speakers, separationist and endorsement concerns should be met while also addressing accommodationist concerns regarding the marginalization of religious language in public life.

Two examples will illustrate this approach. In the holiday display context, government celebration of the holiday season would be limited to its secular aspects, but the secularism of the government’s displays can be balanced by private expression emphasizing the holidays’ religious dimensions. Where parks or other public fora are already available for private speech, religious individuals and groups should take responsibility for erecting their own crèches and menorahs. Where public places are not already available for such displays, the government should open up spaces for privately-sponsored expression. As long as the government administers these spaces in a neutral way and makes them available on an equal basis to religious and nonreligious speakers, the government will avoid any message of endorsement of religion over nonreligion and make room for public celebration of religious holidays in a way that avoids the dangers of commercialization, secularization, and politicization.

In the public school setting, Justice Stewart’s concern that public school education so structures a child’s life that the removal of religious expression from this setting will place religion at an artificial state-created disadvantage can be addressed by providing students with opportunities during the school day to acknowledge and express their religious views and commitments on their own and among one another. The role that public schools play in transmitting fundamental values and forming character makes opening such spaces for private religious expression by students critical where government speech must remain secular. As long as the opportunities that the schools provide for private expression are available equally to religious and nonreligious students and the school is scrupulous not to prefer religious over nonreligious activities, place pressures on stu-

"nonpublic fora." For further discussion of these fora and the rights of private speakers to use these fora, see infra notes 727–34 and accompanying text.
students to participate in religious exercises, or otherwise interfere with student religious speech, the concerns of separationists, supporters of the endorsement test, and accommodationists should all be met. The federal government has already provided one such opportunity in public secondary schools receiving federal funding. In 1984, Congress passed the Equal Access Act, which guarantees student religious clubs equal access to school facilities where they are made available to other noncurriculum related groups for meetings during noninstructional time. The protections of the Act extend to nonreligious groups as well as religious groups, and discrimination is prohibited where it is based on the "religious, political, philosophical, or other content of the speech at such meetings." Thus, instead of prayers designed and administered by the government, students are provided with the chance to engage in their own religious expression on an equal basis with nonreligious groups. By providing the opportunity for students with religious commitments to support one another in their faith as well as to share their faith with other students in a noncoercive setting, the school makes it possible for students to affirm their religious commitments without government involvement or endorsement. As long as they are not designed to encourage prayer over nonreligious forms of reflection, moment-of-silence laws also provide students with opportunities to acknowledge the importance of religion in their lives without government endorsement or interference. The Court addressed the constitutionality of moment-of-silence laws in Wallace v. Jaffree. While the Court struck down Alabama's statute on the grounds that the purpose of the legislature in enacting the law was to endorse prayer, two of the Justices who joined the Court's judgment expressly stated that they would approve moment-of-silence laws where the laws were neutral towards religion in purpose and effect, and three dissenting Justices voted to uphold the Alabama law. Robust private religious expression in the public sphere is not only the best way to balance the concerns of all the Justices, but it also

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722 See id. at 56.
723 See id. at 62, 66 (Powell, J., concurring); id. at 73-74, 76 (O'Connor, J., concurring in the judgment).
724 Of the dissenting Justices, two argued that the Alabama statute did not, in fact, endorse prayer over other activities. See id. at 85-90 (Burger, C.J., dissenting); id. at 90-91 (White, J., dissenting). Justice Rehnquist argued that general endorsement of prayer is not unconstitutional. See id. at 114 (Rehnquist, J., dissenting).
has significant advantages over religious expression by the state. It is in living one’s faith by expressing and sharing one’s views with others and seeking to explain and justify what one believes in public dialogue and debate that the role of religion as the guiding framework for one’s life is best preserved. Government expression can reflect the religiosity of the people, but it can never live their traditions. Furthermore, even at its most inclusive, government religious expression only mirrors the religious life of the American people. Private religious expression in the public sphere is not just a static reflection of the religious beliefs of Americans, but it is also part of the dynamic process by which religious traditions grow and develop in interaction with each other and the larger culture. Where private religious expression in public settings takes the form of dialogue and interchange among religious and nonreligious points of view, religious speakers learn from one another and from nonbelievers, and the entire community benefits from the valuable contributions that religious perspectives can make to public culture. It is in this living process of expression, interchange, growth, and development that religious traditions are best preserved and their most important contributions to American public life are made. As long as there are sufficient opportunities for such public expression and dialogue and religious speakers have full and equal access to public debate, religion does not need the support of government acknowledgment or recognition.

The success of this vision depends in part on the willingness of religious individuals and communities to enter into dialogue and debate in the public sphere, but it also depends upon sufficient opportunities for private religious speakers to voice their opinions on an equal basis with nonreligious speakers. Where the state operates speech fora available for public use, religious speakers must be guaranteed equal access to these fora on the same basis as nonreligious speakers. Government should also be encouraged to open up additional avenues for debate, and courts should give deference to these efforts to accommodate private religious expression as long as the fora are available to believers and nonbelievers alike on an equal basis and the state shows no favoritism towards religious expression. The Court has generally been very protective of the rights of religious speakers to participate in speech fora, and in each of its existing cases addressing the participation of religious speakers in government-operated speech fora, the Court has upheld the right of the religious speaker to use the forum. When the Court upheld the Equal Access Act in Board of Education v. Mergens, it also showed deference to the federal govern-

ment’s effort to accommodate private religious expression in the public school setting on an equal basis with nonreligious speech. However, in its early cases addressing private religious expression in government-operated speech fora, the Court always left open the possibility that in some circumstances the Establishment Clause might place special limitations on the access of private speakers to these fora, and in its most recent cases, a majority of Justices have made clear that they believe that special restrictions on private religious expression are sometimes required. As the discussion below demonstrates, the concerns that motivate these Justices are understandable, but the Justices both overestimate the potential dangers associated with private religious speech in government-operated speech fora, and they underestimate the detriment to religion that would result from restricting its access to public debate. In so doing, they propose a differential treatment for religious and nonreligious speech that threatens to undermine the full participation of religious speakers in public life and the robust private religious expression which are the most promising avenues for reconciling the concerns of all the Justices regarding religious expression by the state.

The Court has decided five cases addressing the access of religious speakers to government-operated speech fora. In each case, the government entity operating the forum sought to exclude the religious speaker on Establishment Clause grounds. Except in Mergens, where the Court addressed statutory protections for student speech, the Court began by considering the rights of the speaker under the Free Speech Clause of the First Amendment and then considered whether the Establishment Clause placed a special bar against the religious expression at issue. In addressing the speaker’s free speech rights, the Court followed its standard forum-based approach for evaluating restrictions on private expression on government property. This approach distinguishes between “traditional public fora,” “designated public fora,” and “nonpublic fora.” Traditional public fora such as streets and public parks are places “which by long tradition or by government fiat have been devoted to assembly and debate,” and in these fora, the government may not enforce content-based restrictions unless these restrictions are “necessary to serve a compelling state i-

726 For the plurality in Mergens, it was significant that the Act prohibits discrimination on the basis of the “political, philosophical, or other” content of student speech as well as its religious content. See id. at 248–49 (O’Connor, J., plurality). Congress’s protection of secular as well as religious speech supported the plurality’s finding that the legislature did not intend to endorse religion over nonreligion. See id. at 249.

terest and . . . narrowly drawn to achieve that end."728 A designated public forum is property that the state has opened up for use by all or part of the public.729 The designated public forum is a "limited" public forum if it is only open to a part of the public, and it is "unlimited" in character if it is open generally to the public.730 Restrictions on speech in designated public fora are subject to the same standards that apply to traditional public fora.731 If the government excludes a speaker who falls within the class of speakers to which the designated public forum is made generally available, the exclusion is subject to strict scrutiny.732 Other speech fora are nonpublic fora. In a nonpublic forum, the government can enforce content-based exclusions as long as "the distinctions drawn are reasonable in light of the purpose served by the forum"733 and "not an effort to suppress expression merely because public officials oppose the speaker's view."734 The Court's cases addressing the access of religious speakers to government-operated fora have involved all of these types of fora.

The Court's first case addressing the access of religious speakers to government-operated speech fora was *Widmar v. Vincent*,735 which was decided in 1981. In *Widmar*, the Court held that student religious groups at the University of Missouri at Kansas City were entitled to equal access to university facilities made generally available for the activities of student organizations.736 According to the Court, by opening its facilities for use by student groups, the University had created a designated public forum and, thus, was required to justify any content-based restrictions on student speech by a compelling state interest.737 The University argued that exclusion of religious groups was required by the Establishment Clause.738 The Court rejected the University's

728 *Id.* at 45.
730 *Id.*
731 *See id.* (citing *Perry*, 460 U.S. at 46).
734 *Perry*, 460 U.S. at 46.
736 For the facts in *Widmar*, see *id.* at 264–65.
737 *See id.* at 269–70. The Court in *Widmar* actually used the term "generally open forum," not designated public forum. *See id.* at 269. The Court developed the term "designated public forum" in later case law, and it has subsequently identified the forum in *Widmar* as falling into the designated public forum category. *See Cornelius*, 473 U.S. at 802–03; *see also Perry*, 460 U.S. at 45.
738 *See Widmar*, 454 U.S. at 270–71.
claim that use of its facilities by student groups would violate the Establishment Clause. The Court noted that the University did not identify itself with any student groups and that the facilities were open to a wide spectrum of student groups. According to the Court, at least in the absence of evidence that religious groups would dominate the forum, an equal access policy would not have the impermissible primary effect of advancing religion.

In 1990, in its decision in Mergens, the Court held that the equal access policy in the federal government’s Equal Access Act did not violate the Establishment Clause. Writing for a plurality of four, Justice O’Connor evaluated the constitutionality of the Act under the endorsement test, and she found that at least where religious clubs do not dominate a school’s club system, secondary school students are mature enough to understand that the school’s message is one of neutrality, not endorsement. Like the Court in Widmar, O’Connor left open the possibility that the Establishment Clause would be violated if religious groups dominated the forum. In an opinion concurring in the judgment, Justice Marshall, joined by Justice Brennan, also used the endorsement test, but he argued that the fact that many high school club systems are designed to promote fundamental values and citizenship will mean that the participation of religious groups will almost certainly signal school endorsement unless the school takes steps to disassociate itself affirmatively from the club system as a whole or the religious speech in particular. Justice Kennedy, joined by Justice Scalia, concurred in the judgment but disagreed with the use of the endorsement test. They agreed with Justice Marshall that the inclusion of religious groups in a club system designed to further the

739 See id.
740 See id. at 274.
741 See id. at 274–75. The Court’s Establishment Clause analysis in Widmar was based upon the three-part test developed in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Lemon test, a government policy must have a secular purpose, not have a principal or primary effect of advancing or inhibiting religion, and not foster excessive entanglement between government and religion. See id. at 612–13. According to the Court, while access to the forum in Widmar would benefit the religious groups “incidentally,” advancement of religion would not be the forum’s primary effect at least where religious groups do not dominate the forum. See Widmar, 454 U.S. at 274–75.
743 See id. at 252–53.
744 See id. at 267, 270 (Marshall, J., concurring in the judgment).
745 See id. at 261 (Kennedy, J., concurring in part and concurring in the judgment).
development of students will endorse religion, but they argued that such endorsement was a permissible accommodation of religion under the approach developed by Justice Kennedy in *Allegheny.* Justice Stevens dissented on statutory grounds.

Three years later in *Lamb’s Chapel v. Center Moriches Union Free School District,* the Court held that a church was entitled to equal access to public school facilities which were made available to the public for social and civic uses during nonschool hours. The church planned to use the facilities to show a film on child rearing and family values from a Christian perspective. The school district denied access on the grounds that allowing the church to use the school would violate the Establishment Clause. The Court assumed for the purposes of deciding the case that the school facilities were a nonpublic forum and, thus, that the school district could make content-based restrictions on speech as long as the restrictions were "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." According to the Court, because the church’s plan to use the forum for a film on child rearing fit within the general category of social and civic uses and their application was denied solely because of the religious perspective of their program, the school district had en-

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746 Justice Kennedy evaluated the constitutionality of the Equal Access Act under the accommodationist approach he developed in *Allegheny.* See *id.* at 260–62. According to Kennedy, the Act does not, on its face or as applied, coerce participation, see *id.* at 261–62, or give benefits to religion in such a degree that it "establishes a [state] religion or religious faith, or tends to do so," *id.* at 260 (quoting County of *Allegheny v. ACLU,* 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

747 Justice Stevens argued that the Equal Access Act applies only when a school has chosen to open up its club system to at least one group whose purpose is the advocacy of partisan theological, political, or ethical views. See *Mergens,* 469 U.S. at 276 (Stevens, J., dissenting). In that case, the school may not discriminate on the basis of the religious, political, philosophical, or other content of student speech. In Justice Stevens’s view, the majority interprets the statute too broadly when it construes the Act to require equal access to religious and other partisan groups whenever a school admits a club not directly related to the school’s curriculum. For the majority’s view, see *id.* at 239–40 (O’Connor, J.). Because the club system in *Mergens* had not been opened to such partisan groups, Justice Stevens found it unnecessary to reach the Establishment Clause question. See *id.* at 284 (Stevens, J., dissenting). While six of the Justices in *Mergens* agreed on the statutory issues, there was no majority regarding the Establishment Clause issue.


749 See *id.* at 386–87.

750 See *id.* at 387–88.

751 See *id.* at 394.

752 *Id.* at 392–93 (quoting Cornelius v. NAACP, 473 U.S. 788, 806 (1985)).
gaged in impermissible viewpoint discrimination. The Court rejected the school district’s argument that exclusion of the church was required by the Establishment Clause. Citing the fact that the film would have been shown after school hours without sponsorship by the school and in a forum open to and repeatedly used by a wide variety of private organizations, the Court found “no realistic danger” that the community would think that the school district was endorsing religion.

While the Court protected the right of the religious speaker to use the government-operated forum in each of these cases, it always left open the possibility that in certain circumstances the Establishment Clause might require restricted access. In Widmar, the Court suggested that where religious groups dominate the forum, unrestricted access would violate the Establishment Clause even absent any intent to favor religion on the part of the government. Justice O’Connor agreed when she applied the endorsement test in her plurality opinion in Mergens, and Justices Marshall and Brennan would have gone even further in requiring schools to affirmatively disassociate themselves from student religious groups whenever a club system is designed to further student development. In Lamb’s Chapel, the Court’s use of the endorsement test also suggested that in different circumstances where access to the forum could lead to the appearance of government endorsement, the Establishment Clause might require special restrictions on religious speech.

In 1995 in Capitol Square Review and Advisory Board v. Pinette, the question left open in Widmar, Mergens, and Lamb’s Chapel was addressed squarely by the Justices, and a majority argued that the Establishment Clause does place special limitations on private religious expression in government-operated speech fora. The question in Capitol Square was whether the Establishment Clause would be violated by allowing the Ku Klux Klan to place a cross on a state-owned plaza surrounding Ohio’s statehouse. The Klan applied for permission to place its cross on Capitol Square after the Capitol Square Review and Advisory Board authorized the state to put up its annual Christmas tree and granted a rabbi’s application to erect a menorah on the plaza. Because Capitol Square is a traditional public forum, the Court held that the Board was required to justify any content-based

753 See id. at 393-94.
754 See id. at 394-95.
755 Id. at 395.
757 See id. at 757-58.
758 See id. at 758.
restrictions on speech by a compelling state interest. The Board denied the Klan's request on the grounds that allowing the Klan to place its cross on the plaza would send a message of government endorsement of Christianity in violation of the Establishment Clause. The Court agreed that compliance with the Establishment Clause is a sufficiently compelling state interest to justify restrictions on speech in public fora, but rejected the Board's argument that the Klan's cross would violate the Establishment Clause.

The seven Justices who joined the judgment in Capitol Square disagreed over the appropriate analysis under the Establishment Clause and, in particular, over whether the endorsement test should be applied to private religious expression. Writing for a plurality of four composed of the Court's accommodationists, Justice Scalia argued that the endorsement test is only applicable where religious expression by the state is involved. The Establishment Clause is not violated where the government merely allows purely private speech in a traditional or designated public forum which is administered neutrally by the state and open to all on equal terms. The fact that private speech might be confused with government speech does not justify exclusion from the forum unless the government has fostered or encouraged the mistake.

The remaining five Justices argued that analysis of the cross under the endorsement test was appropriate and that the endorsement test is not limited to religious expression by the government. According to these Justices, permitting private religious speech in government-operated speech fora violates the Establishment Clause where a reasonable observer would confuse the speech with government expression or endorsement. Justice O'Connor gave the example of private religious speech which dominates the forum, and she also argued that in some cases the geography of the forum, the nature of the public space, or the character of the religious speech at issue

759 See id. at 761.
760 See id.
761 See id. at 764–66 (Scalia, J., plurality).
762 See id. at 770.
763 See id. at 766.
764 See id. at 775 (O'Connor, J., concurring in part and concurring in the judgment); id. at 786–87 (Souter, J., concurring in part and concurring in the judgment); id. at 799–800 (Stevens, J., dissenting).
765 See id. at 777–78 (O'Connor, J., concurring in part and concurring in the judgment); id. at 786 (Souter, J., concurring in part and concurring in the judgment); id. at 799–800 (Stevens, J., dissenting). As discussed infra note 772, the Justices disagree over what knowledge should be attributed to the "reasonable observer."
might lead to a confusion of private and public actors. Where this occurs, nonreligious speech would be permissible, but religious expression would not be.

Three of the Justices who applied the endorsement test in *Capitol Square* found no violation of the Establishment Clause. In a concurrence joined by Justices Souter and Breyer, Justice O'Connor emphasized that the square had been used for expression by a variety of nongovernmental groups and that the Klan was willing to place an adequate disclaimer on its cross informing the community that the cross was not government expression or endorsed by the government. Justice Souter was more troubled that the placement of an unattended religious symbol on government property in front of a government building could lead easily to a perception of government endorsement, but he also noted the possibility of attaching an adequate disclaimer to the cross. Justice Stevens dissented from the judgment of the Court and argued that no disclaimer would be sufficient to negate the message of endorsement that the Klan’s cross would send. According to Stevens, where the state permits an unattended religious symbol to be displayed on its property, the “normal inference” is that the state has endorsed the message of the display, and this is particularly so where the display is in front of the state’s capitol building. A disclaimer would not negate the message of endorsement because the state’s decision to allow a third party to place the symbol on its property continues to send a message of endorsement, and in this case a disclaimer could easily be overlooked by passing motorists and pedestrians. Justice Ginsburg also dissented.

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766 *See id.* at 777–78 (O'Connor, J., concurring in part and concurring in the judgment).
767 *See id.* at 782.
768 *See id.* at 785–86 (Souter, J., concurring in part and concurring in the judgment).
769 *See id.* at 784, 793–94.
770 *See id.* at 801–02 (Stevens, J., dissenting).
771 *See id.* at 806.
772 *See id.* at 806 n.13. Justice Stevens also disagreed with Justices O'Connor, Souter, and Breyer regarding the knowledge that should be attributed to the “reasonable observer” who is the subject of the endorsement test. According to O'Connor, the endorsement test should be applied with respect to a reasonable observer who is aware of the “history and context” of the forum in which the display appears. *See id.* at 780 (O'Connor, J., joined by Souter & Breyer, J.J., concurring in part and concurring in the judgment). By contrast, Justice Stevens argued that the endorsement test is violated if any reasonable person could perceive a message of endorsement, including tourists, traveling salesmen, and school children. *See id.* at 799–800 & n.5, 808 n.14 (Stevens, J., dissenting).
She argued that the disclaimer used by the Klan was not sturdy and that the district court did not mandate an adequate disclaimer when it ordered the Board to allow the Klan to display its cross. Justice Ginsburg left open the question of whether a sturdier disclaimer could withstand Establishment Clause challenge.

Thus, for five of the Justices in Capitol Square, the Establishment Clause places special limitations on private religious expression in government-operated speech fora where the speech can be confused with government expression or endorsement even if the government does nothing to foster the mistake and administers the forum on a neutral basis. Justices O'Connor, Souter, and Breyer suggest that in many cases a disclaimer will solve the problem of endorsement and, thus, the exclusion of the religious speaker will not be required. However, Justice Stevens argues that the ameliorating effects of disclaimers are limited at least where unattended displays are at issue, and Justice Ginsburg would subject any disclaimers to exacting scrutiny. None of the Justices would require disclaimers from nonreligious speakers where both religious and nonreligious speech can be confused with government endorsement. As Justice Scalia points out in his plurality opinion, religious speech alone may be required to disclaim public sponsorship.

On the same day that it decided Capitol Square, the Court addressed another possible restriction on religious speech in government-operated speech fora in Rosenberger v. Rector and Visitors of the University of Virginia. In Rosenberger, four of the Justices who applied the endorsement test in Capitol Square argued that the Establishment Clause also places special restrictions on the participation of religious speakers in public fora where funding by the state is involved rather than merely access to government property. The religious speaker in Rosenberger was a student organization at the University of Virginia formed to publish a magazine addressing philosophical, personal, and community issues from a Christian perspective. "Wide Awake Publi-
cations" sought reimbursement for its printing costs from a university student activities fund generally available to other student news, information, and opinion groups. The University denied funding under a university policy excluding "religious activities" that "primarily promote[] or manifest[] a particular belief[] in or about a deity or an ultimate reality" from the fund, and defended its decision on Establishment Clause grounds. In a decision written by Justice Kennedy, the Court found that the student activities fund was a limited public forum "more in a metaphysical than in a spatial or geographic sense," and that the University's decision to deny funding was viewpoint discrimination. The Court rejected the University's argument that the exclusion was required by the Establishment Clause. According to the Court, the University's program was neutral towards religion and the funding involved was indistinguishable from government expenditures to maintain physical fora such as the meeting rooms in Widmar and Mergens. In the Court's view, the University was essentially funding a "pure forum for the expression of ideas" in which student religious groups were entitled to participate.

The dissent in Rosenberger was authored by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer. According to Justice Souter, participation by religious publications in the student activities fund would involve the direct funding of religious activities, which the Court has prohibited under its cases addressing aid to religious schools and other religious organizations. This prohibition applies even where the funding is made on a neutral basis to both religious and nonreligious organizations. Souter distinguished Widmar and Mergens on the grounds that they involved "the preservation of free speech on the model of the street corner." Where the forum is not one for "literal speaking" and direct government funding of expression is involved, participation by religious groups violates the Estab-

779 See id. at 824-25, 827.
780 Id. at 825, 827 (quoting from university guidelines governing disbursements from the student activities fund).
781 See id. at 837.
782 Id. at 830.
783 See id. at 829-32. Justice Kennedy's opinion was joined by Justices Rehnquist, O'Connor, Scalia, and Thomas.
784 See id. at 840.
785 See id. at 842-43.
786 Id. at 844.
787 See id. at 873-75, 877-85 (Souter, J., dissenting).
788 See id. at 877-85.
789 Id. at 888.
Justice O'Connor wrote a concurrence acknowledging both the importance of government neutrality to religion as well as the Court's prohibition against the direct funding of religious activities, and she sought to resolve the conflict between them by using the endorsement test. Pointing to the fact that a wide range of groups receive funding, that financial assistance is limited to printing costs, and that student groups are independent of the University, Justice O'Connor found no danger that the participation of religious groups would convey a message of endorsement of religion.

The Justices who argue that the Establishment Clause places special limitations on private religious expression in government-operated speech fora have understandable concerns. As Justice Souter noted in Capitol Square, the perception of government endorsement makes religious minorities and nonbelievers feel like outsiders even if the government does not intend this effect. Justice Souter also worries that government funding of private religious expression in public fora will involve the same dangers of the "secularization of a creed" which are present when government engages in religious expression directly. However, while their concerns are not without some basis, the Justices tend to underestimate the harm to religion that would result from the differential treatment of private religious expression and overestimate the potential dangers associated with equal access for religious speakers to government-operated fora. While some private religious expression might be confused with government endorsement of religion even in neutrally-administered speech fora, the dangers of endorsement are far lower than in situations where the government does the speaking. Similarly, while there is a possibility that funding for private religious expression in public fora will have a distorting or secularizing effect on religious speech, this possibility is small where the government remains strictly neutral among viewpoints and is careful not to identify itself with private expression. By contrast, the detriment to religion associated with restricting the access of religious speakers to public debate is great. Where government speech is limited to the secular, robust private religious

790 See id. at 889. Justice Souter also argued that the University had not engaged in viewpoint discrimination. See id. at 895–99.
791 See id. at 846–47 (O'Connor, J., concurring).
792 See id. at 849–51.
expression in the public sphere is essential if religion is not to be marginalized in the lives of believers. Restricting the participation of religious speakers in government-operated speech fora not only diminishes the opportunities for private religious expression, but it also skews public debate and exchange in favor of the secular and deprives the larger community of the contributions that religious viewpoints can make. For example, if student religious groups at a public university do not have the same opportunities to publish their views that nonreligious groups do, secular ideas will take prominence over religious ones and valuable contributions to student debate will be lost. Likewise, if public fora are restricted to secular celebrations of the holiday season, the richness that is associated with its religious dimensions will be overshadowed. The Klan's cross on Capitol Square was surely abhorrent, but as Justice Stevens argues, if the cross is unconstitutional, so is the rabbi's menorah. Moreover, where nonreligious speakers have access to fora which present dangers of endorsement but religious speakers do not, a message of government endorsement of nonreligion over religion will be sent. Where religious expression is not excluded but special disclaimers are required of religious speakers but not nonreligious speakers, a similar discriminating effect will result.

Those who argue that the endorsement test should be applied to private religious expression in government-operated speech fora also overestimate the dangers associated with religious speech even when it can be confused with government expression. In many cases, religious speech in a public forum will be a catalyst for debate that encourages other religious and nonreligious actors to participate as well. The Justices who apply the endorsement test to private speech have recognized that a wide range of speakers in the forum significantly reduces the potential for endorsement. However, they have always focused on the range of speakers who have used the forum in the past and are using the forum at the time of litigation. What they do not take into account is the significant chance that religious speech which might be confused with government expression in the present will, in the future, provoke vibrant debate that will negate any endorsing effect. If religious speech is excluded from a forum because it might be confused with government endorsement at the time a lawsuit is underway, the possibility that it might be a source of valuable dialogue and debate in the future will be cut off.

The facts in Capitol Square illustrate the potential that religious speech has for stimulating interchange and debate. When the Justices 795 See Capitol Square, 515 U.S. at 808-09 (Stevens, J., dissenting).
in Capitol Square evaluated the potential for government endorsement associated with the Klan's cross, they focused largely on the range of groups which had used the forum in the past, the dangers associated with having an unattended religious display so close to a government building, and the potential ameliorating effects of a disclaimer. What they did not focus on in their application of the endorsement test was the ongoing process of expression which stimulated the Klan's display and in turn was stimulated by it. The story of the holiday display in Capitol Square began when the Capitol Square Review and Advisory Board authorized the state to put up its annual Christmas tree.796 A rabbi followed with an application to erect a menorah on the plaza, which the Board granted.797 The rabbi's application promoted the response by the Klan and their application to place a cross on the plaza.798 While the Board initially denied the Klan's application, it granted the permit for the cross after the Klan filed suit in federal district court and the district court issued an injunction requiring the Board to allow the cross.799 The final stage in this story occurred after the Klan erected its cross when a number of local churches responded to the bigotry that the Klan's cross represented by adding their own crosses to the display.800 The end result was that part of the square was, to use Justice Souter's words, "strewn with crosses."801 One glance at the photograph of the scene in the United States Reports is sufficient to demonstrate that the eclectic, messy scene which resulted could not possibly be confused with government action. Far from the pleasant and commercialized display in Lynch or the well-orchestrated displays in Allegheny, the scene on the plaza was clearly a dialogue involving numerous voices, some very ugly and others quite uplifting. It is this sequence of events and the debate that it represents that is the most convincing evidence that the speech was private. Not all private religious expression which might be confused with government endorsement will provoke such an interchange, but it is better to err in favor of the free exchange of ideas and the valuable contributions that religious expression can make than to shut off the possibility of future dialogue or skew debate by subjecting some voices to special restrictions. The costs to participants and to society from restricting free debate and expression are too great a price to pay when there is

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796 See id. at 758 (Scalia, J.).
797 See id.
798 See id.
799 See id. at 758–59.
800 See id. at 759; see also id. at 792 (Souter, J., concurring in part and concurring in the judgment).
801 Id. at 792 (Souter, J., concurring in part and concurring in the judgment).
strong chance that what may be confused with government endorsement in the present will not, in fact, be the last word. For those who are concerned that religious expression can be confused with government expression, the appropriate response is to jump into the forum rather than to litigate.

The fact that some religious expression which can be confused with government endorsement will not provoke the dialogue or debate necessary to negate any endorsing effects may mean that it is not possible to fully satisfy the supporters of the endorsement test. However, perhaps they can be reconciled if they consider that the dangers of endorsement associated with private religious expression in government-operated speech fora are low when compared to the high costs to religion that would result if it were subject to special restrictions that do not apply to nonreligious speech. The concerns of the accommodationists are real. Just as it is appropriate to ask accommodationists to take into account the positions of the separationists and supporters of the endorsement test and to consider a secular state, it is also appropriate to ask supporters of the endorsement test to take into account the concerns that lie beneath the accommodationist position and to consider equal protections for private religious expression even when this expression might occasionally be confused with government endorsement. If all of the Justices compromise a little, it will be possible to balance all of their concerns.

For some Justices and scholars, the value of unrestricted debate among private religious actors in the public sphere is not as great as I have represented it to be. For example, in *Capitol Square*, Justice Stevens emphasizes that debate among religious adherents always carries the potential of bitter strife and controversy particularly when the participants perceive that their opponents' expression might be confused with government endorsement. For Justice Stevens, the story in *Capitol Square* was such a story of strife and controversy, and it justifies his view that, where there is a danger of confusing private religious expression with government endorsement, the balance should be struck in favor of stemming divisiveness rather than in favor of ensuring equal access of religious speakers to public debate. Justice Stevens's view that religious debate carries dangerous potential for strife and factionalism is a common view among scholars who favor strict limitations on religious expression by the government. For example, Ira Lupu speaks of the potential for religion to become a "source of

802 See id. at 811–12, 814 (Stevens, J., dissenting); cf. County of Allegheny v. ACLU, 492 U.S. 575, 651 & n.10 (1989) (Stevens, J., concurring in part and dissenting in part).
ugly and destructive factional dispute." While it can also be a "force of great social good and personal inspiration," religion presents "a unique set of social hazards" and "an unusually grave risk of factional conflict." According to Lupu, a central function of the Establishment Clause is to control this potential for strife by "deterring religiously motivated fights" that result from the involvement of religious institutions with the government. The "unique constitutional disability" of religion under the Establishment Clause is required to prevent this danger of "nightmarish conflict and potential tyranny." For Kathleen Sullivan as well, the primary purpose of the Establishment Clause is to end the "war of all sects against all" by establishing a "secular public moral order," and she argues that the "price of this truce is the banishment of religion from the public square" and the "privatiz[ation]" of religious disputes and ques-

803 Lupu, supra note 712, at 357.
804 Id.
806 Lupu, supra note 712, at 362. According to Lupu, the Establishment Clause functions to control religious faction by requiring the principle of "equidistance." Id. Equidistance, which Lupu has also referred to as "equal religious liberty," see, e.g., Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. Pa. L. Rev. 555, 567 (1991), means that the government may not explicitly favor one religious sect over another, see Lupu, supra note 712, at 362. Equidistance can take the form of either separationism or formal neutrality among sects and between religion and nonreligion. See id. Lupu generally favors formal neutrality over separationism except where separationism is required to achieve equidistance. See id. at 362–63. One example of where separationism is required is in the holiday display context; government may never celebrate the religious aspects of a holiday with religious meaning. See id. at 370. Lupu distinguishes religious expression by the state from private religious speech in public fora. See id. at 370 n.47.
807 Lupu, supra note 712, at 362.
808 Id. at 360. While Lupu argues that the Establishment Clause places special disabilities upon religion, he also argues that the Free Exercise Clause gives special protections to religious adherents. See id. at 357. According to Lupu, the Free Exercise Clause should be construed to mandate limited exemptions from neutral, generally applicable government policies which burden individual free exercise. See id. at 375–84. For Lupu's views about when exemptions should be required, see id. at 379–80, and see also Ira C. Lupu, The Trouble with Accommodation, 60 Geo. Wash. L. Rev. 743, 775 (1992), and Lupu, supra note 806, at 562–63. Lupu links the special protections for religion under the Free Exercise Clause to the positive value of religion as a force of social good and personal inspiration. See Lupu, supra note 712, at 357.
810 Id. at 222.
tions. In Sullivan’s view, as in the view of the majority of Justices in Capitol Square, where private speech can be confused with government expression, government must be non-neutral to religion. When Justice Ginsburg cites Sullivan’s defense of a “secular public order” with approval in Capitol Square, she suggests that she also shares Sullivan’s views.

There is no doubt that religious debate can lead to sharp disagreement and deep controversy and that historically some of these disagreements have been very destructive. However, what these Justices and scholars tend to overlook is that these debates can also be a source of great value for participants as well as the larger society even when disagreement becomes intense. The Justices and scholars who emphasize the negative aspects of religious controversies tend to understand religion as something divorced from knowledge or reason, and thus, religious disagreement becomes a battle among irreconcilable factions who take their positions on faith and, thus, are unable to engage in productive dialogue or interchange. In Lupu’s words, the dangers of religious factionalism are, in large part, the “unfortunate byproduct of the individual suppression of doubt upon which religious faith depends,” and the claims that religious institutions make to divine inspiration as a basis of power and legitimacy “discourage skepticism” and undermine the “habits of mind necessary for democratic decisionmaking.”

When Justices Brennan, Blackmun, and Stevens speak of religion as a matter of faith, not reason, they express a similar view of religion. For example, in his separationist concurrence in Weisman, Justice Blackmun describes religious faith as something beyond rational deliberation and incompatible with dialogue and dissent:

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human delib-

811 Id. at 211.
814 Lupu, supra note 712, at 360.
815 Lupu, supra note 806, at 597.
816 Id. at 598.
eration. When the government appropriates religious truth, it "transforms rational debate into theological decree."\textsuperscript{817}

When Justice Stevens discusses the potential for divisiveness and bitter controversy among religious adherents in \textit{Capitol Square}, he also describes religion as "the realm . . . where knowledge leaves off, and where faith begins."\textsuperscript{818}

As I have argued above, these Justices misunderstand the nature of religious belief when they suggest that faith is disconnected from knowledge or reason. Scholars who suggest that faith involves blind obedience which suppresses critical inquiry, questioning, and rational deliberation also present a distorted picture of religious faith. These Justices and scholars are surely correct that religious belief involves matters of faith that are beyond the capacity of humanity's rational faculties to fully understand, and they are correct to emphasize that faith has important experiential dimensions that relate as much to feeling as to knowledge. However, for most believers, faith also involves critical reflection and inquiry and it is not a matter of blind obedience. Deep thought and questioning often precede a decision to accept a particular religious tradition as one's own, and when this decision is made, it is because these traditions have the power to make sense of one's world and experiences. Thus, faith is part of a process by which individuals use their capacities for reflection, investigation, and judgment to better understand their world. A decision of faith may mean accepting claims that are beyond humanity's capacities to fully understand, but these claims are not irrational and the response of faith is a reasonable one that can be discussed and shared with others. Furthermore, for most believers, questioning and reflection never end as they seek to understand the truths that they have embraced more fully and apply them to their lives. Discernment, debate, growth, and development are intrinsic aspects of faith both in the lives of individual believers and in religious communities as a whole, and both benefit from interchange and dialogue with members of other traditions as well as nonreligious world views. It is through open debate and discussion that religious traditions are brought closer to the truth that they seek, and the important insights that they contain are shared with each other and the larger community. To be sure, where


\textsuperscript{818} \textit{Capitol Square}, 515 U.S. at 812 n.19 (Stevens, J., dissenting) (quoting Clarence Darrow, Transcript of Oral Argument at 7, \textit{Scopes v. State}, 289 S.W. 363 (Tenn. 1927) (on file with Clarence Darrow Papers, Library of Congress)).
government engages in religious expression or otherwise offers active support to religion, the potential for sectarian rivalry and struggle for official favor is likely to generate conflict which is destructive in nature. However, where only private access to public fora is involved, the consequence of any mistaken perception of government endorsement will simply be a more vigorous and inclusive debate as those who feel left out join the conversation. There is no need for religious speakers to curry favor with the government in order to enter into debate in a public forum as long as equal access is available to all.

For Justice Stevens, the fact that the Christmas tree and menorah in *Capitol Square* provoked just such a response from the Klan, and in turn from the churches who added their own crosses, is only evidence of an unfortunate "battle" and a destructive controversy. If one focuses on the Klan's response alone, *Capitol Square* does, indeed, present a bleak picture that supports the views of those who emphasize the vicious and negative aspects of religious controversy. The messiness of the overall scene seems no more uplifting, and one could easily conclude that an empty public square, or at least a square limited to secular symbols of the holiday, would have been better. However, when viewed as a whole, the sequence of events in *Capitol Square* invites a closer look. The story in *Capitol Square* did not end with the cross. When the Klan turned "one of the most sacred of religious symbols [into] a symbol of hate," a number of local churches responded by emphasizing the meaning of the cross as a symbol of love and concern for others, including those outside of their own religious tradition. In so doing, they gave the story in *Capitol Square* a redemptive ending and demonstrated the positive contributions that religious voices can make to society. These churches became part of a long tradition of religious groups in America who have drawn upon their religious resources to press their fellow believers and the larger society to live up to their higher values and to renounce hatred, discrimination, and the exploitation of others. In demonstrating solidarity with the Jewish community, they also showed that discussion among religious tra-

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819 *Capitol Square*, 515 U.S. at 811.
820 *Id.* at 771 (Thomas, J., concurring). For Justice Thomas, the primary message of the cross was not a religious one, but a political one. *See id.* The Klan used the cross to send a message of racism and intimidation, *see id.* at 770-71, and in Thomas's view, the case may not have involved religious speech at all, *see id.* at 771. However, while the Klan certainly exploited the cross for political ends, the fact that the Klan erected its cross as part of a larger holiday display suggests that at least in this case, the Klan's expression did have a dual religious and political meaning.
821 For example, religious groups played a central role in the fight to end slavery and in the civil rights movement. *See Noonan, supra* note 3, at, 250-52, 256-58.
ditions need not take the form of disagreement, but can take the form of cooperation and mutual respect. Thus, what happened on Capitol Square was messier and uglier than a holiday display designed by the state, but in many ways it was also more valuable. It was a real debate, and the churches who placed their crosses on the plaza not only affirmed the relevance and vitality of religious language and practices to their lives, but they also lived their traditions in a way that mere government acknowledgment of religion never can. As they did so, they challenged the Klan to live up to the real meaning of the symbols they displayed and reminded the larger community of its fundamental commitment to equality and fair treatment of all members of society. One might also argue that allowing the Klan to display its cross diffused some of the animosity of its members rather than increased it, and that it is the suppression of religious factionalism, not open debate, that contributes more to its strength. The positive aspects of the religious debate and dialogue come at a price, and there will always be ugly and divisive voices such as the Klan. However, to gain the benefits that religious expression and interchange bring, one must be willing to allow all voices to participate fully in public debate, and the story in *Capitol Square* shows how open debate can even bring something good out of evil.

Thus, in the end, the story in *Capitol Square* showed how robust private religious expression in the public sphere can be a force for good in society while also preventing the marginalization of religion, ensuring the fair treatment of religious minorities and nonbelievers, and preventing the secularization of religious symbols and traditions that results from too close a union between religion and government. It also confirms the suggestion above that while religious pluralism is both deep and inescapable in American society, it is not radical. Most Americans can appreciate the positive messages that were present on the plaza, both in the menorah and in the church's crosses, just as they will condemn the hatred behind the Klan's message. Conversations among religious believers and nonbelievers are possible and fruitful: there is a truth towards which we all strive and which we can glimpse in part, and we are not so radically different from one another that we cannot understand and appreciate the insights that different religious voices can bring to American society.