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Essay

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The Establishment Clause and the Concept of Inclusion

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.
> - Earl Warren[1]

> When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). *See* discussion *infra* Part I.B.1.

> premised on the belief that all persons are created equal when it asserts that God prefers some.
>
> - Harry Blackmun[2]

A connection exists between the message one sees or hears and the subjective experience one has in response. A movie can make us laugh or cry, a piece of music can immediately bring us back to some moment in time, painful or exulting, a flag can make us feel patriotic, a few words can put us on top of the world, or at the bottom. Common experience confirms that words, in particular, can evoke strong emotions. In the realm of religious experience, words can be used to transmit dogma, conduct sacred rituals and other elements of religious practice, or foster group identity. The impact of such words on individuals and groups both inside and outside of a given religious order may be powerful. When the government uses religious words, the message is just as provocative. Depending on the circumstances, it may be even more so.

In a recent constitutional challenge to the words "under God" in the Pledge of Allegiance,[3] Michael Newdow, on behalf of his daughter, claimed that the daily recitation of the Pledge at the public elementary schools of the Elk Grove Unified School District violates the Establishment Clause.[4] The specific injury claimed by Newdow is that his daughter is "compelled to 'watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's is 'one nation under God.'"[5] The U.S. Court of

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[2] Lee v. Weisman, 505 U.S. 577, 606-07 (1992) (Blackmun, J., concurring). *See* discussion *infra* Part II.

[3] The original Pledge of Allegiance did not include the words "under God," which were added in 1954 by an act of Congress. Act of June 14, 1954, Pub. L. No. 396, Ch. 297, 68 Stat. 249 (codified as amended at 4 U.S.C. § 4).

[4] Newdow v. United States Cong., 292 F.3d 597 (9th Cir. 2002) (*Newdow I*), *republished at* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom*. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

[5] *Newdow I*, 292 F.3d at 601. Ironically, the mother of Newdow's child reports that her daughter is a professed Christian and that she has no objection to reciting the Pledge. *See* Bob Egelko, *Girl in Pledge Case Not an Atheist, Mom to Tell Court*, S.F. CHRON. July 13, 2002, at A15. Although her motion was ultimately denied, the mother of Newdow's daughter challenged Mr. Newdow's standing to sue on the ground that she maintains sole custody of their daughter. *See* Newdow v. United States Cong., 313 F.3d 506 (9th Cir. 2002). In his opinion for the Supreme Court, Justice Stevens noted the conflict between Newdow's and his daughter's reported beliefs. *Newdow*, 124 S. Ct. at 2312.

> In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in

Appeals for the Ninth Circuit agreed with Newdow, finding the Pledge, including the words "under God" unconstitutional under the *Lemon*, coercion, and endorsement tests set forth by the U.S. Supreme Court.[6] The Ninth Circuit denied the Government's requests for an en banc rehearing and issued an amended decision reaching essentially the same conclusion.[7] The implementation of the decision was stayed pending review by the U.S. Supreme Court.[8] On Flag Day, the Court released its much anticipated decision.

In an opinion by Justice Stevens, the Court emphasized the significance of the Pledge as "a common public acknowledgment of the ideals that [the] flag symbolizes."[9] Nonetheless, the Court ultimately reversed the decision of the Ninth Circuit on the ground that Newdow lacked prudential standing.[10] Chief Justice Rehnquist authored an opinion concurring in the judgment but found that Newdow had standing to challenge the Pledge. Discussing the merits, Rehnquist opined that the Pledge does not violate the Establishment Clause because the words "under God" reflect the Nation's religious history.[11] Justice O'Connor joined in Rehnquist's conclusion, though she wrote separately to emphasize why she maintains that the Pledge is not a state endorsement of religion.[12] Justice Thomas concurred in the judgment but stated that under current precedent, the Pledge could

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dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing.

Id.

6 *Newdow I*, 292 F.3d at 597.

7 Newdow v. United States Cong., 328 F.3d 466 (9th Cir. 2003) (*Newdow II*), *rev'd sub. nom*. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). In the amended decision, the Ninth Circuit invalidated only the school district policy of reciting the Pledge. In its initial decision, the Ninth Circuit panel had struck down the 1954 statute which amended the pledge to include the words "under God." That ruling would have made every state or federal government application of the Pledge unconstitutional.

8 Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 384 (2003) (mem.). The Court identified the questions presented as "[w]hether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,' violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment," and whether Newdow had standing to challenge the school district policy. *Id.*

9 *Newdow*, 124 S. Ct. at 2305.

10 *Id*.

11 *Id*. at 2312 (Rehnquist, C.J., concurring).

12 *Id*. at 2321 (O'Connor, J., concurring); *see infra* Part II.A.1.

not withstand an Establishment Clause challenge.[13] Rather, Thomas once again advanced his view that the Court's incorporation of the Establishment Clause through the Fourteenth Amendment set the Court's doctrine on an erroneous course.[14] Justice Thomas concluded that even if the Establishment Clause has been properly incorporated against the states, the Pledge does not constitute a state establishment of religion.[15] The majority opinion, supported by five Justices, does not reach the issue of whether public school application of the Pledge violates the Establishment Clause.[16]

In reflecting on *Newdow*, I recall a very special teacher telling me about an earlier time in her life when she began her career teaching elementary school children. After she taught her students to say the Pledge of Allegiance, they failed to notice when she no longer repeated it with them. As a young black woman in the 1960s, she found it difficult to pledge allegiance to the flag, not for lack of patriotism, but because her own life experiences told her that American reality often did not live up to its lofty ideals, at least some of which are reflected in the Pledge.[17] It was in part this reality that the Supreme Court confronted in *Brown v. Board of Education*,[18] the landmark civil rights decision declaring segregation in education unconstitutional.

I also recall hearing some Christians occasionally express grief over "the day that prayer was taken out of school," no doubt referring to *Engel v. Vitale*,[19] a Supreme Court case decided during the same era as *Brown*. Much like the cases invalidating school-sponsored classroom prayer and Bible reading, the Ninth Circuit decision in *Newdow* excited passionate reactions. But the practice involved in *Newdow* is far from the school-sponsored classroom prayer and Bible reading involved in those cases.

[13] *Newdow*, 124 S. Ct. at 2327 (Thomas, J., concurring) (applying Lee v. Weisman, 505 U.S. 577 (1992)); *see* discussion *infra* Part I.B.3.

[14] *Newdow*, 124 S. Ct. at 2328; *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 677-80 (2002) (Thomas, J., concurring).

[15] *Newdow*, 124 S. Ct. at 2333 (Thomas, J., concurring).

[16] *See id.* at 2305. Justices Kennedy, Souter, Ginsburg and Breyer joined in Stevens' opinion. Justice Scalia recused himself from the case apparently due to public comments he had previously made concerning the Ninth Circuit decision in *Newdow*. *See* Charles Lane, *High Court to Consider Pledge in Schools; Scalia Recuses Himself from California Case*, WASH. POST, Oct. 15, 2003, at A1.

[17] Among other things, the Pledge characterizes America as "one Nation, under God, with liberty and justice for all."

[18] 347 U.S. 483 (1954).

[19] 370 U.S. 421 (1962).

While the principle that public schools cannot organize and facilitate religious practices such as prayer has long been recognized, the Ninth Circuit decision was controversial because it strikes two words from the Pledge based on the subjective experience of listeners.[20] Many unfamiliar with the Supreme Court's Establishment Clause doctrine would not have supposed that being required to listen to a phrase such as "under God" would amount to a constitutional harm. And those same persons, when posed with the question of whether they believed the Pledge of Allegiance to be a religious exercise, would have probably answered "no." Thus Michael Newdow's claim can be seen as doubly anomalous, resting on the feelings of a religious outsider when required to passively listen to a marginally religious message.[21]

The lower court decision in *Newdow* was not, however, as some have suggested, merely a product of the "liberal" Ninth Circuit. Nor is the Ninth Circuit's decision the judicial aberration from precedent that many claim it to be.[22] Rather, the Ninth Circuit's decision in *Newdow* reflects a trend within a particular strand of the Supreme Court's Establishment Clause jurisprudence that has become increasingly concerned with the religious minority's sense of inclusion in a given religious message.[23] The Court's concern with eliminating the discomfort of nonadherents began in the school prayer cases. As the Court's Establishment Clause jurisprudence has developed, however, the Court has applied this approach in other factual settings.[24]

This trend reflects the Court's reaction to what in some cases has been and in other cases has appeared to be practices that

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[20] This Essay does not evaluate whether requiring teachers to lead willing students in reciting the Pledge constitutes an affirmation of belief, religious or otherwise. For such a discussion of the Pledge, see Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41 (2003).

[21] For the purpose of this Essay, I assume that the Pledge, containing the words "under God," can be appropriately characterized as religious, without any qualification as to whether its non-religious elements (political, historical, or traditional) render it otherwise.

[22] *See* Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1869 n.13 (2003). While collecting commentary concluding that the Pledge including the words "under God" is constitutional, Professor Gey takes the position that the current Pledge violates the Establishment Clause.

[23] Establishment Clause claims challenging aid to religious institutions, as well as claims by religious groups seeking access to public facilities, are beyond the scope of this Essay.

[24] *See infra* Part I.B.

exclude persons with "religious minority" status.[25] So in one view, the Court's Establishment Clause decisions could be characterized as antidiscrimination cases that (together with *Brown*) represent a cultural movement from a bad society to a better one—from exclusion to inclusion.[26] Yet others perceive the same Establishment Clause decisions as secularizing and antireligious, marking society's movement from bad to worse. It is difficult to ascribe any particular motivation to one person, let alone, as in the case of the Supreme Court, several different groups of people over time.[27] Nonetheless, in this Essay, I attempt to do so and I conclude that it is probably fair to say that the Court's intention was to target discrimination, with incidental harm to religionists occurring as a type of secondary effect.

The problem that eventually arose was, in part, one of degree. Recognizing the reality of the impact of words and symbols on non-adherents, the Court began invalidating religious manifestations on grounds scarcely more than religious offense. In its jus-

[25] As is often the case with labels, the terms "majority" and "minority" are difficult in this context. Generally and historically, Protestant Christianity has been in the religious majority and most other faiths as well as non-believers have been in the minority. These designations are subject to change as the analysis shifts from one community to another. Any attempt to characterize the religious majority and minority is also made difficult by considerations of the overall societal power structure. While certain vocal members of the religious majority may wield power in their local communities, they are probably in the minority in terms of their representation in national government, the media, academia, and other outlets that exert considerable control over the direction of society.

[26] *Cf.* Marci Hamilton, *Holiday Decorations, Religion Clauses and the Supreme Court*, CNN.COM *at* http://www.cnn.com/2004/LAW/01/01/findlaw.analysis.hamilton.decorations/index.html (Jan. 1, 2004) (arguing that the Supreme Court's religious display cases progressively dispelled the idea of a "solely Christian world view" much like the Court's decision in *Brown* responded to the discrimination fostered by Jim Crow). In a related discussion Hamilton asks, "[i]f a public school offers only Christian holiday symbols, will non-Christian children feel fully included in the education offered?" *Id*.; *see also* Tseming Yang, *Race, Religion and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 180 (1997) ("Endorsement jurisprudence evinces the constitutional importance of inclusion and tests the permissibility of government programs and actions in this regard.").

[27] Several recent works have offered pragmatic explanations for the Court's Establishment Clause decisions. John C. Jeffries, Jr. & James A. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (noting early Establishment Clause decisions reflecting a strict separation of church and state inspired by Protestant bias against growing Catholic population); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 238-51 (2003) (arguing that Jewish claimants making Establishment Clause challenges to majoritarian practices succeeded to the extent that members of the Court found Jewish interests consistent with the interests of the Protestant majority).

tifiable haste to safeguard minority interests, the Court has produced a doctrine that is poised to displace all public religious manifestations.[28] The shifting constitutional tests used to evaluate Establishment Clause cases reveal a diminishing quantum of Establishment harm required to invalidate a particular policy, devolving to no more than mere exposure to a religious message. In this Essay, I propose for consideration the following thought and attendant questions: one's evaluation of *Newdow* depends on which story one believes. Does the Court's Establishment Clause doctrine, focusing on the inclusion of outsiders, amount to a vindication of religious minorities? Or does the doctrine threaten to overbalance in favor of religious offense at the expense of the religious majority?

The Court is aware of the tension raised by these questions. Members of the Court have, over the years, proposed a resolution in a category of constitutionally acceptable references to religion, sometimes referred to as ceremonial deism. The theory of ceremonial deism is essentially that certain common religious references do not offend the Establishment Clause. Taking seriously ceremonial deism and repeated Court dicta about the constitutionality of the Pledge, Judge Fernandez, dissenting from the Ninth Circuit panel majority in *Newdow I*, viewed the case as little more than one of political correctness run amuck:

> [S]uch phrases as "In God We Trust" or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity. Those expressions have not caused any real harm of that sort . . . and are not likely to do so in the future.[29]

This conclusion necessarily implies a balancing of the will of the majority against the concerns of the minority. The invocation of ceremonial deism in a given case represents—though not explicitly—the Court's best attempt to answer the question of which group's interests should prevail. But without more explanation, it is difficult to discern why, as a doctrinal matter, these

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[28] Of course, some argue that this is precisely the purpose of the Establishment Clause. *See*, *e.g.*, Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

[29] Newdow v. United States Cong., 292 F.3d 597, 614 (9th Cir. 2002) (Fernandez, J., dissenting) *republished at* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

cases ought to come out any differently than those not invoking ceremonial deism.[30]

Nonetheless, on the issue raised in *Newdow* I agree with Judge Fernandez,[31] but not without some deliberation about the concept of inclusion as what appears to be the new Establishment Clause marker. One will not find "inclusion," as such, offered by any member of the Court as an explicit constitutional test,[32] but woven into the fabric of much of the Supreme Court's modern Establishment Clause jurisprudence is the idea that a good law, practice, or policy is one that does not exclude.[33] Commentators

[30] *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996) (finding most instances of ceremonial deism unconstitutional under the endorsement test); *see also* Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986) (arguing that a fair application of the endorsement test would render unconstitutional the words "under God" in the Pledge, as well as the Supreme Court's practice of opening its sessions with the invocation, "God Save This Honorable Court").

[31] Although the de minimis approach is appealing, I reach this conclusion not by merely asserting that the phrase "under God" is trivial. As discussed *infra*, triviality is a matter of perspective. As some have observed, if the words "under God" were trivial or unimportant, the effort to remove them would not be met with such intense resistance. *See generally* Gey, *supra* note 22; *cf.* Sullivan, *supra* note 28, at 207 n.59 (1992) ("[W]e need not melt down the national currency to get rid of 'In God We Trust.' Rote recitation of God's name is easily distinguished as a de minimis endorsement in comparison with prayer or the seasonal invocation of sacred symbols. The pledge of allegiance is a closer question.").

[32] Interestingly, at oral argument Justice Breyer pressed Michael Newdow about whether the Pledge was inclusive of many religious faiths:

> Question: I mean, it's pretty, it's a pretty broad use of religion sometimes. I—does it make you feel any better, and I think the answer's going to be no, but there is a case called *Seeger*, which referred to the Constitution—to the statute that used the word, supreme being, and it said that those words, supreme being, included a set of beliefs, sincere beliefs, which in any ordinary person's life fills the same place as a belief in God fills in the life of an orthodox religionist. So it's reaching out to be inclusive, maybe to include you, I mean, to—because many people who are not religious nonetheless have a set of beliefs which occupy the same place that religious beliefs occupy in the mind and woman of a religious—of a religious mind in men and women.
>
> So do you think God is so generic in this context that it could be that inclusive?

See Transcript of Oral Argument at *34-35, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (No. 02-1624), 2004 WL 736416; *see also Excerpts From Arguments on the Meaning of 'Under God' in the Pledge of Allegiance*, N.Y. TIMES, Mar. 25, 2004, at A22 (attributing the question to Justice Breyer).

[33] Webster's defines "inclusion" as "[a] relation between two classes that exists when all members of the first are also members of the second." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 609 (Frederick C. Mish et al. eds., 1988). In this

also have accepted this idea as an appropriate measure of the Establishment Clause.[34] Since by definition most traditional religions have characteristics of doctrinal, organizational, and/or social exclusivity, it follows that almost any public religious manifestation can be said to exclude non-adherents.[35] The likelihood of reaching this conclusion is increased considerably when one evaluates, as proof of exclusion, the presumed psychological impact on outsiders. *Newdow* is significant because the Ninth Circuit's decision to avoid ceremonial deism in favor of inclusion puts pressure on current doctrine. In reversing on standing rather than reaching the merits, the Supreme Court has temporarily avoided confrontation with the inconsistencies in its Establishment Clause doctrine. For the reasons discussed in this Essay, however, the concept of inclusion reflects a larger trend that will ultimately eclipse the issue of the Pledge, regardless of whether and when it finds its way back to the Supreme Court.

This Essay evaluates the development, scope, and impact of the concept of inclusion. Unlike most contemporary commentary, however, this Essay questions whether the concept of inclusion as an element of Establishment Clause doctrine benefits society as a whole, which, of course, consists of religious majorities and minorities.

Part I of this Essay traces the development of a concept of inclusion in the Court's Establishment Clause cases. The Essay attempts to contextualize the Court's Establishment Clause decisions by comparing concerns in cases such as the early school prayer cases with similar concerns in the quintessential antidiscrimination case, *Brown v. Board of Education*. Part II highlights the inconsistency between ceremonial deism and the

Essay I use the term inclusion to refer to the idea that the Establishment Clause should be interpreted to craft a society that is inclusive of everyone.

[34] *See* Loewy, *supra* note 30, at 1069 (interpreting the endorsement test as one that prohibits government from placing a "badge of inferiority" on religious minorities); *see also* Epstein, *supra* note 30; Kenneth L. Karst, *The State of Civil Liberties: Where Do We Go From Here*, 27 HARV. C.R.–C.L. L. REV. 503 (1992). One commentator has even advocated a positive right of inclusion. *See* Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281, 282-83 (2003) ("I suggest that, even if a governmental action is not demonstrably harmful to church/state relations, it can still be unconstitutional if it does not help further the Establishment Clause's larger goal of creating an inclusive society that welcomes all members . . . .").

[35] Many non-traditional religions, by contrast, do not fit neatly into a conception of exclusivity. *See, e.g.*, http://www.scientology.org (describing as a maxim of the religion that "only those things that one finds for himself are true").

Court's inclusion approach, and argues that the category of ceremonial deism has not been adequately explained in light of its striking conflict with existing precedent. Part II further argues that the Court must squarely confront the balance implicit in its doctrine, between the interests of religious minorities in being free from exclusion or offense and the interests of religious majorities in maintaining certain practices. Part II attempts to assess the relative claims of majorities and minorities by asking whether an Establishment Clause theory of inclusion achieves its goal of creating a better, more inclusive society. After discussing the two harms the concept of inclusion is presumably aimed at redressing—persecution and psychic injury—Part II concludes that while the idea of an inclusive society is a desirable one, the Court's doctrine does not necessarily achieve that effect. Finally, Part III argues that the practical application of inclusion as a doctrine tends to leave behind the related concept of tolerance upon which inclusion appears to be grounded.

I

THE PATH TO INCLUSION

A. Rhetorical Inclusion

It is no secret that the U.S. Supreme Court does not have a sterling historical record of combating insensitivity—religious, racial, or otherwise.[36] If one follows the course of the Court's precedent in the area of religion, however, a pattern of increasing awareness of religions other than Protestant Christianity and of the nonreligious slowly appears.

In *Davis v. Beason*,[37] the Court upheld an Idaho law that required citizens, before they could register to vote, to take an oath that they were not members of any group that taught polygamy, and that they did not publicly or privately advocate polygamy.[38] The Court rejected the petitioners' Establishment Clause chal-

[36] Buck v. Bell, 274 U.S. 200, 207 (1927) (denying an Equal Protection challenge to a Virginia law requiring sterilization of mentally handicapped women). "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough." *Id*. *See generally* Dred Scott v. Sanford, 60 U.S. 393 (1856); Korematsu v. United States, 323 U.S. 214 (1944) (affirming forced detention of Japanese-Americans living in the United States).

[37] 133 U.S. 333 (1890).

[38] *Id.* at 333.

lenge, though the law's apparent aim was to prevent Mormons from voting or otherwise holding office. Downplaying the aspects of the law that purported to regulate belief and association, the Court reasoned that the Idaho law covered only conduct that could be criminally prohibited notwithstanding any conflict with religious doctrine.[39]

And in *Holy Trinity Church v. United States*,[40] a religious corporation was convicted under a federal statute which forbade paying for foreign persons to immigrate into the United States. Interpreting the statute, the Court reasoned that even if Holy Trinity's conduct were covered by the language of the prohibition, Congress did not intend the statute to restrict the immigration of "ministers of the gospel."[41] In defending its holding, the Court noted at length the history of religious references in various state laws and constitutions, as well as in the federal Constitution and the Declaration of Independence.[42] Recognizing these religious references along with previous judicial observations, the Court declared the United States to be a "Christian nation."[43] In so doing, the Court made seemingly approving references to Roman Catholicism and Judaism, while quoting a lower court decision denigrating Islam and other faiths as imposters.[44]

In later Establishment Clause cases, the Court began to recognize all religious faiths, as well as nonreligion. In *Everson v. Board of Education*,[45] a case challenging public funds used to reimburse parents for money spent on bus transportation for children attending parochial schools, the Court made clear that the scope of protection under the religion clauses extends to those who profess no religion at all. The Court recounted the history of religious divisiveness and persecution in England and in the early colonies, concluding that the Establishment Clause erects a "wall of separation between Church and State" that would forbid the use of public funds to support religious institutions.[46] In upholding the program, the Court reasoned that the

[39] *Id.* at 347-48.
[40] 143 U.S. 457 (1892).
[41] *Id.* at 463.
[42] *Id.* at 465-70.
[43] *Id.* at 471.
[44] *Id.* at 470-72.
[45] 330 U.S. 1 (1947).
[46] *Id*. at 16.

Free Exercise Clause would likewise not permit states to exclude from the benefits of public welfare legislation "Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it."[47]

In *Zorach v. Clauson*,[48] the Supreme Court upheld an off-campus release time program against an Establishment Clause challenge, stating on behalf of all Americans that "[w]e are a religious people whose institutions presuppose a Supreme Being."[49] Though today this statement sounds controversial when juxtaposed with other Supreme Court decisions from the same modern period, it represented a serious move away from explicit references to the God of Christianity and Judaism. The Court further explained,

> We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.[50]

While *Everson* and *Zorach* marked the transition from rhetorical exclusion to inclusion, the development of inclusion as an element of Establishment Clause doctrine was gradually unfolding.

B. Inclusion as a Paradigm

1. Vulnerability of the Young — "Hearts and Minds"

In *McCollum v. Board of Education*,[51] the Supreme Court struck an Illinois release time program which provided religious instruction on public school grounds during the school day.[52] In finding a violation of the Establishment Clause, the Court relied on the principle of strict "separation of Church and State,"[53] articulated in the previous term in *Everson*. Justice Frankfurter's concurring opinion signaled a hint in the direction of inclusion as an aspect of separation. Frankfurter discussed the danger of fus-

[47] *Id*.
[48] 343 U.S. 306 (1952).
[49] *Id.* at 313.
[50] *Id*.
[51] 333 U.S. 203 (1948).
[52] Students who had their parents' permission were allowed to leave their secular class to attend a religion class on a weekly basis. *Id.* at 206.
[53] *Id.* at 211-12.

ing the functions of religious and secular education, and elaborated on what he perceived to be the impact on children whose religious sects were not represented among the religious teachers:

> The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care.[54]

Though not a part of the majority opinion, Justice Frankfurter's language marked an incremental step in the shift toward a focus on the feelings of an excluded group.[55]

In its first school prayer decision, *Engel v. Vitale*,[56] the Court invalidated a school board's policy directing voluntary recitation of a non-sectarian prayer at the beginning of each school day.[57] The Court found a violation of the Establishment Clause without any specific showing of coercion, noting the "indirect coercive pressure" leveled against religious minorities to conform to the majority faith.[58] In *Abington School District v. Schempp*,[59] the Court invalidated school policies requiring daily Bible reading

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[54] *Id.* at 227-28 (Frankfurter, J., concurring).

[55] *Cf.*, *e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 684-86 (2002) (recognizing Frankfurter's opinion in *McCollum* as a precursor to the adoption of a political equality theory of the Establishment Clause).

[56] 370 U.S. 421 (1962).

[57] The prayer consisted of the following sentence: "'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'" *Id.* at 422. In *Engel*, the Court was careful to insure that its school prayer ruling could not be construed to invalidate practices like the Pledge:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are *officially encouraged* to express love for our country by reciting historical documents such as the Declaration of Independence which contains references to the Deity or by singing officially espoused anthems which include the composer's profession of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

Id. at 435 n.21.

[58] *Id.* at 431.

[59] 374 U.S. 203 (1963).

and recitation of the Lord's Prayer.[60] Although students could be excused from the Bible reading and prayer, the daily exercises were curricular activities supervised by teachers as a part of compulsory public education. Thus, the Court found that the practices violated the Establishment Clause.[61]

Though sometimes referencing the history of the early colonies, the Court likely found its approach desirable in light of more contemporary controversies. The civil rights struggles of the day amply demonstrated that unchecked majority rule could mean domination and oppression.[62] Against this background, it is no wonder that the Warren Court that decided *Brown v. Board of Education* would make quick strides toward condemning practices that smacked of religious domination.[63] To make matters worse, many of the areas viewed as bastions for school prayer and other majoritarian religious manifestations were the *very same places* that bitterly fought to hold onto Jim Crow.[64]

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[60] The Pledge of Allegiance was also part of the daily exercise. *Id.* at 208.

[61] *Id.* at 223.

[62] This is one explanation. Professor Klarman has argued, for example, that the Court's post-World War II Establishment Clause jurisprudence developed, in part, as a reaction to the atrocities committed against the Jews at the hands of the Nazis. *See, e.g.*, Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 47 (1996). He also opines that the rise of separationism reflected in the Court's doctrine was facilitated in part by the demise of fervent anti-communism. *Id.* at 61.

[63] Noah Feldman has noted the commentators making the connection between *Brown* and the Court's post-war Establishment Clause jurisprudence. *See* Feldman, *supra* note 55, at 702-03; *see also, e.g.*, Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1011 (2002); William P. Marshall, *"We Know It When We See It": The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 531 n.214 (1986) (speculating that *Brown* was the "true spiritual guide" of the school prayer cases).

[64] *See* Berg, *supra* note 63, at 1015. The State of Arkansas defended against an Establishment Clause challenge to its "anti-evolution statute," which criminalized the teaching of evolution in public schools. *See*, *e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968). The petitioner challenging the law was a teacher at Little Rock Central High School, the same school where the state's National Guard had been deployed to prevent the admission of the "Little Rock Nine" ten years earlier. *See* Cooper v. Aaron, 358 U.S. 1 (1958). In recent times, the Eleventh Circuit has compared Alabama Supreme Court Justice Roy Moore, who refused to remove a Ten Commandments monument from the rotunda of the state judicial building, to former Mississippi Governor Ross Barnette, who attempted to block the integration of the University of Mississippi in 1962, and to former Alabama Governor George Wallace, who in 1965 interfered with and failed to provide police protection to a civil rights march from Selma to Montgomery. *See, e.g.*, Glassroth v. Moore, 335 F.3d 1282, 1302-03 (11th Cir. 2003); *see also* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 387-88 (1997); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 442 (1983) (noting that those who opposed *Brown* also

The weapon that the Court used in *Brown* to invalidate the separate but equal doctrine was its focus on the psychological impact of segregation on black school children. In his opinion, Chief Justice Warren framed the Equal Protection violation in terms of the negative impact on the "hearts and minds" of blacks.[65] As counsel for petitioners, the NAACP Legal Defense Fund (LDF) had argued the sociological point in the lower court and in related segregation cases. Thurgood Marshall, then lead LDF counsel, decided to rely heavily on sociological research to condemn segregation in education.[66] The decision in *Brown*, introducing its "hearts and minds" language and referencing sociological research in its famed footnote 11, canonized this compelling appeal to personal experience. *Brown*'s focus on the feelings of the excluded group arguably foreshadowed the eventual use of similar criteria in the area of religion.[67] And even as many of the horribles of the Jim Crow era were slowly moving into the past, new reasons for the Court to fear majoritarian control seemed to emerge. The robust development of the Religious Right in the seventies and eighties, for example, no doubt raised concern for at least some members of the Court that perhaps local governments could be dominated by a single, powerful religious majority.[68]

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opposed the Court's school prayer cases). In a bizarre forecast of things to come, a group picketing the White House to protest the Warren Court's school prayer decisions carried signs bearing various messages including "The Flag is Next." *Id.* at 391.

[65] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[66] *See* JAMES T. PATTERSON, *Brown v. Board of Education*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 42-45 (2001); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 158-62 (1987).

[67] *Compare* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 363-66 (1991) (classifying the claim in *Brown* as one of "stigma" not present in claims of religious offense), *and* Feldman, *supra* note 55, at 704-05 (noting that the Court's Establishment Clause jurisprudence and the endorsement test in particular focus on political exclusion and not merely individual feelings of exclusion), *with* Kenneth L. Karst, *The First Amendment, The Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 504-05 (1992) (noting that religious minorities suffer a "painful status harm"), *and* Epstein, *supra* note 30, *passim* (characterizing the endorsement test as one that asks whether an individual is made to feel like a religious outsider in her own country).

[68] *See, e.g.*, FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES & DISSENTERS 7 (1999).

> Society is becoming increasingly pluralistic, but at the same time the country is witnessing the immense growth in power of the Christian Coalition

2. *Non-Endorsement and the Outsider*

As the Court's Establishment Clause jurisprudence developed in other areas, the concept of inclusion and the perspective of the outsider became paramount. In *Lynch v. Donnelly*,[69] a case involving a public crèche display, Justice O'Connor in a concurring opinion advanced her endorsement test which inquires whether a particular government-sponsored activity "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[70] The majority upheld the display, reasoning that national observation of the Christmas holiday did no more than recognize the country's religious heritage.[71] O'Connor agreed that the crèche display did not violate the Establishment Clause because, in her view, the citizens of the town would not understand the crèche to indicate an endorsement of Christianity.[72] In a later case, *County of Allegheny v. ACLU*,[73] the Court adopted the endorsement test but found the county's crèche display unconstitutional.[74] The Court distinguished *Lynch*, reasoning that the crèche in that case was surrounded by other items that would detract from its religious meaning, thus diffusing the message and any possibility of endorsement.[75]

> and other evangelical organizations with similar agendas. In addition, large numbers of citizens identify themselves as 'born again.' Much of this group sees increasing religious . . . pluralism as a threat to its values and beliefs. This powerful segment of society actively seeks to use the mechanisms of government, and particularly the public schools, to back its beliefs and political views.

Id.

Even before official recognition of a developing "Religious Right," a considerable Protestant majority existed in the United States. *See, e.g.*, Michael DeHaveson Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 306-07 (2002). Steven Gey suggests that the national reaction to *Newdow* in defense of the current Pledge is evidence of the religious majority's attempt to "subtly underscore its continuing dominance." STEVEN G. GEY, RELIGION AND THE STATE 9 (Supp. 2002).

[69] 465 U.S. 668 (1984).

[70] *Id.* at 688 (O'Connor, J., concurring). Under O'Connor's formulation, disapproval sends the opposite message, and is likewise unconstitutional.

[71] *Id.* at 685-86.

[72] *Id.* at 692 (O'Connor, J., concurring).

[73] 492 U.S. 573 (1989).

[74] *Id.*

[75] *Id.* at 598-601. Particularly relevant was the fact that the crèche display in *Allegheny* contained the words, "Glory to God in the Highest." *Id.*

Although Justice O'Connor introduced the endorsement test as a modification of the oft-criticized *Lemon* test used in Establishment Clause cases,[76] the endorsement inquiry clearly shifts the focus from the actor to the audience. *Lemon* asks whether a local government has acted with a religious purpose, and whether that action has a primary effect that either advances or inhibits religion.[77] With endorsement, the question becomes whether a "reasonable observer" would interpret the government's action as a message communicating outsider status.[78] Though the Court has sometimes protested to the contrary,[79] its Establishment Clause doctrine places a great deal of importance on the feelings of perceived outgroups. Thus, notwithstanding the Court's decisions in *Lynch* and *Allegheny*, many equate endorsement with the presence of any religious symbol in government, regardless of size, scale or context.[80]

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[76] *See Lynch*, 465 U.S. at 688-89 (O'Connor, J., concurring).

[77] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[78] The reasonable observer is presumed to be familiar with the history of the statute or practice in question. *See* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). The precise religious identity of the observer is an unknown. *See Allegheny*, 492 U.S. at 620 ("[A]n adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions . . . ."); *see also* discussion *infra* note 150.

[79] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 597 (1992) ("We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."); discussion *infra* Part I.B.3. Indeed, the Court's statement itself suggests that in at least some cases, offense alone shows a violation.

[80] Controversies over municipal seals and logos amply demonstrate this point. Recently, in a 3-2 decision, the Los Angeles County Board of Supervisors voted to remove a small cross from its county seal. *See* County of Los Angeles, County of Los Angeles Official Seal, *at* http://lacounty.info/seal.htm (last visited July 10, 2004). The seal is divided into approximately seven symbols, one of which depicts a small cross. *See id*. The cross shares its segment of the seal with two small stars and is suspended above a rendering of the Hollywood Bowl. Ironically, the largest image in the entire seal is the pagan goddess Pomona holding an armful of fruit, pictured in the middle of the seal and appearing at least ten times larger than the cross and several times larger than the other symbols pictured—a tuna, a cow, oil derricks, a Spanish galleon, and engineering instruments. Under a straightforward reading of *Lynch* and *Allegheny* which together rely on scale and context, the Los Angeles County seal should easily pass the endorsement test. Nonetheless, the executive director of the ACLU's Southern California chapter was quoted as explaining the proposed legal challenge to the seal as an issue of inclusion: "We realize that this is not the most important civil liberties issue in our society . . . [b]ut it does make some people feel unwelcome. And we feel the county seal should be welcoming." *See id*.

3. School Prayer Revisited

A pivotal school prayer decision, *Lee v. Weisman*,[81] went further than the Court's earlier school prayer cases, paving the way for the Ninth Circuit's decision in *Newdow*. In *Lee,* the Supreme Court considered a parent's challenge to a public school superintendent's longstanding policy of inviting members of the clergy to deliver invocations and benedictions at middle and high school graduations. At Weisman's middle school graduation, a rabbi delivered the invocation and benediction pursuant to the school's guidelines, which contained an admonition to compose nonsectarian prayers with "'inclusiveness and sensitivity.'"[82]

Justice Kennedy, writing for the majority, found that the graduation prayers were coercive toward students who did not desire to participate.[83] Kennedy's opinion in *Lee* marked the Court's first use of the coercion test in Establishment Clause jurisprudence, though the version of coercion he advanced was arguably different than what some would have expected.[84] Although no one was required to pray or even stand during the approximately ninety seconds of total prayer time, the public exercise, according to the Court, placed indirect peer pressure on dissenting students to stand and be silent rather than remain seated and risk social disapproval.[85] Since standing would appear to be participating, the prayer placed students in the untenable position of having to choose between personal conscience and popularity.[86] In language reminiscent of *Brown*, Justice Kennedy proffered research in sociology and psychology to support the Court's assertion that adolescents are particularly susceptible to peer pressure to conform to social norms.[87] Justice Blackmun's concurrence, couched

[81] 505 U.S. 577 (1992).

[82] *Id.* at 581. The quoted phrase comes from a pamphlet adopted by school officials and distributed to clergy to aid in preparation of the invocation and benediction. The pamphlet, entitled, "Guidelines for Civic Occasions," was prepared by the National Conference of Christians and Jews. *Id.*

[83] *Id.* at 586.

[84] *See, e.g.*, *id*. at 640-44 (Scalia, J., dissenting). *But see* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 158-59 (1992) (arguing, before the decision in *Lee* was issued, that a realistic application of coercion would result in the specific prayer in *Lee* being found unconstitutional).

[85] *Lee*, 505 U.S. at 593.

[86] *Id.*

[87] *Id.* This argument had been advanced by Justice Frankfurter with respect to the release time program at issue in *McCollum*, though without any attempt at objective support for the proposition. McCollum v. Bd. of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring).

in terms of avoiding civil strife between competing religious factions, clearly echoed concerns about the exclusion of outsiders.[88]

Yet the Court's finding of coercion in *Lee* was a serious departure from the Court's earlier school prayer cases. It is significant that *Engel* involved a long-standing practice of nonsectarian Christian prayer and *Schempp* involved both prayer and Bible reading in a classroom setting. Such school-sponsored religious exercises occurred on a daily basis, and thus the students likely feared that dissent would attract the disapproval of not only peers, but teachers and perhaps other school officials. The "indirect coercive pressure" included the possibility that teachers or school officials could single out and punish dissenting students for failure to participate in religious observances. In *Lee*, the Court recognized peer pressure alone as a cognizable Establishment Clause harm.

And in *Santa Fe Independent School District v. Doe*,[89] a later case involving a student-led prayer policy for high school football games, the Court's focus shifted from peer pressure to confrontation with "personally offensive religious rituals."[90] *Santa Fe* involved a school policy that permitted students to vote first on whether there would be an "invocation," "message," or "statement" as a part of the pre-game ceremonies for a given football season.[91] If the students voted in favor of a pre-game message, they were to then elect a particular student both to deliver the message and to determine what message to deliver.[92] Con-

> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

Id. In his concurrence in *Abington*, Justice Brennan later quoted Frankfurter's statement, citing research in social psychology. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 291-92 & n.69 (1963) (Brennan, J., concurring).

[88] *Lee*, 505 U.S. at 599-609 (Blackmun, J., concurring) (quoted at the beginning of this Essay). Though included in a footnote as support for the assertion that government endorsement of religion escalates civil strife, a rare quote from Sigmund Freud can better be explained for the proposition that religions engender feelings of exclusion: "Sigmund Freud expressed it this way: 'a religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it.'" *Id.* at 607 n.10 (quoting SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO 51 (James Strachey trans. 1922)).

[89] 530 U.S. 290 (2000).

[90] *Id.* at 312.

[91] *Id.* at 297-98.

[92] *Id.*

fronted with the potential for prayer facilitated by a majoritarian policy, the Court presumed harm to religious minorities given the small likelihood that a minority candidate would prevail in the election.[93] The Court noted that the policy at issue, previously titled "Prayer at Football Games," invited religious messages because of, among other things, its stated purpose of "solemniz[ing] the event."[94] Critical in both *Lee* and *Santa Fe* is the fact that the religious message was actually delivered or proposed to be delivered by persons other than school officials, and that any resulting exclusion was at the hands of students, though arguably facilitated by the existence of the message.

The Court's decisions make clear that, for however long this interpretation is accepted by a majority of the Court, the Establishment Clause is largely about protecting the feelings of the nonadherent from a public manifestation that may confer outsider status.

II

TESTING THE HYPOTHESIS

While most Establishment Clause theory has attempted to demonstrate some nexus or lack of nexus between current doctrine and original intent, in this critique I do not attempt to do so. There may be good reasons for following an originalist approach, but it is not likely to be responsive to the concerns that underlie the concept of inclusion.[95] Rather, the interesting question (that few, if any, have asked) is this—does inclusion work? At a mini-

[93] *Id.* at 304 ("[T]his student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.").

[94] *Id.* at 306. The Court also mentioned the existence of evidence of proselytizing by students and school officials. *Id.* at 295.

[95] This is not an attempt to avoid the doctrinal implications of an inquiry into original intent. An originalist approach would probably support inclusion of the words "under God" in the Pledge as well as many other instances of ceremonial deism, though the Court's precedent has shown that Establishment Clause history in particular can be quite malleable. I avoid the debate simply because the respective approaches of originalism and inclusion typically have nothing to say to each other. *Compare* County of Allegheny v. ACLU, 492 U.S. 573, 671 (1989) (Kennedy, J., dissenting) ("It requires little imagination to conclude that [presidential Thanksgiving Proclamations] would cause nonadherents to feel excluded, yet they have been a part of our national heritage from the beginning."), *with* Epstein, *supra* note 30, at 2155-56 ("I readily concede that arguments advanced above [asserting the unconstitutionality of ceremonial deism] fly in the face of the original intent of the Framers of the First Amendment . . . . The key question is not what the Constitution meant in 1789 or 1791, but what it should mean today.").

mum, a good legal theory should accomplish what it claims to be able to do. If a theory of the Establishment Clause is supposed to safeguard minorities and create a more tolerant and hence, better society, we should at least ask whether it actually does that.

A. Majorities and Minorities in Context[96]

1. Ceremonial Deism as a Majoritarian Bulwark

The precise issue raised in *Newdow*—whether recitation of the Pledge of Allegiance in public school is constitutional—has been asked and answered by the Supreme Court, at least in dicta. The Pledge controversy began with *West Virginia Board of Education v. Barnette*,[97] in which the Supreme Court held that elementary school students may not be compelled to recite the Pledge.[98] The plaintiffs in *Barnette* objected out of a religious duty, but the Court emphasized that the First Amendment freedom from compelled orthodoxy does not depend on whether one's objection is religious.[99] This was before the words "under God" were even a part of the Pledge. The assumption underlying *Barnette* is that silent dissent and excusal without punishment, the remedy sought by the plaintiffs in that case, was a sufficient means to protect their First Amendment interests. In terms of the Court's Establishment Clause doctrine, *Lee*'s emphasis on psychological pressure, combined with *Barnette*'s recognition of the more general right to be free from compelled orthodoxy, would seem to suggest quite logically that the organized, teacher-led recitation of the Pledge is unconstitutional, even if an opt-out alternative is provided.[100] Justice Thomas took this view in his concurrence in *Newdow*, though Chief Justice Rehnquist defended the distinc-

[96] This discussion focuses on the treatment of minorities and majorities under a particular line of Establishment Clause cases not including equal access and aid, which in recent years have been particularly accommodating to religious majorities. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Good News Club v. Milford, 533 U.S. 93 (2001); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819 (1995). As discussed *infra* Part II.A.2., recent Free Exercise Clause doctrine has been far less charitable to the cause of religious minorities. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990).

[97] 319 U.S. 624 (1943).

[98] *Id*. (overruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)).

[99] *Barnette*, 319 U.S. at 642.

[100] For a discussion of the constitutionality of the Pledge in light of *Lee v. Weisman*, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

tion between *Barnette* and *Lee*, referring to the former as "compulsion" and the latter as "coercion."[101] Any *Lee* coercion present in *Newdow* was permissible, according to Rehnquist, only because the Pledge is not a religious exercise.[102]

In fact, the Supreme Court in dicta has included the Pledge within a category of cultural references to religion sometimes referred to as "ceremonial deism."[103] At times members of the Court have justified the idea of ceremonial deism on the ground that popular religious references, by virtue of repetition and acceptance by the masses, have lost their true religious character.[104] At other times, some of the justices have opined that such references, although religious, are used by government in a secular way for such purposes as "solemnizing public occasions" and "expressing confidence in the future."[105] A third justification for excepting religious references such as "under God" is based on the significance of religion and the multitude of religious references in the Nation's history since the founding.[106] Nonetheless,

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[101] *Compare* Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301, 2327-30 (2004) (Thomas, J., concurring), *with id*. at 2320 n.4 (Rehnquist, C.J., concurring), *and id*. at 2326-27 (O'Connor, J., concurring) (noting that coercion is permissible in cases of ceremonial deism, though "overt" coercion, similar to compulsion, would not be).

[102] *Id*. at 2320 n.4.

[103] *See* Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (adopting the phrase and including the Pledge in a category of practices that do not violate the Establishment Clause). In ruling that the Pledge does not violate the Establishment Clause, the Seventh Circuit relied on Court dicta regarding ceremonial deism. *See* Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992).

[104] *See Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) ("While I remain uncertain about these questions, I would suggest that . . . the references to God contained in the Pledge of Allegiance . . . [are] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.").

[105] *Id.* at 693 (O'Connor, J., concurring); *accord id.* at 717 (Brennan, J., dissenting) ("Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases."); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (noting that previously in dicta the Court had approved the Pledge as consistent with the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J. concurring) (referring to her concurrence in *Lynch* as support for the proposition that the 1954 Amendment to the Pledge adding the words "under God" did not render the Pledge unconstitutional).

[106] See *Lynch*, 465 U.S. at 676 ("One nation under God," as part of the Pledge evidences the country's religious heritage); *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring) (stating that recitation of the Pledge "may merely recognize the historical fact that our Nation was believed to

the intuition of a number of Justices over the years that the Pledge and similar references are constitutional is directly at odds with the Court's own Establishment Clause jurisprudence. The Ninth Circuit decision in *Newdow* underscores the paradox in the Court's doctrine, between the inclusion approach and that of ceremonial deism.[107]

Justice O'Connor, the author of the endorsement test and, increasingly, an influential justice in the development of the Court's Establishment clause doctrine, defended ceremonial deism in her concurrence in *Newdow*. Reiterating earlier justifications and providing a more nuanced exposition of others, O'Connor highlighted four factors likely only to be present in the case of the Pledge and other instances of ceremonial deism: (1) the history and ubiquity of the practice; (2) the absence of worship or prayer; (3) the absence of reference to a particular religion; and (4) minimal religious content.[108] Of course, to acknowledge the minimal religious content of the Pledge concedes the point that the Pledge is, by some standard, religious. Yet Justice O'Connor insists that there are no de minimis constitutional violations; rather, she explains that ceremonial references simply do not offend the Constitution.[109] In her discussion of the history and ubiquity of the Pledge, O'Connor notes that in

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have been founded 'under God'"); Engel v. Vitale, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring) (mentioning the Pledge and some of the legislative history surrounding the 1954 Amendment without comment on its significance).

[107] *See* sources cited *supra* note 30. As evidence of the paradox in the Court's doctrine, compare *Lee*, for example, in which Justice Kennedy rejected a de minimis argument often used to support ceremonial deism:

> It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditating on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character . . . .

Lee v. Weisman, 505 U.S. 577, 594 (1992), with Kennedy's prescient analysis of *Newdow* in an earlier dissent:

> To be sure, no one is obligated to recite th[e] phrase [under God], but it borders on sophistry to suggest that the "'reasonable atheist'" would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as a part of their expression of patriotism and love for country, a phrase he believed to be false.

Allegheny, 492 U.S. at 673 (Kennedy, J., dissenting).

[108] Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2322-27 (2004) (O'Connor, J., concurring).

[109] "These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all." *Id*. at 2323 (O' Connor, J., concurring).

the fifty years since the addition of the words "under God," the Pledge has only been challenged three times.[110] This observation purports to mirror an analysis under the defunct entanglement prong of *Lemon* as applied in an earlier case,[111] but can also be read to suggest that majority preferences perhaps play some role in the analysis of ceremonial deism.

One could accept the judicially-created category of ceremonial deism as an exception within the framework of Establishment Clause doctrine, but the reasons supporting the exception are inconsistent with the doctrine. If the central problem is that a particular religious message excludes or offends certain listeners, then it should not matter whether the message is part of a long-standing practice or historical tradition.[112] Likewise, the assertion that "under God" does not mention a specific religion is only partially true, for it surely references something by what it excludes. Granted, the phrase "under God" is generic in comparison to a more specific reference such as "under the God of Abraham, Isaac, and Jacob," for example, but it is unavoidably different from such alternatives as "under the Lord God, Jehovah," or "under Allah," and it necessarily excludes all religions that do not incorporate the concept of God. Nor does it help to say that a given reference such as "under God" is more secular than religious, either because the truly religious character has worn off over time, because it is only minimally religious, or because it is being given a secular application. Though arguably the strongest justification, the fact that the Pledge can be classified as neither worship nor prayer would ultimately seem to fail under the same logic. To be sure, in the eyes of the faithful, such ceremonial references to God may not hold nearly the same religious content as a fiery sermon or well-delivered homily. But from the perspective of the outsider, "One Nation under God" might be, as the Ninth Circuit found, just as strikingly religious as "One Nation under Vishnu" or "One Nation under no god."[113]

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[110] *Id.*

[111] *See* Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984) (noting that the only evidence of religious divisiveness caused by the crèche display was the filing of the lawsuit in the case before the Court).

[112] *See* Waltz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.").

[113] Newdow v. United States Congress, 292 F.3d 597, 607-08 (9th Cir. 2002) (*Newdow I), republished at* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301 (2004).

One may question how, then, have several members of the Court concluded over the years that the Pledge, including the words "under God," is constitutional? Arguably implicit in the ceremonial deism analysis is a type of balancing of the claims of the outsider against the claims of the larger society.[114] The underlying question is at what point a claim of religious exclusion or offense should give way to the will of the majority and its interest in the status quo. In the category of practices known as ceremonial deism, the Court has apparently concluded that the majority should prevail. This position has not been adequately supported, however, and it is unclear how long the Court can preserve this category without a better explanation for its existence. It would seem preferable, instead, to make explicit what has previously been implicit: if in certain Establishment Clause cases there is a reason to defer to majority preferences, the Court should say so, and explain why.

2. Rethinking Majority/Minority Discourse

My suggestion that the interests of the majority should play an explicit role in constitutional decision making probably seems counterintuitive, to say the least.[115] While there is some divergence of opinion,[116] most commentators agree that the Supreme

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[114] *Cf.* Gey, *supra* note 22, at 1872 (asking whether "the very concept of constitutional triviality [is] one of the most effective mechanisms for maintaining majoritarian control over public discourse").

[115] *See, e.g.*, Epstein, *supra* note 30, at 2171 ("The purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from raw majoritarian impulses."); *see also* Loewy, *supra* note 30, at 1059 ("If the Establishment Clause means anything, it must mean that whether this Nation is under God or without God can neither depend on a vote of a temporary majority nor vacillate according to the tenor of the times."); *cf.* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117 (1992) ("[T]he purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government . . . to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism.").

[116] A doctrinal obstacle to the normative view of the Supreme Court as the protector of minority rights in the Establishment Clause context is the ongoing debate about whether the clause was originally intended to safeguard individual liberties. Many have argued that the Establishment Clause was meant as a structural constraint on the federal government—to prevent it from taking actions to establish a federal church and, more importantly, to prevent it from interfering with existing state establishments. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33-35 (1998); *see also* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1 (1998). Under this line of analysis, the Establishment Clause was never intended to have been incorporated against the States by the Fourteenth Amendment. *See*

Court should and does play a significant role in protecting minorities, religious and otherwise, from majority encroachment. Majorities can usually protect themselves in the political process, and even in cases in which a court frustrates the majority's efforts, the conventional wisdom seems clear: "fundamental rights . . . depend on the outcome of no elections."[117] But the wisdom is not entirely clear in the Establishment Clause context.

A comparison can be made to the Free Exercise Clause, which has traditionally protected religious minorities from the application of laws that burden their religious practice.[118] The Free Exercise Clause represents the idea that a given majority may not write its laws in ways that overlook the impact on religious minorities. While *Employment Division v. Smith*[119] subverts the conventional wisdom by suggesting that religious minorities can adequately protect themselves in the political process, post-*Smith* doctrine provides that, at a minimum, majorities cannot craft laws that target religious minorities.[120] The traditional concept of the Free Exercise Clause as a safeguard for minority rights makes perfect sense when thinking about the possibility of a given community legislating minorities out of their religious practices.[121] In the Establishment Clause context, however, it seems that majorities and minorities often have equally reasonable, albeit different, claims.[122] The minority wants to be free from government messages about religion and the majority wants to be free from government (read: court) interference with the expression of its religious preferences. When an exemption is granted in the Free Exercise context, an insensitive majority may

AMAR at 33-35. For a challenge to the view that the Supreme Court actually performs a countermajoritarian function, see Klarman, *supra* note 62. In the Court's early school prayer decisions, for example, Klarman asserts that "[w]hile the rulings plainly were contrary to the preferences of a national majority, they were not dramatically countermajoritarian, which is what they would have been had the Court rendered them a generation earlier." *Id.* at 16.

117 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

118 *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). The scope of this protection has shrunk in recent years. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

119 494 U.S. at 872.

120 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

121 The Court's current doctrine, on the other hand, reflects great concern for minorities in the Establishment Clause context with little recognition of minority vulnerability in the Free Exercise context.

122 In cases such as a religious tax, an organized school prayer, or a community controlled by a religious group, for example, minorities would have the superior claim to religious freedom.

grunt at the scofflaw who smokes peyote free from criminal sanction, but the exemption in no sense thwarts the majority's religious interests.[123] In Establishment Clause cases, on the other hand, a ruling in favor of a given religious minority requires immediate termination of the majority's chosen form of religious expression.

This is not to say that the Establishment Clause should essentially have no force, being interpreted as applying only to government actions that would also be covered by the Free Exercise Clause. But it does suggest that there is a latent majoritarian concern that rarely has been recognized in the Court's doctrine.[124] If we temporarily suspend the idea that, in all Establish-

[123] Of course, under the post-*Smith* regime, no such exemption would be granted. *See Smith*, 494 U.S. at 902-07 (O'Connor, J., concurring) (explaining that even if the compelling state interest test were used, Oregon could show compelling interest in wholesale prohibition on peyote use). My assertion somewhat flouts the Court's benefits/burdens test used in *Texas Monthly, Inc. v. Bullock* to evaluate Free Exercise accommodations under the Establishment Clause. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). This test can easily be criticized by noting that a benefit to one segment of the population can always be construed as a corresponding burden to another. My point is that the respective religious burdens to the majority and the minority are not equal. The burden to the religious claimant—threat of legal sanction—is often immediate and serious. The corresponding burden to the unexempted is a diffused, nonreligious burden experienced by an undefined "other" that composes the majority.

[124] Members of the Court have, at times, expressed concerns about overbalance in favor of the religious minority. For example, Justice Frankfurter's strikingly different view of the problem in *Barnette* suggests that, barring a restriction on free exercise, he would have afforded more deference to the will of the majority:

> That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, *so long as no inroads are made upon the actual exercise of religion by the minority*, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 662 (1943) (Frankfurter, J., dissenting) (emphasis added). In his dissent in *Allegheny*, Justice Kennedy expressed similar concerns with respect to the application of the endorsement test in the Establishment Clause context:

> I am quite certain that [a Court observer] will take away a salient message from our holding in these cases: The Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions.

County of Allegheny v. ACLU, 492 U.S. 573, 677 (1989) (Kennedy, J., dissenting). Some have occasionally attempted to characterize this concern as a "majoritarian free exercise" claim. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225-26 (1963)

ment Clause cases, courts must favor minorities over majorities, then the question would become one of how to determine who wins. I am not advocating a simple majority rules formulation—two against the practice, ten for the practice, tens have it![125] Yet the sheer numbers of the majority suggest that society as a whole may have a significant interest in continuing a particular religious practice or tradition.[126] To decide, it would be helpful to consider whether court-ordered cessation of the Pledge would promote inclusion. The Ninth Circuit's opinion in *Newdow* and the Supreme Court precedent upon which it relies seem to be based on a popular but unrealistic assumption that complete elimination of a symbol or practice promotes inclusion. This is apparently grounded in the idea that what represents no one includes everyone. It is doubtful that this latter assumption is true in most cases, and one can think of several examples showing that it is not.[127]

(rejecting such a claim on Establishment Clause grounds). Whether the Court should adopt or develop a right of majoritarian Free Exercise is beyond the scope of this Essay.

125 For what appears to be an exposition of this view, see Samuel P. Huntington, *Under God*, WALL ST. J., June 16, 2004, at Editorial Page.

126 In the case of the Pledge, there is a national rather than a local majority in support of the current version, and the presence of a national controversy should warrant, at a minimum, increased sensitivity by the Court. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). In terms of minority interests, the presence of a national majority in some ways diminishes and in other ways increases the possibility of harm. See discussion *infra* Part II.B.

127 In the controversy surrounding the Los Angeles County seal discussed *supra* note 80, for example, over 1000 citizens gathered outside the Hall of Administration in Los Angeles to protest the Supervisors' plan to remove the cross from the seal and possibly replace it with an image of a Spanish mission and Native Americans. *See* Sue Fox, *Protesters Rally for County Seal Cross*, L.A. TIMES, June 9, 2004, at B1. The protesters were not mollified by the idea that the cross would be replaced with a Spanish mission, also a religious symbol, though one that is believed by the group threatening suit to be more inclusive than the cross. *See id.* The standard assumption that "everyone will be happier" with the more secularized version is mythical.

Professor Stanley Fish has somewhat cynically argued that attempts to arrive at any theory of church/state relations provide cover for what are essentially political grabs for dominance. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2274-75 (1997). Fish criticizes liberal theorists who typically seek greater church/state separation not for their ends but for misunderstanding and misstating their means, which are, he argues, just as intolerant as those of the so-called religious zealots. *See id.* Speaking of such theorists, Fish writes:

> They don't want to answer the question "How would you persuade the true believer to abandon his efforts to write his beliefs into the law?" to be "By scaring him with the spectre of perpetual conflict." They want to answer by holding out a promise—of a better life, a better community, a better self—

Perhaps more important, in cases in which courts have decided in favor of the minority, the corresponding Establishment Clause remedy of eliminating the practice often fails to send a message of inclusion to members that had previously been excluded. Because the community itself has not changed, the cessation of a given practice is less likely to signal a sudden, collective change of heart and more likely to communicate only compliance with a court order.[128] In many communities, a court mandate initiates an awkward transformation process reflecting a combination of reluctance and confusion. Take for example, the Santa Fe Independent School District's football season policy. By the time the controversy in *Santa Fe* reached the Supreme Court, the school district had already made attempts to comply with a federal district court order enjoining its practice of permitting prayer at football games.[129] The school district had developed an elaborate policy that provided that students would vote on whether there would be a pre-game "message," "statement," or "invocation" to be delivered, then required students to vote on the student who would deliver the message.[130] The policy further provided that if it were to be enjoined by the court, then an automatic fallback provision would take effect, requiring that any messages or statements be "nonsectarian and nonproselytizing."[131] The school district's response to the lower court injunction resulted in a policy with an apparent focus on creating a constitutionally acceptable way to facilitate prayer, rather than alleviating the concerns of dissenters. On the other hand, in a case like *Lee*, in which the school district policy advocated "inclusiveness and sensitivity," the Court's approach effectively penalized those efforts, noting that nonsectarian prayer, for example, only serves to aggravate the offense of outsiders who do not fit into the presumptively broader, more inclusive cate-

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> that will make the believer happy to forgo his present zeal for the sake of a brighter and even glorious future.

Id. at 2275.

128 This observation refutes Professor Garfield's assertion that the Ninth Circuit's decision in *Newdow* communicates a societal commitment to inclusion "so unwavering that we are willing to sacrifice a cherished ritual to achieve our goal." Garfield, *supra* note 34, at 289.

129 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 296-98 (2000).

130 *Id.* at 297-98.

131 *Id.* at 297.

gory.[132] The Court's logic may be accurate, but the result—banning the practice—does not promote inclusion. And as a practical matter, it is likely that a given majority will be less responsive, not more, to the wishes of the religious minority in the future.[133] Instead, it would seem better to allow the process of inclusion to proceed, in whatever form it may take, as a sincere and voluntary effort by a given community, rather than as "principle imposed from above."[134]

A natural response to these observations might be that the Court's unwillingness to defer to the desires of the majority may nonetheless promote inclusion in the long run. Even if a given majority objects to a Supreme Court decision, that decision will eventually change attitudes. As many believe to have happened with *Brown*, a Court "statement" on the issue will foster a future society that is more inclusive than the present one.[135] It is certainly possible that this may happen in the very long term. This response, however, reveals a larger problem imbedded within the concept of inclusion. Expecting a majority to change its religious views and practices under a "better society" rationale incorporates a normative conclusion that some religionists, like segregationists, need changing. Far from being neutral, this position proceeds upon an unstated assumption that begs the very question to be answered—whether the world would be a better place with less public religion.

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[132] Lee v. Weisman, 505 U.S. 577, 594 (1992). The idea of "nonsectarian" prayer may not only fail at being all-inclusive, it probably fails at being religious.

[133] For example, in the first game of the season at Santa Fe after the Court's decision, some students and spectators stood to engage in spontaneous prayer immediately before the start of the game, and there are reports of several similar movements at other schools. *See* Paul Duggan, *A Few Texas Faithful Make Stand for Prayer; Big Football Showing Fails to Happen*, WASH. POST, Sept. 2, 2002, at A1, *cited in* Feldman, *supra* note 55, at 720.

[134] STEVEN D. SMITH, FOREDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 117 (1995).

> [I]n a pluralistic community exhibiting a considerable degree of religious and secular diversity, civil peace and inclusiveness can be achieved only imperfectly and only through compromise, cultivated tolerance, mutual forbearances, and strategic silences. In this context, the judicial imposition of *any* set of consistent and explicit principles is likely to undermine the possibilities for compromise and forbearance, and hence to aggravate the dangers of civil strife and alienation. Civil peace, in short, must be the product of prudence, not of principle imposed from above.

Id.

[135] *Cf.*, *e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

B. The Anecdotal Evidence

The evidence that is generally offered to support inclusion as a protector of religious minorities is anecdotal. Eschewing any claim (for the purposes of this Essay) to an originalist assessment of inclusion, I have no problem evaluating anecdotal evidence. Most of us draw conclusions about the world around us based on our own personal experiences, so it seems to make perfect sense to listen to the stories of others, particularly when the stories are different than our own. Some of the most compelling stories have moved the Court's jurisprudence in groundbreaking directions that now seem correct as a matter of social policy.

1. The Cost of Dissent

In many Establishment Clause cases there is some evidence of accompanying background harms that exist distinct from the alleged harm caused by the religious practices. Chief among these harms is religious persecution, which many argue provides good reason to promote inclusion as a touchstone of the Establishment Clause. The Court has rarely focused on this background discrimination, though it has often cited historical religious persecution as a reason for the adoption of the religion clauses.

To be sure, religious minorities—including the nonreligious as well as those of minority religious faiths[136]—face persecution. Many of the early First Amendment cases reflect the divisiveness of communities in which the Protestant majority actively fought the cultural infusion of Mormons,[137] Jehovah's Witnesses,[138] and Catholics.[139] In recent times, in cases representing predominantly Protestant communities in Bible Belt states such as Mississippi and Alabama, students who dissented from religious themes and practices found themselves the subjects of ridicule and ostracism.[140] The reported instances of backlash have not

[136] This group also includes members of the majority religion who do not share certain majority beliefs and members of the majority religion who do not approve of public religious expression.

[137] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[138] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[139] *See*, *e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947); *see also* Jeffries & Ryan, *supra* note 27.

[140] *See, e.g.*, Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902 (N.D. Miss. 1995). For example, Mississippi school children who challenged religious broadcasts over the intercom and student-led classroom prayers were allegedly referred to as

been limited to Southern states.[141] Worse still, persecution can take far more violent forms. Plaintiffs challenging school prayer and other religious exercises, for example, have been subjected to hate mail, death threats, physical violence, and humiliation.[142]

These examples have caused many to conclude that elimination of potentially divisive religious practices is the only means to prevent future skirmishes. This position has some merit if the persons participating in and facilitating the religious practices are the same persons responsible for the persecution. For example, in cases in which school officials and peers mistreat children who refuse to say the Pledge, it would appear that a reasonable response could be to eliminate the practice. A better response, however, would be to administer some sort of sensitivity training for students and school officials.[143] If we trust individuals with

"atheists" and "devil-worshippers" by teachers, among others, in front of other students. *See* STEVEN G. GEY, RELIGION AND THE STATE 403-05 (2001). And, in Alabama, two Jewish public school students were reportedly taunted and referred to by students as "Jew boys" and "Jewish jokers." One of the two boys was forced by a teacher to bow his head during a Christian prayer at an assembly, while the other was required to write an essay about Jesus as a form of discipline. *Id*.

141 *See* RAVITCH, *supra* note 68, at 3-18.

142 *See id*.

143 A recent free speech case demonstrates the need for some sort of training that could facilitate non-alienating responses to dissent. At the center of *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), is an Alabama statute which requires the State Board of Education and local school boards to develop character education programs to inculcate such values as courage, patriotism, respect for others, self-control, courtesy, tolerance, diligence, and patience. *Id.* at 1261-62. As a part of this program of character education, the statute includes voluntary recitation of the Pledge. *Id.* One morning in a twelfth-grade economics and government class, a student stood silent with his hands in his pockets during the daily recitation of the Pledge. *Id.* Immediately after the other students finished reciting the Pledge, the teacher confronted the student openly. *Id.* When the student responded that he no longer desired to say the Pledge, the teacher questioned incredulously, "You don't want to say the Pledge and the United States Air Force Academy has given you a scholarship?" *Id.* at 1260. Upset by the teacher's handling of the situation, a second student protested the following day by silently raising his fist in the air during the Pledge. *Id.* at 1261. The teacher chastised the second student in front of the class, and the second student later sued, claiming a free speech violation and an Establishment Clause claim based on other classroom activities. *Id.* As part of its program to promote values such as tolerance and patience, the local school board could have instructed teachers that students are constitutionally permitted to refuse to salute the flag. Instead, the teacher's handling of the situation snowballed into a more noticeable protest by a second student and ultimately, a lawsuit.

Of course, sensitivity training for students necessarily raises other issues. Those conducting such training should be careful to avoid criticizing the substance of religious beliefs and instead focus on criticizing inappropriate behavior. This distinction is not easily appreciated and has caused some to question the propriety of teaching civic morality in public schools. *Compare* Bd. of Educ. v. Pico, 457 U.S. 853, 864

the authority to act as teachers and administrators on behalf of the state, then presumably we can expect them to treat all children with respect.[144] Likewise, students should learn as early as possible to respect those who may come from different religious backgrounds or have different religious views. Because the religious practice triggers the dissent and corresponding backlash, it serves to illuminate the existence of insensitivity in the public schools. Better to face the problem, however gruesome, than to simply turn off the light.

More difficult are the cases in which those acting out against dissenters are neither students nor school officials. Apparently these individuals, likely parents and other members of the local community, become aware of the dissent as a result of publicity which may include media coverage of ensuing litigation. That the proposed elimination of public religious exercises unearths persons willing to commit acts of cruelty and violence is scary indeed.[145] Unfortunately, the state has no direct control over these individuals except perhaps through the criminal law. With respect to these individuals, elimination of the religious practice might remove otherwise identifiable targets for their frustration and violence. Of course, this would also penalize law-abiding students who desired to participate in the practices.

2. Subjective Emotional Experience

In the Establishment Clause cases discussed in this Essay, the constitutional harm consists of the subjective emotional experi-

(1982) (noting that schools bear the burden of teaching the values necessary for citizenship), *with* Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 301-02 (2002) (arguing that teaching students critical rationality, one popular tenet of which is tolerance, interferes with the family's ability to cultivate religious values in children).

144 This reveals my background assumption that people harm others because of insensitivity. I do not assume, as others may, that an excessive or aberrant religious disposition causes some to discriminate against those with different beliefs. *Cf.*, *e.g.*, RAVITCH, *supra* note 68, at 79-81, 84 (regarding Christian fundamentalism, "[c]ertainly, some individuals who share these views can rise above the urge to be intolerant, but the views themselves do not promote a great deal of tolerance toward those with divergent beliefs.").

145 Violent actions and outbursts by parents are apparently more common than we would like to think. A recent example in a different context involves a mother who was ejected from a high school basketball game for yelling obscenities and a father who body-slammed a referee in retaliation. *Parent Body-Slams Ref at High School Basketball Game*, CNN.COM (Feb. 10, 2004), *at* http://www.cnn.com/2004/US/Northeast/02/10/referee.assault.ap/index.html.

ence of persons deemed to be excluded from the religious messages.[146] While the Court's post-*Brown* equal protection jurisprudence has not focused on feelings, the Court's Establishment Clause jurisprudence is vulnerable to the same criticism leveled at the reasoning in *Brown*—that it is based on intangible rather than concrete harms.[147] This is not to deny the powerful, negative emotions that a Jew or Muslim may experience while looking at a crèche, or that an atheist may experience while listening to the words "under God." As Michael Newdow has explained in other places, he resents looking at coins that say "In God We Trust" when he does not trust in God.[148] To create a similar impact for those less likely to be offended by civil references to God, one commentator asks the reader to consider her reaction upon hearing a series of hypothetical openings for the United States Supreme Court, including, "Satan save the United States and this Honorable Court."[149]

But feelings, however potent, can be an unreliable basis upon which to find a constitutional violation. To risk stating the obvious, an individual's feelings are constantly subject to change based on factors that courts are ill-equipped to evaluate. Because of the idiosyncratic nature of feelings, the same message may rouse different emotions in different observers.[150] It is also

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146 *See supra* Part I.B.

147 Even ideologically opposed commentators such as Professor Derrick Bell and Justice Clarence Thomas appear to agree on the narrow proposition that the most serious problem with Jim Crow was not the asserted negative psychological effects on the black children involved. *See, e.g.*, Derrick A. Bell, *in* WHAT *Brown v. Board of Education* SHOULD HAVE SAID (Jack Balkin ed., 2001) (chastising the majority for failing to recognize that the schools were not equal); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 990-91 (1987) (noting that *Brown* failed to acknowledge segregation's origins in slavery).

148 *See* Howard Fineman et al., *One Nation Under . . . Who?*, NEWSWEEK, July 8, 2002, at 25.

149 *See* Loewy, *supra* note 30, at 1055.

150 This problem, sometimes articulated in terms of perspective, has been a lingering conceptual difficulty in the Court's application of the endorsement test. *See, e.g.*, Karst, *supra* note 67, at 515; *see also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 291-93 (1987) ("Whose perceptions count?"); Sullivan, *supra* note 28, at 207 ("Not to see the crèche as sending a message of exclusion to Jews, Muslims or atheists is to see the world through Christian-tinted glasses."); Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Psuedo-Scientific Sieve*, 36 HASTINGS L.J. 155, 162 (1984). Justice O'Connor has defended the endorsement test against these perceived problems:

> Saying that the endorsement inquiry should be conducted from the per-

true that a presumably offensive message may evoke a strikingly different reaction in the same observer, depending upon numerous considerations, including context and the identity of the speaker.[151] Attempting to address these inevitable difficulties, the Court has adopted the "reasonable observer" standard. Thus, whether the Court comprehends the emotional harm depends upon its own willingness to accept the plaintiff's characterization of cause and effect. In terms of outcome, it was certainly fortunate that the Court in *Brown* was disposed to accept the plaintiffs' interpretation of the impact of segregation. An earlier Court confronted with what was essentially the same claim, however, glibly concluded that racial segregation communicated a "badge of inferiority," if at all, only because blacks chose to interpret it that way.[152]

> spective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a 'reasonable non-adherent,' . . . nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2321-22 (2004) (O'Connor, J., concurring).

[151] *Cf.*, *e.g.*, RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 159-71 (2002). Suppose that, for example, in town X composed mostly of Muslims, the court clerk posted on a wall in the town courthouse a sign that stated, "Only valid religious reasons may excuse you from jury duty service," with a small star and crescent appearing at the bottom of the sign. Suppose alternatively that in town Y, also composed mostly of Muslims, the town clerk posted an identical sign. Assume also that at a hearing in the respective cases challenging the postings in towns X and Y, each town clerk testified that she recently obtained a new "clip art" database for her office computer and was merely experimenting with religious symbols to accompany the sign, with no intention to endorse a particular religion. Citizen A of Town X, a Christian, believes that the town council members and court clerk are respectful of Christianity because she has seen them at meetings and other events sponsored by her local church. She is not offended by the sign and is likely to believe the clerk's testimony. On the other hand, if Citizen A views the same posting in Town Y, knowing little about the local government, she is likely to be offended; she may very well assume that the town has intended to communicate that only religious duties arising from Islam could provide an excuse from jury service. For loosely similar facts only as to the circumstances surrounding the clip art, see, for example, *Granzeier v. Middleton*, 955 F. Supp. 741, 747 (E.D. Ky. 1997) (finding county courthouse closing in observation of Good Friday constitutional but invalidating sign posted on county building noting the closing and depicting a clip-art crucifix).

[152] Plessy v. Ferguson, 163 U.S. 537, 551 (1896) *overruled by* Brown v. Bd. of

Even if we could identify with precision emotional harms that rise to the level of constitutional significance, and even if we could maintain over time a composition of the Supreme Court that would consistently appreciate such harms, there is a bigger problem with hinging our Establishment Clause doctrine on feelings. Absolute freedom from offense is untenable in a society that places a certain premium on unbridled expression. Allowing a person's feelings of exclusion to dictate what is appropriate reduces Establishment Clause jurisprudence to that of the least common denominator—an approach that is inconsistent with the generally accepted value of tolerance that illuminates our understanding of the religion clauses and the Free Speech Clause.[153]

Finally, freedom from offense does not encapsulate the religious persecution that the Establishment Clause has been understood to prevent. Traditionally, religious minorities have sought the freedom to dissent from mainstream practices that marginalized their religious traditions, not the right to eradicate all manifestations of religion that may offend. By advocating what has occasionally been termed a "religion of secularism,"[154] defenders of the religious minority aim to transform the public square into one in which dissent is no longer required. Supporters of this position argue that a religion-free environment is preferable to protect religious minorities and ensure that the state plays no role in facilitating or perpetuating the angst and discomfort often associated with minority status.[155] The underlying assumption is

Educ., 347 U.S. 483 (1954); *see also* Tribe, *supra* note 150, at 162 (comparing *Lynch* to *Plessy* and arguing that, in each case, the Court used the wrong perspective).

153 *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944) (hearing a free exercise challenge).

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

Id. at 87; *see also* Marshall, *supra* note 67.

154 Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) ("[A]ffirmatively opposing or showing hostility to religion, leads to 'preferring those who believe in no religion over those who do believe.'").

155 Presiding over the case involving the Mississippi plaintiffs, Judge Biggers concluded that an opt-out remedy would fail to protect religious minorities from psychological harm:

> Permitting students to absent themselves from broadcasts or classroom prayer which they find offensive does not cure the Establishment Clause problem and can be a destructive approach. Contrary to its stated purpose and intent, organized prayer in public schools does not unite students from

that there is no (equally) legitimate competing concern—religionists can practice their religion at home or in other private places.[156]

Let us spend a moment evaluating the assumption. A standard of inclusion no doubt rectifies some feelings of outsider status created by majoritarian religious manifestations. On the other hand, elimination of the practice achieves inclusion only at the expense of the majority, who experience a different but co-extensive emotional harm.[157] If public school application of the

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> various backgrounds and beliefs but, instead, segregates students along religious lines. The plaintiff's children are likely to feel ostracized and stigmatized if their beliefs do not coincide with those of the majority. . . . A method of accommodation that is inclusive of those students who wish to participate is far better than a practice that excludes those that do not.

Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902, 911 (N.D. Miss. 1995); *accord* Steven Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 460 n.273 (2000) (citing several examples of religious persecution, including those mentioned above) ("[R]eligious exercises in public school –- including moments of silence that operate as de facto prayer sessions for a majority of the class –- focus a daily spotlight on the private religious beliefs of those who do not share the majority's faith and make those beliefs the object of constant public debate and (all too often) scorn."); *see also* Newsom, *supra* note 68, at 334-35 (acknowledging that the separationist approach is "strategically" secular if not religiously secular (in the sense of Secular Humanism), and best protects religious minorities and their families from psychological harm).

156 *See, e.g.*, Newsom, *supra* note 68, at 333-34 (relating to the context of religious instruction during school and on school premises after hours); *see also* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993).

157 Some might argue that the logic of recognizing an emotional harm to the religious majority would support recognizing a corresponding emotional harm to whites as a result of *Brown* or other antidiscrimination policies such as affirmative action. The symmetry of the logic offers some appeal, but it is here that religion seems most distinct from race. One commentator attempts to articulate this distinction when evaluating the propriety of government action allocating benefits to "whites" as a group, as compared to allocating benefits to a religious majority:

> Deliberately benefiting the racial majority concomitantly prejudices racial minorities. It therefore . . . plainly violates existing constitutional principles as well as moral norms . . . . [I]t is possible that favor or support for some religions may be viewed as public appreciation for certain appealing beliefs or for various wholesome activities rather than as an indirect expression of disrespect toward other, 'nonpreferred' religions. The overtones of racial prejudice and intolerance historically associated with messages of white supremacy, for example, are simply not present. Thus, favoring the dominant racial group realistically imposes the same constitutionally forbidden harm as deliberately disadvantaging racial minorities, and should almost always be invalid. Assisting mainstream religious groups, however, need not be forbidden, in my judgment, unless it adversely affects religious liberty.

Jesse H. Choper, *Race and Religion Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 500-02 (1994). For a critique of Choper's analysis,

Pledge, including "under God," or a city's display of a crèche, sends a message to religious minorities that they are "outsiders, not full members of the political community," then what does elimination of "under God" or court-ordered dismantling of the crèche communicate? The corresponding message to the religious majority is that their efforts to express religiosity publicly will be met with disdain.[158] The message is one of disapproval—probably worse than if the display had never been erected, or worse than if "under God" had never been a part of the Pledge. Perhaps, however, it could be asserted that the type of emotional harm experienced by the majority is conceptually distinct: It is one thing to feel excluded and alone, quite another to feel excluded but within a large group of others similarly situated. Yet this seems to discount the impact of a government message. The outsider feeling stems from the perception that the government has taken sides on matters of religion, declaring which belief is right or, alternatively, which is wrong. As to this specific affront, approval can be no worse than disapproval.[159] Those who advo-

see Gary J. Simson, *Laws Intentionally Favoring Mainstream Religions: An Unhelpful Comparison to Race*, 79 CORNELL L. REV. 514 (1994).

[158] *Cf.*, *e.g.*, Smith, *supra* note 150, at 310-11 (evaluating the endorsement test):

> If public institutions employ religious symbols, persons who do not adhere to the predominant religion may feel like 'outsiders.' But if religious symbols are banned from such contexts, some religious people will feel that their most central values and concerns—and thus, in an important sense, they themselves—have been excluded from a public culture devoted to purely secular concerns.

Id. A separationist might respond that religionists are free to use private space to express their beliefs. McConnell answers this argument with the observation that a completely secular public square marginalizes religion:

> The problem with the secularization baseline is that it is not neutral in any realistic sense. . . [W]hen the government owns the streets and parks, which are the principal sites for public communication and community celebration, the schools, which are a principal means for transmitting ideas and values to future generations, and many of the principal institutions of culture, exclusion of religious ideas, symbols, and voices marginalizes religion in much the same way that the neglect of the contributions of African Americans and other minority citizens, or of the viewpoints and contributions of women, once marginalized those segments of society. Silence about a subject can covey a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, cultures and ideological commitments, to exclude all those whose basis is "religious" would profoundly distort public culture.

McConnell, *supra* note 115, at 189 (evaluating Supreme Court Establishment Clause jurisprudence with respect to legislative accommodations and public religious displays).

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

cate a standard of inclusion have largely failed to recognize any possible psychological harm to members of the majority, assuming instead that public displays of faith are mere attempts to communicate dominance to outsiders.[160] In fact, both sides may experience a type of psychological harm; neither harm should be the basis for a violation of the Establishment Clause.

3. An Alternative Story

Thus far, I have argued that feelings of exclusion, however powerful, should not be the basis for an Establishment Clause violation. Rather than propose an abstract thought experiment to support this view, it seems preferable to evaluate a real life example. Consider the Jehovah's Witnesses. Long despised for their door-to-door proselytization and rejection of mainstream practices, the Jehovah's Witnesses have apparently learned to accept the social consequences that accompany dissent from the religious and secular mainstream. To appreciate this picture, one need not go back to the wartime setting of *Barnette* and the children who refused to salute the flag. Imagine instead the twenty-first century Jehovah's Witness child's reaction to her first classroom birthday party in public school, in which, for religious reasons, the child must refuse to participate in the festivities, including birthday cake.[161] How does the child cope with the considerable peer pressure to participate, and the ostracization that most surely results from refusal to do so? We can readily observe that the school, in permitting a teacher-supervised classroom party, has created an environment which highlights the child's difference and facilitates any resulting peer pressure due to non-conformity. Yet most would intuitively conclude that the appropriate remedy for the child and her parents is advance notice and exemption. We would *not* say that the party violates the Establishment Clause. Not because the peer pressure and resulting ostracization are not real, but because they are not what the Establishment Clause can logically and coherently be read to

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[160] *But cf.* Loewy, *supra* note 30, at 1063. Loewy acknowledges the possibility of a disapproval outcome, and argues that the Court's cases involving a state's denial of equal access to religious groups and a state exclusion of ministers from elected office can be justified on that ground. Nonetheless, those cases involved the denial of a tangible benefit such as access in addition to any abstract emotional harm.

[161] For a brief explanation of official teaching on this subject, see, for example, *Beliefs and Customs That Displease God*, *at* http://www.watchtower.org/ library/rq/ article_11.htm (last visited July 10, 2004).

prevent[162]—at least not without completely eliminating many classroom activities. This must no doubt be the implicit reasoning in cases rejecting the assertion that public school observance of Halloween and classroom time devoted to similar themes violate the Establishment Clause, though many parents desire to avoid the impact of such practices.[163]

C. Diversity and Tolerance

Most assume that the inclusion approach maximizes the values of diversity and tolerance, usually referred to collectively, which should and do receive a high premium in today's social and legal discourse.[164] The strands of diversity and tolerance can unravel into distinct concepts with different implications. The Court's inclusion approach, at work in the Ninth Circuit's *Newdow* opinion, can be viewed as an attempt at a sort of religious correctness based on the value of diversity. Elimination of the words "under God" acknowledges that there are those in the minority who

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[162] *Cf*. McCollum v. Bd. of Educ., 333 U.S. 203, 232-33 (1948) (Jackson, J., concurring). In sharp contrast to Justice Frankfurter's suggestion, Justice Jackson doubted that the Establishment Clause should be construed to protect religious minorities against psychic harm:

> The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating . . . . [I]t may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.

Id.

[163] *See*, *e.g*., Guyer v. Sch. Bd. of Alachua County, 634 So. 2d 806, 809 (Fla. Dist. Ct. App. 1994) ("Witches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a 'mere shadow,' if that, in the realm of establishment clause jurisprudence."); *see also* Fleischfresser v. Dirs. of Sch. Dist., 15 F.3d 680, 688 n.8 (7th Cir. 1994) (regarding parental challenge to use of Impressions reading series in public elementary school on the ground that the series contained references to concepts found in paganism, witchcraft and satanism) ("Many of the stories involving witches are sequenced to emphasize a Halloween theme. The American tradition of celebrating the eve of All Saints' Day is certainly a secular one."); Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1383 (9th Cir. 1994) (rejecting plaintiffs' challenge to Impressions reading series alleging, *inter alia*, that activities assertedly approximating witchraft denigrate Christianity and make students feel like outsiders); *cf.* Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49 (2d Cir. 2001) (holding that the celebration of Earth Day at public high school did not endorse Gaia religion).

[164] *See, e.g.*, Garfield, *supra* note 34 (repeatedly using the terms "inclusive" and "tolerant" together).

would prefer not to be confronted with the idea. This approach leaves behind the connected concept of tolerance, however, which usually requires those in the majority to accept with patience an idea or practice promoted by those in the minority, but in the case of the Pledge, creates some tension for the minority to accept the practice of the majority.

No doubt to some the majority's plea for tolerance may at first glance seem specious—perhaps akin to the claim that members of a racial majority who do not benefit from affirmative action and similar programs have been the victims of invidious discrimination.[165] But society can be quite intolerant of some members of the overall religious majority, especially when those persons are themselves deemed to be intolerant.[166] In *Mozert v. Hawkins County Board of Education*,[167] for example, the Sixth Circuit rejected the Free Exercise claim of religionist students and their parents who sought an exemption from exposure to the allegedly Secular Humanist positions taken in the Holt Reading Series. The material in the readers contradicted the fundamentalist Christian teachings of the parents, which promoted the concept of absolute truth and the supremacy of God's will over diversity of belief and individual preferences.[168] Because much of the ma-

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[165] This is not intended to express an opinion on whether such a view of affirmative action is, in fact, specious. *See* discussion *supra* note 157. For an example of such skepticism, see Joseph R. Duncan, Jr., *Privilege, Invisibility, and Religion: A Critique of the Privilege That Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617, 633 (2003) ("No person should be ostracized by society and made to feel aberrant simply because the majority believes that it can exercise its rights to religious freedom whenever it wishes.").

[166] Variations of this theme have been raised both by those who could be characterized as sympathetic as well as those who probably would be opposed to my overall position in this Essay. *See, e.g.*, Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. Rev. 163, 187 (1993) ("This is the phenomenon of selective multi-culturalism: boundless tolerance and respect for some voices, and ruthless suppression of others. Religion is an especially vulnerable target because religion represents the wisdom of the ages, which is an obstacle to the transformation of society."); *see, e.g.*, Fish, *supra* note 127, at 2293 ("Tolerance is defined in a way that renders the troubling views unworthy to receive it; openness of mind turns out to be closed to any form of thought not committed to its hegemony . . . ."); *cf*., *e.g.*, Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 84 (Mark Tushnet ed., 1990) ("Secular humanism . . . is not a solvent of tolerance for all points of view but a conflicting belief system . . . ."). Needless to say, my argument here will not persuade those who believe that intolerance of the intolerant is necessary or desirable.

[167] 827 F.2d 1058 (6th Cir. 1987).

[168] *Id.* at 1060; *see also* Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me*

terial in the Holt Series was antithetical to the students' religious training, the parents claimed that mere exposure to the Holt Series would seriously undermine their children's efforts to maintain their own religious values.[169] The remedy sought by the plaintiffs in *Mozert*, an exemption, was much narrower than the remedy for an Establishment Clause challenge, which would have required complete removal of the Holt Series from the curriculum. Nonetheless, the court rejected the plaintiffs' position that in light of the curriculum's sharp conflict with their religious views, it was anything but neutral.[170] Similar Establishment Clause challenges to public school curricula have likewise failed.[171]

To be sure, the court's decision in *Mozert* does not conclusively prove the larger point about intolerance, but it does show, in my view, that our background judgments about religion filter our assessment of these problems. If the right answer for the plaintiffs in *Mozert* and in similar cases is to "put up"[172] with what they view as pervasive secularism, why is token or ceremonial religiosity not also something to be tolerated, at least in

Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993). As Stolzenberg explains, *Mozert* highlights a compelling paradox. A curriculum that purports to teach respect for cultural and religious difference by requiring students to accept competing religious philosophies as equal to their own is necessarily intolerant of students who believe that there is only one truth.

169 *Mozert*, 827 F.2d at 1060.

170 *Id.* at 1070.

171 *See, e.g.*, Smith v. Bd. of School Comm'rs, 827 F.2d 684 (11th Cir. 1987) (challenge to allegedly secular humanist aspects of public school home economics, history, and social studies textbooks); *see also* Fleischfresser v. Dirs. Sch. Dist., 15 F.3d 680 (7th Cir. 1994); Grove v. Mead Sch. Dist., 753 F.2d 1528 (9th Cir. 1985).

In one publicized case, a federal district court rejected an Establishment Clause claim by Christian students and their parents challenging a seventh-grade curriculum that included an extended segment on Islam. *See* Bob Egelko, *Judge OKs Islamic Role-Playing in Classroom/Contra Costa County Parents' Suit Dismissed*, S.F. CHRON., Dec. 12, 2003, at A2. The plaintiffs did not object to the mere exposure of students to Islam, but to requirements that students adopt Muslim names, recite Muslim prayers in class and give up television or candy to simulate fasting for Ramadan. *See id.* In its unpublished decision, the district court reasoned that the eight week curriculum did not violate the Establishment Clause because the simulated exercises were not the actual religious rites required by Islam, and students did not perform the activities with "devotional or religious intent." *See* Order Granting Defendants' Motion for Summary Judgment at 13, Eklund v. Byron Union Sch. Dist., No. C02-3004 (N.D. Cal. 2003).

172 *Cf*. *Mozert*, 827 F.2d at 1080-81 ("Our holding requires plaintiff to put up with what they perceive as an unbalanced public school curriculum, so long as the curriculum does not violate the Establishment Clause.").

some cases? The very concept of diversity means that in a multiplicity of messages, there may be some objectionable ones. Diversity costs, and tolerance is the price we pay for preserving it.

A case that stretches the limits of tolerance is *Bob Jones University v. United States*,[173] in which the Supreme Court upheld the withdrawal by the Internal Revenue Service of the fundamentalist Christian university's tax-exempt status because it maintained rules against interracial dating. The Court's decision probably seemed like a substantial victory for diversity—but not necessarily from the perspective of those who advocate tolerance for divergent religious views and practices.[174] However confounding one may find Bob Jones' position that rules prohibiting interracial dating do not amount to race discrimination, its position was religiously held.[175] The best place to tell Bob Jones that it is wrong is in the marketplace, as when a prominent televangelist minister with a viewing audience of several million wrote a three volume series and spent a full year of television broadcasts deriding racism in the evangelical movement and criticizing, in particular, prohibitions on interracial dating.[176]

The foregoing examples begin to demonstrate the folly in the assumption that there exists a value-free, religion-neutral approach to which we can aspire.[177] In fact, the concept of inclusion necessarily exalts certain values over others. In *Lee*, Justice Kennedy acknowledged but dismissed the double standard objection of the majority: "[S]tudents may consider it an odd measure of justice to be subjected during the course of their education to ideas deemed offensive and irreligious, but to be denied a brief,

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[173] 461 U.S. 574 (1983).

[174] *But cf.* Minow, *supra* note 166, at 91 (using this as one of several examples to suggest that threats to cultural integrity due to antidiscrimination policies stand on a different footing).

[175] The Court characterized the conflict in *Bob Jones* as a clash between the University's free exercise and the governmental interest in "eradicating racial discrimination in education." *Bob Jones Univ.*, 461 U.S. at 604. *Bob Jones* presents a nontrivial conflict between First and Fourteenth Amendment values, and I do not mean to suggest here that one automatically trumps the other. The more obscure and unyielding the beliefs, however, the more comfortable we may feel, rightly or wrongly, in making a choice between the two.

[176] *See*, *e.g.*, 1 FREDERICK K.C. PRICE, RACE, RELIGION AND RACISM (1999) (arguing that rules prohibiting interracial dating signal a form of racial prejudice entirely unsupported in Scripture).

[177] *Cf.* Jeffries & Ryan, *supra* note 27, at 368 (acknowledging in the context of school prayer that "no meaningful opportunity for complete neutrality as between religion and nonreligion exists").

formal prayer ceremony that the school offers in return."[178] Kennedy explained that the special character of religion as being both favored under the Free Exercise Clause and disfavored under the Establishment Clause, a "fundamental dynamic" of the Constitution, rendered this argument unavailing.[179] But Kennedy's conclusion necessarily depends on one's interpretation of the Establishment Clause. In the Court's modern jurisprudence, that interpretation has tended toward a balance in favor of religious minorities with little consideration for the interests of a given religious majority. In the view of Judge O'Scannlain, writing for the judges dissenting from the Ninth's Circuit's refusal to grant rehearing, the Ninth Circuit's decision in *Newdow* vividly depicts the result of such an overbalance:

> In affording Michael Newdow the right to impose his views on others, *Newdow II* affords him a right to be fastidiously intolerant and self-indulgent. In granting him this supposed right, moreover, the two-judge panel majority has not eliminated feelings of discomfort and isolation, it has simply shifted them from one group to another.[180]

Sometimes it is better to put up with what puts you off.[181]

CONCLUSION

It makes perfect sense for a reasonable society to be concerned about religious oppression and coercion. That *Brown* and similar antidiscrimination ideas arguably sensitized the Court to subtler harms experienced by religious minorities represented a positive development. As the Court's Establishment Clause doctrine shifted to reflect similar ideas, however, it took a dangerous turn. The Establishment Clause, with its attendant all-or-nothing remedy, has proved too broad an instrument to address harms created by merely offensive or exclusionary practices.

In an apparent effort to rectify this result as applied to a narrow class of practices, several members of the Court have repeatedly stated that the current Pledge of Allegiance, the national

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[178] Lee v. Weisman, 505 U.S. 577, 591 (1992).

[179] *Id*.

[180] Newdow v. United States Congress, 328 F.3d 466, 481 (9th Cir. 2003) (O'Scannlain, J., dissenting), *republished at* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

[181] I acknowledge the view that tolerance defined as no more than putting up with what one dislikes is less than ideal. *Cf.* Minow, *supra* note 166, at 92 (arguing that the term "putting up" itself suggests a form of superiority or dominance on the part of the group doing the putting up).

motto "One Nation under God," and similar ceremonial religious references do not offend the Establishment Clause. Nonetheless, this category is plainly inconsistent with the Court's recent approach in Establishment Clause cases. The Court's creation of an ad hoc category of approved practices appears to reflect a type of balancing of the will of the religious majority against the interests of the religious minority. But this balancing has never been adequately explained. Thus ceremonial deism exists as a type of doctrinal anomaly in the larger context of the Court's Establishment Clause jurisprudence, which focuses largely on the reaction of the religious minority to a given religious message, and tends to balance in favor of the religious minority.

Given this paradox, the Ninth Circuit in *Newdow* was not unreasonable in assuming that, absent more explanation, the Court might be willing to retreat from ceremonial deism in favor of the current trend of Establishment Clause doctrine. The Supreme Court opinions in *Newdow* indicate that, at least with respect to three Justices, the Ninth Circuit's assumption was incorrect. But the Ninth Circuit's decision was wrong, in my opinion, because the Establishment Clause should not be interpreted as requiring elimination of every religious message or practice. Demanding inclusion merely inverts the classifications of judicial winners and losers, but does little to promote the overall well-being of society's members.

In this Essay I have attempted to explain why the concept of tolerance suggests that religious minorities should be permitted to dissent from certain majoritarian practices such as the Pledge, but not necessarily stop them altogether. The alternative of homogenization, albeit under the label of secular neutrality, never really works anyway. In large part, one's response to these observations will be determined by one's predisposition toward a particular point of view in church/state cases. What I hope I have proved is that religious minorities are vulnerable to persecution, but that inclusion does little more to protect them than an accommodationist approach. That majorities have claims to emotional harm that rival those of minorities, but a doctrine that takes either into account is on shaky ground. That diversity and tolerance can be advanced by reference to inclusion, and that inclusion can just as easily dismantle these values. That one's idea of what constitutes inclusion is itself a value choice, and that any

doctrine based on inclusion is full of value-laden assumptions about how people ought to behave.

Perhaps instead there is some middle ground between permitting a practice which engenders feelings of exclusion within a religious minority and the total elimination of that practice. Imagine a type of religious "*Miranda*" in which the government attempts to disassociate itself from a particular practice or statement that reflects the desires of the majority. Immediately before voluntary recitation of the Pledge, or perhaps before a student commencement speaker takes the podium, or on a banner next to a public religious display, the following words could be communicated:

> The [county/city/state] of X respects the wishes and practices of our citizens, and desires that no person or group is ostracized, alienated, or coerced in any way. Citizens and others should feel free to dissent from this [exercise/display/message] with the knowledge that your government protects your actions, and encourages others to respect them as well.

This is only a proposed and perhaps not even a good solution to the problem.[182] I hope that this Essay inspires others to think of better ones. In the end, an interpretation of the Establishment Clause that invalidates certain policies or practices merely because they make non-adherents feel excluded appeals to our highest antidiscrimination impulses, but does not do justice.

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[182] *Cf. Lynch v. Donnelly*, 465 U.S. 668, 713 (Brennan, J., dissenting) ("In the absence of any other religious symbols or of any neutral disclaimer, the inescapable effect of the crèche will be to remind the average observer of the religious roots of the celebration he is witnessing . . . ."). *Compare* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. at 753, 769 (1995) (Scalia, J., plurality) (in the context of a private religious message in a public forum, questioning the propriety of any identification or disclaimer as a "highly litigable feature"), *with id.* at 775-83 (O'Connor, J., concurring) (in the same context, approving of a disclaimer as an effective means of disassociating government from a religious message).