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I. INTRODUCTION

In recent years, certain aspects of the Supreme Court's Religion Clause jurisprudence have taken on the appearance of a quest for religious unity. This quest for unity has assumed various forms, but has been most prominent in the theme of neutrality that has come to dominate the Court's jurisprudence regarding government financing of religious enterprises.[1] The quest for unity has been an undercurrent of the Court's recent paeans to neutrality in two different but related senses. First, a majority of the Court has pursued unity in the sense of doctrinal uniformity—i.e., the desire to develop a uniform constitutional standard that can be applied in a way that does not exclude religious groups and individuals from competing for political largess alongside every other interest group that operates in the larger political culture.[2] Second, and perhaps

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1. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002). The *Zelman* majority held:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Id. at 652.

2. *See id*. (upholding a Cleveland, Ohio, school voucher program under which students were given government vouchers to attend private schools, most of which were religious, on the ground that the program provided neutral assistance to parents without regard to their choice of religious schools); Mitchell v. Helms, 530 U.S. 793 (2000) (upholding a federal program under which funds were distributed to religious schools to purchase educational materials on the ground that the program was neutral with regard to religious and secular schools).

The Supreme Court's recent decision in *Locke v. Davey*, 124 S. Ct. 1307 (2004), is not inconsistent with the point made in the text. In *Locke*, the Court upheld the State of

more perniciously, some members of the Court have pursued unity by encouraging the use of religion as a unifying cultural force. This is the sense of unity in which Justice Scalia once remarked that "nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek."[3] At the outer extreme, this sense of religious unity leads to the conclusion that being religious and being American are one and the same thing. Recall Justice Douglas's famous quip that "[w]e are a [country] whose institutions presuppose a Supreme Being."[4]

This Article critiques and responds to the recent quest for political unity through religion. The premise of this Article is that the quest for unity through religion will inevitably fail because, in a

Washington's denial of state scholarship money to any student pursuing a degree in devotional theology. *Id.* at 1309. The State interpreted its scholarship program in this way to avoid violating a state constitutional prohibition on providing state funds to "any religious worship, exercise or instruction, or the support of any religious establishment." WASH. CONST. art. I, § 11. The United States Supreme Court held by a 7–2 vote that this action did not violate a theology student's rights under the Free Exercise Clause of the First Amendment of the United States Constitution. *Locke*, 124 S. Ct. at 1315. The Court concluded that the case involved the "play in the joints" between what the Establishment Clause permits the states to do to aid or advance religion and what the Free Exercise Clause requires them to do to protect the religious exercise of citizens. *Id.* at 1311 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). The Court said nothing in *Locke* that would undermine previous decisions permitting states to provide significant financing to religious institutions through voucher programs; in fact, the Court specifically reaffirmed pertinent decisions such as *Zelman*. *Id.* at 1311–12. With regard to the issues discussed in the text, *Locke* therefore leaves the landscape exactly as it was coming into the case. Thus, under the Court's theory of neutrality as articulated and applied in decisions such as *Zelman*, religious groups may use their political power to gain access to state funds, and the government may base its allocation of social-service and educational funds to religious groups on the government's perception of religion's special benefits to program beneficiaries. *See* Bowen v. Kendrick, 487 U.S. 589, 607 (1988) ("Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part that religion or religious organizations may play in resolving certain secular problems.").

3. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting); *see also* Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (arguing against a theory of "rigid separation" of church and state and asserting that the Establishment Clause "d[oes] not require government neutrality between religion and irreligion nor d[oes] it prohibit the Federal Government from providing nondiscriminatory aid to religion"); Marsh v. Chambers, 463 U.S. 783, 786, 792 (1983) (rejecting an Establishment Clause challenge to officially sanctioned legislative prayer, noting that such prayers are "deeply embedded in the history and tradition of this country," and concluding that they are "simply a tolerable acknowledgement of beliefs widely held among the people of this country").

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

religiously pluralistic country, no one religion will be capable of mustering the necessary support among the country's diverse population around a common set of ultimate goals or ideals. The quest for religious unity therefore will inevitably degenerate into sectarian factionalism and political ostracism for those who refuse to climb onto the majority's religious bandwagon. A more fruitful path to political unity requires a secular constitutional framework in which all approaches to the subject of religion and politics may thrive simultaneously. The outline and justification for such a framework is provided below. Specifically, Sections IV and V outline an affirmative and a negative case for constitutional secularism, respectively. The affirmative case for constitutional secularism asserts that there is positive value in a secular democratic system in which religious and nonreligious citizens may participate in political decision making on equal terms as long as they recognize certain rights and protections of those whose basic values conflict with their own. The negative case is simply a reminder of the Hobbesian axiom that conceding the authority to impose religious values on the entire society is preferable to the prospect of a war of all against all for sectarian dominance of political power. Under either the affirmative or negative justification, the Constitution should be read to guarantee a secular government in which religion may not be used as the focal point for national unity.

II. THE QUEST FOR RELIGIOUS UNITY

Currently, the approach suggested in this Article seems to cut against the dominant tendencies of the broader culture. The Supreme Court is not alone in its quest for public unity through religion. The Court has been joined on this quest by many prominent political figures, some of whom have few reservations about publicly expressing their deep religious devotion. For example, the country is currently being led by a president who proudly announced during a political debate that his favorite philosopher is Jesus Christ.[5] This president does not merely give lip service to his religion; President Bush's religious zeal regularly filters into his

5. Frank Bruni, *Bush Tangles with McCain over Campaign Financing*, N.Y. TIMES, Dec. 14, 1999, at A1 (reporting that during a Republican Party primary debate the candidates were asked to name their favorite "philosopher-thinker[ ]," to which Bush responded, "Christ, because he changed my heart").

administration's political policies. Among other things, he has created a special office within the executive branch with the single purpose of increasing government interaction with religious social-service groups as part of "the Federal Government's comprehensive effort to enlist, equip, enable, empower, and expand the work of faith-based and other community organizations to the extent permitted by law."[6] On a more dangerous plane, the President has the tendency to equate his foreign policy initiatives with God's divine plan, as when he quoted the prophet Isaiah in announcing (perhaps prematurely) the American military victory in Iraq.[7] These religious-policy overtones have generated relatively little negative comment domestically, although they are frequently criticized abroad. American soldiers "are no longer simply killing enemies," one British commentator noted dryly about Bush's sense of engaging on a religious crusade, "they are casting out demons."[8]

The President is by no means alone on this score, however. Members of the legislative branch are equally anxious to publicize their righteousness as widely as possible, and sanctimony often melds with aggressive patriotism as the legislative gloss on the theme of national unity. In response to the now notorious Ninth Circuit Court of Appeals decision regarding the Pledge of Allegiance,[9] a

6. *See* Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001) (creating the White House Office of Faith-Based and Community Initiatives).

7. *See, e.g.*, George Monbiot, *America Is a Religion: U.S. Leaders Now See Themselves As Priests of a Divine Mission to Rid the World of Its Demons*, THE GUARDIAN (London), July 29, 2003, at 19 ("Wherever you go, you carry a message of hope—a message that is ancient and ever new. In the words of the prophet Isaiah, 'To the captives, come out, and to those in darkness, be free.'" (some internal quotation marks omitted) (quoting President George W. Bush's comment to troops)).

8. *Id.*

9. *See* Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2002), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). Although the issue discussed in this Article is at the heart of the dispute in *Newdow*, all of the Supreme Court justices avoided confronting the matter in their opinions reversing the Ninth Circuit's ruling in favor of Mr. Newdow. The majority reversed the Ninth's Circuit ruling on the basis of standing, holding that although Mr. Newdow had a constitutionally sufficient injury, he failed to meet the Court's "prudential" grounds for standing. *Newdow*, 124 S. Ct. at 2313. Essentially, the majority deferred to the California courts' determination that the mother of Mr. Newdow's daughter had sole custody, holding that this determination gave the mother exclusive authority to decide whether a lawsuit should be brought to enforce the daughter's rights under the Establishment Clause. There is a serious question as to whether this holding accurately represents the implications of the California courts' custody rulings, and also whether this holding misrepresents Mr. Newdow's own claims. *See id.* at 2316 (Rehnquist, C.J., concurring) (noting that that Mr. Newdow was suing on his own—not his daughter's—

unanimous Senate[10] and all but three lonely members of the House of Representatives[11] quickly voted to denounce the court and reaffirm that we are indeed a nation "under God."

This quest for unity has taken on particular force since the attacks of September 11. Since that sad day, many have discussed the unifying effect of religion. Even legal academics have joined the parade. In the academic literature, religion has been brought front and center into the public square and noted as a justifiable rallying point of a nation quite literally under attack. One prominent example of this tendency is William Marshall's recent article exploring the use of religion in times of crisis.[12] Marshall notes the many problems of injecting religion into the government's responses to such crises: "Because both state and religion are at their most influential point in times of crisis, the dangers in church-state concert

behalf). Whatever the merits of the Court's reasoning, the practical effect of its standing approach to the decision allowed the *Newdow* majority to avoid addressing the religious-unity issue altogether.

The concurring opinions also avoided grappling with this issue. Justice O'Connor produced an opinion in which she argued that the religious component of the Pledge should be upheld because its meaning is constitutionally insignificant. To use Justice O'Connor's words, the phrase "under God" "qualifies as a minimal reference to religion," which could be easily avoided by those saying the Pledge. Therefore, the phrase did not rise to the level of a constitutional violation. *Id.* at 2326 (O'Connor, J., concurring). By draining all religious significance out of the phrase "under God," Justice O'Connor avoided having to confront the more difficult issue of whether the government could enlist *real*, as opposed to de minimis, religious reference as a unifying force. A second concurring opinion by Justice Thomas focused on the issue of whether the First Amendment's Establishment Clause should be incorporated into the Fourteenth Amendment's Due Process Clause and therefore applied to the states. *Id.* at 2330 (Thomas, J., concurring). Since he concluded that the answer to this question should be "no," Justice Thomas also avoided having to grapple with the legitimacy of religious unity under the Establishment Clause. *Id.* (Thomas, J., concurring). The third concurring opinion, by Chief Justice Rehnquist, comes closest to dealing with the religious-unity issue, but instead of directly confronting the implications of embracing religion as a unifying force, the Chief Justice chose to dismiss the religious component of the Pledge as little more than a "descriptive phrase" referring to the country's religious heritage. *See id.* at 2320 (Rehnquist, C.J., concurring). Like Justice O'Connor, the Chief Justice essentially robbed the religious component of the Pledge of so much meaning that he rendered the religious-unity issue irrelevant.

10. S. Res. 292, 107th Cong., 148 CONG. REC. S6105 (daily ed. June 26, 2002) (recording the Senate vote of 99–0).

11. H.R. Res. 459, 107th Cong., 148 CONG. REC. H4135 (daily ed. June 27, 2002) (recording the House of Representatives vote of 416–3).

12. William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002).

are at their highest."[13] But Marshall eventually concedes that the conjoining of church and state will occur during such episodes without regard to constitutional reservations, and thus he seeks only to limit the scope and intensity of the joinder by suggesting "something like an exceptional circumstances test that would require a number of factors—such as a national crisis and public mourning combined with a limited temporal nexus between the precipitating event and the state response—in order to sustain a state-supported religious exercise."[14]

This wave of support for religious unity—in times of crisis and otherwise—is often coupled with an attack on a perceived secularist bent in much of the Supreme Court's modern First Amendment church-state jurisprudence.[15] Proponents of the religious unity position argue that constitutional secularism is not only inconsistent with the country's pervasively religious culture and history, but also with the needs of modern governments, which provide a broad range of social services touching nearly every aspect of life. This is the essence of Michael McConnell's contention that "the idea of 'separation between church and state' is either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic."[16] Proponents of religious unity add that in the absence of religion and other mediating institutions, the framework of democratic government will be nothing but an empty shell, devoid of the moral center needed to keep the entire machine running properly. In McConnell's words, churches provide an important mechanism "by which the citizens in a liberal polity learn to transcend their individual interests and opinions and . . . develop civic responsibility."[17] Religion allegedly fills that gap by generating a core set of values that can serve as a unifying force and provide a stable and enduring cornerstone to anchor the country's political structure during the ideological storms produced by a multitude of more mundane and ephemeral policy disputes.

13. *Id*. at 29.

14. *Id*. at 31–32.

15. For examples of criticism of the secularist orientation of modern Establishment Clause jurisprudence, see *infra* notes 56–57 and accompanying text.

16. Michael W. McConnell, *Five Reasons To Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 640–41.

17. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 17.

All of this is problematic for the simple reason that it will not work. National unity will not occur within a religious framework. In fact, the religious framework is peculiarly unsuited to the quest for unity because the very design of that framework is configured around notions of inclusion and exclusion. The religious framework is designed to thwart efforts at unity by making demands on believers that are specifically intended to ensure their inclusion into the holy precincts of the faith. But those same standards for inclusion are also standards for exclusion of nonadherents, and any religion of substance will define itself in part by reference to those who do not meet the standards of the creed.

Once one concedes that a political structure defined by religious principles will exclude those who do not choose to adopt those principles, there is little left in the search for unity through religion. If cultural and political unity is a desirable goal, we must search for a secular alternative to the religious-unity model. I sketch the outlines of two such secular options below. One, which I will term the affirmative case for constitutional secularism, takes as its starting point the essential functions of a democracy and uses those essential functions as the lodestar for political unity. The second, darker model, which I will term the negative case for constitutional secularism, is based on the recognition that the very factors that make religion exclusive and disunifying are also the factors that can lead diverse groups of religious adherents to give up their quest for unity through dominance in exchange for a guarantee of survival. After exploring in more detail the nature of religious exclusivity, I will turn to a fuller explanation of the two options for achieving real—that is, secular—national unity.

III. THE FALSE UNITY OF SECTARIANISM

Religion is by its very nature exclusionary, which means that religion is incapable of producing the unity sought by the proponents of a more overtly religious political culture. This is not a unique or novel observation; a recognition of the messy disunity of religious life is at the heart of Madison's and Jefferson's separationism,[18] as well as the Court's modern Establishment Clause

18. *See* THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, *in* THE PORTABLE THOMAS JEFFERSON 251–52 (Merrill D. Peterson ed., 1975).

jurisprudence—at least since *Everson v. Board of Education*, in which the Court incorporated the Establishment Clause into the Fourteenth Amendment.[19] To Madison and Jefferson, governmental attempts to force religious unity were doomed to fail or, at best, would achieve only a hypocritical and superficial conformity. In Madison's terms, such ecclesiastical establishments "erect a spiritual tyranny on the ruins of Civil authority."[20] Yet the recent scholarship discussed above,[21] and some of what the Court itself has said recently (at least in the religious-financing cases),[22] is deeply contrary to what used to be commonplace among First Amendment church-state jurisprudence. It is therefore worth exploring this matter briefly.

As to the nature of religion, any religion whose precepts are not so diluted, generalized, and generic that they are acceptable to the entire world will be defined by standards that have as their purpose and effect the inclusion of adherents and the exclusion of nonadherents. Religion often consists of a set of exclusionary dichotomies: good and evil, heaven and hell, sinner and saint, believer and infidel, God and mammon.[23] All of the important distinctions that define what we know as religion are distinctions that have the basic purpose of keeping the faith pure by excluding those

> [T]hat the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time . . . .

Id.; *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments* ("Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure [and] perpetuate it, needs them not."), *quoted in* Everson v. Bd. of Educ., 330 U.S. 1 app. at 68 (1947) (Rutledge, J., dissenting).

19. 330 U.S. 1, 10–11, 16 (1947) (noting that efforts to force religious unification on the country—in particular, the forced payment of tithes—"shock[ed] the freedom-loving colonials into a feeling of abhorrence," which led to the adoption of the anti-establishment principle that "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*").

20. Madison, *supra* note 18, *quoted in Everson*, 330 U.S. at 68.

21. *See supra* notes 16–17 and accompanying text.

22. *See supra* note 2.

23. This description applies to a wide variety of faiths that are politically powerful in the modern United States, including traditional Western faiths such as Christianity and Judaism, as well as Islam and even Hinduism. It would not apply to some Eastern faiths, such as Buddhism, which comprise a small fraction of the current population of the United States and which do not require the existence of gods or devils and do not necessarily include concepts of heaven and hell.

who do not meet the high standard of the faithful. The notion of unity makes sense in a religious context only from the internal perspective of those who follow God's word. Religion does not seek to unify the religious and the nonreligious because to do so would corrupt the entire enterprise. In contrast, the goal of political unity is to develop a mechanism to unify the members of a diverse population who are motivated by wildly different senses of the ultimate good. In this sense, not only is political unity not religion's goal, it is actually antithetical to religion's entire reason for existing. Religion offers the prospect for unity only in the sense of joining together to celebrate the accepted faith. In other words, religion offers unity only for those who convert.

Proponents of religious unity offer an image of a devout nation joining hands in a benign collective exercise of national prayer and obeisance to a unifying God. However, this inclusive image does not reflect the more nuanced and sometimes troubling nature of the collective American religious experience. Religion has not been a consistently unifying force in this country. Just as often, it has been the source of division and strife. Even before the founding of the Republic, the infusion of religion into politics was characterized by factionalism and internecine conflict. Stories of battles over early forms of establishment are legion.[24] The Virginia dispute over Patrick Henry's religious-establishment proposal is itself a good case study of the difficulties in achieving significant unity even among groups of Christians whose doctrinal dissimilarities are not nearly as extreme as the disputes among conflicting faiths in the modern world.[25]

24. Tocqueville recounts, for example, seventeenth-century Connecticut laws mandating attendance at state-sanctioned religious services and Massachusetts laws banishing Anabaptists, imposing the death penalty on any Catholic priest who returned to the state after being exiled, and charging severe fines against ship captains bringing Quakers to the colony (plus imprisoning and beating those Quakers who managed to come anyway). ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 42–43 nn.26–27 (George Lawrence trans., Anchor Books 1969) (1848). For a general account of more recent debates over religious establishments in the early states, see LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986).

25. Henry proposed to revive the state-mandated payment of tithes for the support of religion. The details of the dispute are recounted in the various opinions in *Everson*. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 11–13 (1947); *id.* at 35–39 (Rutledge, J., dissenting). Dissention within Christian denominations over the wisdom of the state-mandated assessment was one of the most important reasons the assessment bill was defeated. *See* LEVY, *supra* note 24, at 58 (noting that by the end of the debate "only the Episcopal Church and the Methodists continued to endorse the general assessment").

The strange thing about the modern debate over these issues is how proponents of religious politics use this history of religious conflict to reach precisely the opposite conclusion from that reached by Madison. For example, Justice Thomas appropriately recounts the hostility directed toward Catholics during the nineteenth century,[26] but draws a counterintuitive conclusion from that history, namely, that the Court should lower Establishment Clause restrictions on links between church and state.[27] As would be demonstrated by a more complete rendition of the historical conflict cited by Justice Thomas, religious dominance of government is the problem, not the solution.[28]

There are two possible explanations for this tendency to use the history of politicized religious conflict to argue in favor of increasing religious influence over modern politics. Both of these explanations are unflattering to the proponents of religious unity. The first possible explanation is that the various dominant sects have decided to profit on a short-term basis from access to government funds to which they were all previously barred. This short-term marriage of convenience simply delays the inevitable battle for ultimate dominance between the various religious beneficiaries of government largesse.[29]

26. *See* Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion) (arguing that opposition to state financing of private schools has a "shameful pedigree" in that it is based on a history of anti-Catholic prejudice).

27. Justice Thomas discusses the Blaine Amendment and other efforts to forestall the use of state money to finance private religious schools, but he ignores the historical circumstances that made these private schools necessary in the first place. Catholic private schools were formed in large part to escape Protestant dominance of the public school system, which manifested itself in overt efforts to proselytize—or, failing that, to ostracize or to pressure into submission—Catholic children. The Protestant-controlled public schools were infused with the dominant faith and its religious practices, including religious exercises based on the Protestant Bible, and recalcitrant Catholic children were expelled, sometimes beaten, and generally coerced to conform. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 300 (2001). It is no answer to suggest that the modern versions of religious-unity arguments are different because they are more ecumenical. As usual, Madison provided a succinct response to this argument: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" Madison, *supra* note 18, *quoted in Everson*, 330 U.S. at 65.

28. Madison, *supra* note 18, *quoted in Everson*, 330 U.S. at 65.

29. The fear that permitting the government to favor religion generically will lead to a battle of sect versus sect for dominance is hardly a new or novel idea. As noted previously, Madison expressed this very concern in the *Memorial and Remonstrance Against Religious Assessments*:

The other possible explanation is that a seismic shift has occurred in the way the various mainstream Christian (and even some Orthodox Jewish) sects have decided to approach the issue of sectarian conflict. Prior to the modern era, the main cause of religious conflict was the effort of each sect to dominate competing sects that were products of the same cultural matrix. Disputes between, for example, Protestants and Catholics were hostile and even violent, but the two factions at least shared a common understanding of the religious and political culture in which they

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id., *quoted in Everson*, 330 U.S. at 65–66. The concern has not gone away in the modern era. In the recent litigation over the constitutionality of government vouchers for religious schools, both Justice Souter and Justice Breyer raised the concern of religious divisiveness and the fear of sectarian battles for dominance in the competition for government funding. Justice Souter noted:

> Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. . . . As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord. "Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another."

Zelman v. Simmons-Harris, 536 U.S. 639, 715 (2002) (Souter, J., dissenting) (citations omitted) (quoting *Everson*, 330 U.S. at 53 (Rutledge, J., dissenting)).

Justice Breyer expressed similar concerns:

> Under these modern-day circumstances, how is the "equal opportunity" principle to work—without risking the "struggle of sect against sect" against which Justice Rutledge warned? School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Id. at 723–24 (Breyer, J., dissenting).

both arose.[30] The antagonists may have disputed, for example, the authority of the Pope, but neither faction disputed the authority of God.

In the modern world—or at least in the modern industrialized world—this common understanding is much more tenuous. Two different phenomena have undermined the framework in which religions operate in the West. The first is the rise of cultural (as opposed to political) secularism. In blunt terms, the influence of traditional religion in the Western world is rapidly diminishing. Based on current trends, the practice of traditional Western religion may soon become the exclusive franchise of the United States and parts of the third world. One could make a good case for the proposition that in Western Europe religion is already largely irrelevant to the culture and that religion's influence over the way people live their daily lives is already de minimis. A recent *New York Times* analysis depicts the bleak prospects of religion in Europe. [31] According to one recent comprehensive study of European culture, only twenty-one percent of Europeans said religion was "very important" to them.[32] Church attendance rates of Europeans also reflect the diminishing significance of religion. In Italy—one of the more religious Western European nations—the percentage of the population who regularly attend church is reported to be as low as fifteen percent.[33] The *Times* reporter summarizes the reality of

30. After recounting the history of hostility to Catholicism in the early American colonies, *see supra* note 24, Tocqueville goes on to note the political confluence of Christian sects during the early years of the Republic:

> I have seen no country in which Christianity is less clothed in forms, symbols, and observances than it is in the United States, or where the mind is fed with clearer, simpler, or more comprehensive conceptions. Though American Christians are divided into very many sects, they all see their religion in the same light. This is true of Roman Catholics as well as other beliefs. Nowhere else do Catholic priests show so little taste for petty individual observances, for extraordinary and peculiar ways to salvation, and nowhere else do they care so much for the spirit and so little for the letter of the law.

TOCQUEVILLE, *supra* note 24, at 448–49.

31. *See* Frank Bruni, *Faith Fades Where it Once Burned Strong*, N.Y. TIMES, Oct. 13, 2003, at A1 (citing LOEK HALMAN, EUROPEAN VALUES STUDY FOUNDATION, THE EUROPEAN VALUES STUDY: A THIRD WAVE (2001), *available at* http://spitswww.uvt.nl/web/fsw/evs/documents/evs_sourcebook.pdf).

32. *Id.*

33. *Id.* This observation is particularly telling in that the study also indicates that eighty-five percent of Italians identify themselves as Roman Catholic, and thirty-three percent describe religion as "very important." *Id.*

religion in Europe by noting that "Europe already seems more and more like a series of tourist-trod monuments to Christianity's past" and by further noting that the "withering of the Christian faith in Europe" has effectively shifted the religion's center of gravity to the Southern Hemisphere.[34]

This phenomenon cannot have escaped the attention of the mainstream religious denominations in the United States.[35] If the main task of previous generations of religious leaders was to find ways to convert the adherents of other sects who already shared their basic beliefs, the main task of today's religious leaders is to keep the entire religious enterprise alive in the face of evidence that much of the Western world just does not care. Thus, it is not surprising in the United States to see agreement over issues such as government financing of religion among sects that only a few decades ago were theologically hostile to each other. All such sects are currently under siege on the Western front; the main battle today is not between Catholicism and Protestantism, but between religion and cultural secularism.

The battle to contain the damage inflicted by secularism on the Western front is only one of Western religion's problems. Western religion's other battle is on the Eastern front, where Western religion's dominance is threatened by a radical and thoroughly unaccommodating version of Islam. Unlike the battle against cultural secularism, this battle is not a new one on the global stage, but it is a novelty to be fighting this battle domestically as well as in foreign lands. Islam is one of the fastest growing faiths in the United States,[36] and even if the numerical dominance of Christians ensures

34. *Id.*

35. The United States is not immune from the secularization trend, although that trend is less advanced in the United States than in Western Europe. In the United States, although ninety-one percent of the population declares some religious affiliation, only forty-four percent report regularly attending a church or synagogue. *See* U.S. CENSUS BUREAU, *Chart No. 80: Religious Preference, Church Membership, and Attendance: 1980 to 2002*, *in* STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 67 (2003), http://www.census.gov/prod/2004pubs/03statab/pop.pdf.

36. According to one survey, the number of individuals identifying themselves as Muslim grew 209% from 1990 to 2001. Barry A. Kosmin et al., *American Religious Identification Survey*, Exhibit 1 (2001), *at* http://www.gc.cuny.edu/studies/key_findings.htm (last visited Sept. 27, 2004). In contrast, during the same period the number of individuals identifying themselves as members of a Christian sect only grew approximately five percent, and the number identifying themselves as Jews actually went down approximately ten percent. *Id.*

that Christianity will dominate the culture for the indefinite future,[37] the ground is shifting in unpredictable ways. Consequently, the move toward encouraging the use of shared "Abrahamic" religious values as the focal point of a religious and political cultural unity[38] is really part of a common effort to fend off the encroachments of cultural secularism and avoid the ensuing clash with Islam by encouraging the development of moderate Western versions of the faith that will be more accommodating toward the traditionally dominant Western sects.

The point is that none of this is a recipe for using religion to achieve true political unity. Religious factionalism is no less evident today than it was in earlier periods. The only difference is that the new antagonists to the main Western faiths today—cultural secularism and radical Islam—are not just competing for adherents but are also set on redefining the world in ways that would undermine the entire theological structure in which traditional Western religions operate. Whether they admit it or not, proponents of religious unity are urging a system that would perpetuate their own religious dominance. When Justice Scalia talks of "the God whom [we] all worship and seek," he is not talking about Vishnu or Ormazd; he is talking about the God that he and most other Western religious practitioners worship and seek. The national religious sentiment that we are all urged to embrace will have a distinctly Western—and for the time being, Christian—feel. This may not be as spiritually imperialistic as Justice Story's notorious comment that the Constitution was intended to create a Christian (by which he really meant Protestant) nation.[39] However, permitting

37. As of the year 2001, there were approximately 159 million Christians, 3 million Jews, and 1 million Muslims in the United States. *Id.*

38. *See, e.g.*, Abdulaziz Sachedina, *Guidance or Governance? A Muslim Conception of "Two-Cities,"* 68 GEO. WASH. L. REV. 1079 (2000).

> [The] Abrahamic [faiths—Judaism, Christianity, and Islam—share] traditions [that] are characteristically founded upon the scriptures that locate justice in history through community. . . .
>
> . . . .
>
> . . . The role of religion, then, is to foster norms, attitudes, and values that can enhance peaceful relations among different ethnic and religious communities. The norms like 'your brothers in religion' or 'your equals in creation' can serve as the founding principle of a civil society even today.

Id. at 1086, 1097.

39. "The real object of the amendment was not to countenance much less advance Mahometanism [sic], or Judaism, or Infidelity, by prostrating Christianity, but to exclude all

the public sphere of government to embrace the same religious values that already dominate the culture in the private sphere may have the identical effect of excluding the many individual members of the population who do not belong to one of the dominant faiths, who belong to a Western sect that eschews conspicuous public exhortations of piety, or who are not religious at all. This is a very strange vision of "unity."

For what it is worth, the majority of the current Supreme Court recognizes this in at least half of its Establishment Clause opinions.[40] At the same time that the Court has been systematically dismantling the structure of Establishment Clause separationism in the financing area,[41] it has repeatedly reaffirmed separationism in the symbolic endorsement context.[42] At least in cases involving religion in the public schools, which comprise the overwhelming majority of cases involving governmental symbolic endorsement of religion, a six-justice majority of the Court continues to resist the notion that the legislative majority may choose a set of religious values to serve as the leitmotif for the culture as a whole.[43] Ironically, Justice Kennedy, who is also one of the five Justices seeking to abandon separationism in the financing context, authored one of the most vociferous statements of the separationist principle in the symbolic-endorsement context. In the middle portion of Justice Kennedy's opinion for the majority in *Lee v. Weisman*,[44] he specifically rejected the goal of a religiously based political unity:

rivalry among Christian sects." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (Fred B. Rothman & Co. 1991) (1833).

40. *See supra* note 2.

41. *Id.*

42. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional a school board policy permitting prayer at a public high school football game).

43. *See, e.g.*, *id.*; Lee v. Weisman, 505 U.S. 577 (1992) (holding unconstitutional a school board policy permitting prayer at a public high-school graduation ceremony); Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional a state statute permitting a moment of silence where the policy is intended to insert religion into the classroom); Stone v. Graham, 449 U.S. 39 (1980) (holding unconstitutional a state statute requiring the posting of a copy of the Ten Commandments in public-school classrooms); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (holding unconstitutional a state statute requiring the reading of the Bible in public-school classrooms); Engel v. Vitale, 370 U.S. 421 (1962) (holding unconstitutional a state statute requiring the recitation of prayer in public-school classrooms).

44. 505 U.S. 577 (1992).

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.[45]

Later in the opinion, Justice Kennedy explains why this is so:

> The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.[46]

This, then, is the response to those who would argue that unity through religion is a defining characteristic of the national political character. In justifying government assertions of religious principle in response to national crises, William Marshall gives away the game when he asserts that the "constitutional value of secularism is in its instrumental role, not in its own orthodoxy," because constitutional secularism is intended "to protect, and not to displace, our collective religiosity."[47] Both of the primary ideas asserted in this statement are wrong. The first inaccurate assertion is the notion that the country is defined by its "collective religiosity." This is wrong because even if the majority of the country defines itself in this way, the majority is not "the collective." The second inaccuracy is the assertion that constitutional secularism serves only the instrumental function of protecting religion. The constitutional principle of secularism exists to protect democracy, not religion. This is not to say that the constitutional principle of secularism is hostile to religion any more than democracy is hostile to any other set of beliefs, prejudices, or ideals that define the lives of the citizens who live within the boundaries of a country that is governed democratically.

Perhaps the central underlying problem with the claim of unity through religion is that the claim depends on the attainment of a

45. *Id*. at 589.

46. *Id*. at 591–92.

47. Marshall, *supra* note 12, at 33.

world that will never exist—that is, a world in which we all agree at the most fundamental level about the most basic issues of life, death, and meaning. These are the sorts of issues that religion (at least any religion worth discussing) addresses, and the claim that religious unity is possible implicitly asserts that agreement about these fundamental questions can be achieved. The possibility that any such agreement can occur in a community of any size is sheer fantasy, and any effort to achieve such agreement will lead inevitably to totalitarianism. This is why democratic theory sets a different goal for itself, essentially constructing a society in which these issues can be addressed by individual citizens on their own terms, and without fear of collective coercion or retribution. There are two paths to this narrower, but infinitely more desirable form of political unity. The next two sections sketch the outlines of the two ways in which unity under a secular constitution can be justified.

IV. REAL UNITY AND THE AFFIRMATIVE CASE FOR CONSTITUTIONAL SECULARISM

The pursuit of unity is a precarious objective in a democracy. Some forms of unity are not only permissible but actually necessary for democratic governance. For example, to prevent ordinary disputes over policy decisions from deteriorating into civil war, there must be unity among the population with regard to the need to lose political conflicts gracefully and to respect the legal validity of policies made by one's victorious opponents. Other forms of unity, however, effectively impose an ideological orthodoxy that undercuts the pluralistic prerequisites of democratic government. Religious unity falls into the latter category. The pursuit of national unity through religious values assumes a comprehensive unity of purpose that affirms an identifiable set of fundamental values. This sort of unity is incompatible with democracy because it eschews the ideological agnosticism that is the primary prerequisite for long-term democratic governance.[48]

To insist that democratic government is "agnostic" is not to say that democracy is unprincipled. On the contrary, democratic governance can only endure by adhering to certain core principles.

48. *See* County of Allegheny v. ACLU, 492 U.S. 573, 610 (1989) ("A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed.").

The principles that form the core of a constitutional democracy are essentially the principles of skepticism and constant ideological evolution, the recognition of which prevents the government from ever enshrining in law any particular set of fundamental values to the exclusion of any other set of values. There is a certain innate irony to this conception of democracy, in that it requires a democratic government to tolerate the existence and expression of even the most antidemocratic values among its citizens, even though it is clear that if those antidemocratic citizens gain power (even through democratic means) and establish their values as law, then that government will cease to be a democracy.

This is relevant to the issue of religious unity because the very traits that define religion are precisely the opposite of those traits that define democracy; thus the acceptance of a regime that seeks to achieve a national unity of purpose through the collective acceptance of a religious ideal will constitute an abandonment of democracy. To briefly elaborate on this point, a democratic political structure is defined by three primary characteristics: popular control of the government, the tentative nature of all political decisions, and the idea that policies should be susceptible to rational critique and empirical analysis. The first characteristic of a democratic government is popular control of government. This characteristic is virtually the operational definition of a democracy. The precise mechanisms for exercising popular control can vary among different types of democratic governments. The proportional representation systems used by many European governments are no less democratic than the multiple-district, winner-take-all system prevalent in the United States and Britain. The first principle simply requires that the political structure reflect, in some reasonable way, the policy preferences of the dominant forces in society.

Any combination of religion and government violates the first principle because it has the effect of subordinating popular control to the supernatural agency of God. This conclusion applies to all three major instances of governmental religious establishment: when the government endorses religion, when the government adopts a religious precept as law, or when government uses public funds to finance religious activities. In all three instances the government essentially delegates popular rule to policies dictated by a supernatural being whose decisions are outside human control. The need for something like the *Lemon v. Kurtzman* secular-purpose

requirement[49] is crucial here, because even in situations in which religious policies are adopted by a majority of the electorate, the supporters of such policies would acknowledge that they are not acting on their own behalf, but on behalf of a Supreme Being—an example of political delegation that is unacceptable in a temporal democracy.

The second characteristic of democracy is the tentative nature of all political decisions. This principle follows from the first because as political majorities change, so will the political policies supported by those majorities. Democracy is a long-term process, not a one-time-only vote. This is the easy answer to the countermajoritarian difficulty that tends to absorb so much time in first-year constitutional law classes.[50] The countermajoritarian role of courts in protecting political minorities is compatible with a democratic process that is defined by majoritarian control of political power because today's minority might be tomorrow's majority. By protecting political minorities and the expression of minority political sentiments today, the courts are thereby protecting the long-term survival of a vivid and flexible system of majority rule. In the end, this means that all policies are presumptively temporary, and the government may not enshrine any policy or principle as unquestioned or sacrosanct. Religious principles cannot satisfy this temporality requirement of democracy because religious principles are eternal, unassailable, unchanging, and unchangeable.

The third principle of democracy is that political policies should be based on rationales that are susceptible to rational critique and empirical analysis. This is another way of articulating a similar point made by John Rawls,[51] Robert Audi,[52] and Richard Rorty[53] to the effect that political decisions in a democracy should be based on rationales that are accessible to the entire political culture. All arguments regarding policy should therefore (to use Rawls's

49. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (requiring all statutes to have a "secular legislative purpose").

50. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

51. *See* JOHN RAWLS, THE LAW OF PEOPLES (1999); JOHN RAWLS, POLITICAL LIBERALISM (1993).

52. *See* ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000).

53. *See* RICHARD RORTY, *Religion as Conversation-Stopper*, *in* PHILOSOPHY AND SOCIAL HOPE 168, 172 (1999).

terminology) be cast in terms of public reason, which means they should be defended on terms that are perceived as reasonable even to people whose worldviews are based on irreconcilable ultimate beliefs.[54] Political policies that are based primarily or exclusively on religious rationales cannot satisfy this reciprocity requirement.[55] Political policies that are based on the dictates of God cannot be justified on grounds accessible to those who worship a different God, who view God in a different way, or who do not believe in God at all. Political debate in a system that permits the infusion of sectarian principles into law thus becomes a battle over whose Supreme Being controls.

As these three criteria for democratic governance indicate, a political system set up under these principles will be able to achieve political unity in the form of a government that enacts policies that can be justified on equally accessible grounds to everyone in society and that will allow for the possibility of political change—including change in the democratic nature of the system itself. What I have described here is merely one form of government among many other options. This is not intended to be a claim that the democratic form of government is inherently superior to all others (although I personally think it is), but rather that this is a roughly accurate description of the regime established by the United States Constitution. It is not implausible to reject democracy in favor of other political arrangements, including various types of theocratic governance, but it is impossible to reject these three basic principles without abandoning democracy. If this claim is true, then a system that adopts religious principles to guide the quest for national unity must be viewed as having abandoned the democratic commitment that supposedly was the reason the quest was initiated in the first place.

As noted above, resistance to the adoption of secular democratic principles by those seeking to embrace some form of religious political unity is based primarily on the contention that these secular principles have the effect of skewing the system against religious practitioners and the beliefs that form the core of their spiritual lives.

54. *See* RAWLS, *The Idea of Public Reason Revisited*, *in* THE LAW OF PEOPLES, *supra* note 51, at 131–32.

55. Thus, the Establishment Clause permits the government to adopt only those policies that can be justified in secular terms and are accessible and acceptable to both religious adherents and nonadherents.

The argument is that secular democracy ostracizes religious believers and devalues their beliefs. In Stephen Carter's version of this argument, when the secular Constitution privatizes religious faith it forces believers to treat their religion as a "hobby," not something to be taken as seriously as the secular ideas that form the basis of law and public life.[56] Graham Walker even argues that this in essence creates a secular establishment: "Not only does this force religious citizens to truncate their identities, but it gives a special public advantage to those who embrace in their persons the principle of the polity, that is, to secularists."[57]

The answer to these complaints lies in the secular Constitution's unwavering protection of a vibrant private sector, coupled with multiple protections from government control over activities within that sector. Privatizing religion does not, as Carter claims, ostracize or devalue religious belief; rather, by privatizing religion secular government protects religion by allowing it to grow free of government control and free of domination by each group's religious antagonists. If the secular Constitution does not allow even dominant and powerful religions to use their private power to incorporate their religious views into law as the defining principles of cultural unity, then that is simply because other, weaker religious groups—as well as the nonreligious—also deserve protection from their more powerful adversaries. Religious groups can continue to practice their faith unless doing so will harm their neighbors or impose their values on unwilling fellow citizens. Members of religious groups can decide not to abort nonviable fetuses, but they cannot force that choice on others who have a different view of ensoulment. Likewise, religious children can pray in public school study halls and classrooms, so long as their parents do not insist that the State use its power to force other students to do the same. And under a proper rendering of a secular democracy (*Zelman's* contrary holding[58] notwithstanding), religious parents can send their children to private religious schools, so long as they do not force their neighbors to pay the tuition.

56. *See* Stephen L. Carter, *Evolution, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977.

57. Graham Walker, *Illusory Pluralism, Inexorable Establishment*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 111, 111–12 (Nancy L. Rosenblum ed., 1987).

58. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding a Cleveland, Ohio, school voucher program that provided financial benefits to private religious schools).

Under a regime of secular democracy, religious groups can even militate to replace the secular democracy with an undemocratic theocracy—at least up to the point that their militancy becomes a direct incitement to imminent revolution.[59] But if they want to play by democracy's rules, religious groups should not be able to write their principles into law, unless those principles can be justified in secular terms that are accessible and acceptable to nonadherents.[60] Likewise, religious adherents cannot make their chosen theology the focal point of crusades for national unity. In the context of the current controversy, sinners, atheists, transgressors, and apostates are Americans too, even in times of crisis, and the quest for national unity must treat them with the same respect as the most sanctimonious politician bowing ostentatiously in public prayer.

V. REAL UNITY AND THE NEGATIVE CASE FOR CONSTITUTIONAL SECULARISM

The affirmative case for constitutional secularism proceeds from the assumption that there is positive value in a democratic system in which everyone may participate in political decision making, but in which even political losers may retreat into loyal opposition in the private sector without fear of civil sanctions, imprisonment, or worse. This affirmative case seems insufficient for many of those seeking to introduce their religious values into the public sphere and thereby to enforce their God's commands as law. The security of the private sector provided by secular democratic regimes will never suffice for any religious group that seeks to dominate the culture and define that culture through the group's own perspective on the word of God. For any group such as this, there must be another, more convincing argument for secular democracy that does not rely on notions of political reciprocity, guarantees of equal political participation, and participation in an open and vibrant private sector. For such a group the argument for democracy must take a negative form; in other words, the case for democracy must be made in comparative terms as the lesser of alternative evils. The negative case for democracy therefore must be made through appeals to fear. Secular democracy may not give you everything you want, democrats

59. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

60. *See supra* notes 51–55 and accompanying text.

must say to reluctant religious advocates, but it's better than what you could suffer under alternative regimes.

This is the Hobbesian case for a secular constitutional democracy. There is no reason to suspect that the basic human drive for dominance described by Hobbes does not also apply to humans who are motivated by religious conviction. Under this view, we can assume that religious activists are governed by the same urges as all other humans, toward the "perpetuall and restlesse desire of Power after power, that ceaseth onely in Death."[61] Thus, the same Hobbesian covenant that justifies political sovereignty generally[62] also justifies the grant of political authority to secular officials such as judges, who enforce the voluntary renunciation of power to enact and enforce religious dictates as law. This, as Hobbes puts it, is the real "[u]nitie of them all"[63]—that is, a unity based on fear and the desire for self-preservation. Such fear results in what Kathleen Sullivan has termed the "social contract produced by religious truce."[64]

The case presented to skeptical proponents of religious unity is basically this: at least if you lose the battle for power in a secular democracy, the winners will not be allowed to kill you, exile you, take your property, or confiscate your printing press. These are not small consolations. In a system without protections such as those offered by the First Amendment, the battle for power is crucial because the battle for power is also the battle for survival. Surely anyone who has witnessed the bloody history of the latter part of the twentieth century is familiar with the religious variation on this phenomenon.[65]

61. THOMAS HOBBES, LEVIATHAN 49 (Everyman ed. 1973) (1924).

62. Hobbes wrote:

> This is more than Consent or Concord; it is a reall Unitie of them all . . . as if every man should say to every man, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner*.

Id. at 89.

63. *Id*.

64. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

65. Any in-depth exploration of the details of recent religious wars is both impossible in this context and also unnecessary for anyone who routinely peruses a daily newspaper. For a journalistic introduction and overview of the situation, which reviews recent religious conflicts

It is true, as Stephen Carter, Michael McConnell, and others argue,[66] that political actors with a specifically religious agenda are treated differently than other political actors because those religious actors are told from the outset that they may not enact certain of their preferred policies into law. But religious political actors are not alone in this regard. The Constitution tells many different political actors that their deeply held convictions are not acceptable as law. Members of the Ku Klux Klan may run for political office, but they may not enact into law their most cherished discriminatory policies. Strong proponents of retributive capital punishment may become governors and even presidents, but they will not be permitted to execute robbers or rapists.[67] The nature of a constitutional democracy is such that some issues are taken off the political table, and the quid pro quo for this limitation is that all groups, no matter how unpopular, may continue to ply their wares in the private sector. With this comes the possibility that such groups might muster enough support to eventually convince a sufficient number of citizens to renounce the constraints of secular democracy for a system with more certainty and less freedom.

Religious groups may not be completely comfortable with the constraints imposed by the Establishment Clause, but they should acknowledge it as the constitutional equivalent of the old Cold-War theory of mutually assured destruction. Remove the constraints of the Establishment Clause, and no one can predict the results. Kathleen Sullivan summed up the negative case for the Establishment Clause nicely:

> [T]he exclusion of religion from public programs is not, as McConnell would have it, an invidious "preference for the secular in public affairs." Secular governance of public affairs is simply an entailment of the settlement by the Establishment Clause of the war of all sects against all. From the perspective of the prepolitical war of all sects against all, the exclusion of any religion from public affairs looks like "discrimination." But from the perspective of the

in twenty-eight different countries, see JAMES A. HAUGHT, HOLY HATRED: RELIGIOUS CONFLICTS OF THE '90S (1995).

66. *See, e.g.*, *supra* notes 16–17, 56.

67. *See* Coker v. Georgia, 433 U.S. 584 (1977) (holding that it is unconstitutional to impose the death sentence for the crime of rape).

settlement worked by the Establishment Clause, it looks like proper treatment.[68]

VI. CONCLUSION

Proponents of a religious form of national unity are fooling themselves. If we ever achieve unity through religion it will be a false unity, a unity of coercion and intolerance and mandatory obeisance to the God representing influential and politically dominant religious groups. Efforts to achieve religious unity fall victim to the universal God fallacy articulated by Justice Scalia in the graduation prayer case.[69] Unity of this sort can never be achieved because Justice Scalia is simply wrong: there is no such thing as a "God whom [we] all worship and seek."[70] We do not all worship God, and the God some of us worship is different from the gods others venerate. But many of us do worship the same God, and those of us who do control most of the political power in this country. So even if a kind of unity could be achieved and the courts would allow it, some of us would have to be dragged to the chapel. And if history is any indication, such efforts to compel unity will inevitably fail in the long run, and maybe violently so.[71] Compelling spiritual or political harmony is always futile, as Justice Jackson so eloquently reminded us half a century ago during another time of religious and patriotic fervor. Now, as then, "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."[72]

68. Sullivan, *supra* note 64, at 198–99 (quoting Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992)).

69. *See* Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

70. *Id.*

71. For an in-depth exploration of the complex interrelationship of religion, cultural identity, politics, and violence in the Indian context, see SUDHIR KAKAR, THE COLORS OF VIOLENCE: CULTURAL IDENTITIES, RELIGION, AND CONFLICT (1996).

72. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).