
Beyond the wall of separation: Religion and the American state in comparative perspective

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In comparative perspective, the American religion–state regime is generally considered as strictly separationist, with a “wall of separation” keeping religion and state apart. This article traces a recent move away from this toward a European-style “modest establishment,” in which religion and state cooperate in the fulfillment of important social functions. The mechanism for bringing about this change has been an increasingly conservative Supreme Court that has partially incorporated the agenda of the Christian Right. However, the attack on separationism was differently successful in different domains. The greatest success has been achieved with respect to access to public resources, where the wall of separation has been “breached.” With respect to religious symbols in the public sphere, I argue, the wall has merely been “battered.” This is because the state can align itself with religion only indirectly, by secularizing it as culture and tradition. These developments are contrasted with religion–state relations in Europe, which have moved in the opposite direction, from vestigial establishment to stronger forms of separation.

1. Introduction

In the context of comparative religion–state relations, the United States has always presented a paradox. In this society that is the religiously most active in the Western world, where religious rhetoric and metaphors are omnipresent in political discourse, religion and state have also been more strictly separated than anywhere else. Contrast this with France, which is in many ways America’s secularist sister republic: it directly supports religious schools and sports a bureau for religious affairs in its Ministry of the Interior. This would be inconceivable in the USA. America’s uniquely strict separation is epitomized in Thomas Jefferson’s famed notion of the “wall of separation.” However, as I will argue in this article, after more than three decades of mobilization by the Christian Right,¹ the wall of separation has become largely vestigial. Politically, the

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¹ The “Christian Right,” as referred to in this article, is an umbrella term for a movement led by (but not limited to) Protestant Evangelicals aimed at bringing conservative religious precepts to bear in public

Christian Right, which is dominated by conservative Evangelicals and has made huge inroads in the Republican Party since the 1980s, has achieved few of its goals. Legally, however, it was more successful, by way of a US Supreme Court that has become more conservative under Republican Presidents. Because “legal secularism,”² the separationist regime in place for much of the postwar period, was a legal construction, it is apt that it is coming apart through the legal route also.

This story will be told in this article through a comparative European perspective. Such a perspective is value-adding because Europe has recently moved in the exact opposite direction of increasing religion–state separation.³ Under the growing influence of the European Court of Human Rights (ECtHR), which watches over the world’s strongest regional human rights regime, European religion–state relations have undergone an “institutional secularization.”⁴ A German–American legal scholar even speaks of an emergent “transnational nonestablishment” rule, “mild” in Europe while “robust” in the United States.⁵ This is accurate for Europe, but it exaggerates the robustness of nonestablishment in the USA. To grasp this, one must situate these legal developments in their larger social contexts, which are very different on both sides of the Atlantic. In Europe one is dealing with residually-Christian nation-states, which most often have only incompletely separated themselves from the majority religion. However, these states are placed in societies that have undergone dramatic secularization in the past half century,⁶ while the religious factor is now mostly experienced externally, as immigrant religions (especially Islam) that challenge the persistent church–state amalgams. To impose secularism in this context amounts to a belated decoupling of the state and the majority religion, and it may subtly exclude the new religious minorities that show more religious fervor than a religiously exhausted majority does. This explains an altogether ambiguous caseload of the ECtHR, which

policy and law-making and at overcoming the “wall of separation” between church and state that once distinguished America from Europe. The Christian Right rose to prominence with (but is not exhausted by) the “Moral Majority” of Baptist Evangelical Jerry Falwell in the late 1970s, followed by Pentecostal Evangelical Pat Robertson’s “Christian Coalition,” and has since become closely associated with the Republican Party, including the more recent Tea Party movement. Richard John Neuhaus, though distancing himself from the shriller evangelicals and their “revivalist politics of the camp meeting,” is an intellectual leader of the Christian Right (as are constitutional lawyers Stephen L. Carter and Michael McConnell, to whom the same proviso applies). See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* 104 (1984). That Neuhaus, Carter, and McConnell, all three respected public intellectuals or academics, still belong to the Christian “Right” is immediately apparent when contrasting their anti-separationist views with the rather pro-separationist views of the “Religious Left,” who “oppose tight connections between church and state in accordance with their religious premises.” See STEVEN SHIFFRIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* 1 (2009).

² NOAH FELDMAN, *DIVIDED BY GOD* ch. 5 (2005).

³ With respect to religious symbols in the public sphere, this divergence between America and Europe was first noted by John Witte & Nina-Louisa Arold, *Lift High the Cross? Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 EMORY INT’L L. REV. 5 (2011).

⁴ Matthias Koenig, *Governance of Religion at the European Court of Human Rights*, in INTERNATIONAL APPROACHES TO GOVERNING ETHNIC DIVERSITY 51, 52 (Jane Bolden & Will Kymlicka eds., 2015).

⁵ Claudia Haupt, *Transnational Nonestablishment*, 80(4) GEO. WASH. L. REV. 991, 997 (2012).

⁶ See HUGH McLEOD, *THE RELIGIOUS CRISIS OF THE 1960s* (2000).

in many ways has restricted old (or renewed) Christian majority privileges,⁷ while *also* refusing to accommodate Islam in the public sphere (see only its persistently negative headscarf decisions).⁸ Interestingly, the distancing from both majority *and* minority religions is taken for the sake of neutrality and secularism. One scholar thus perceptively noted the ECtHR's heightened scrutiny of majority religious privileges, while the court showed "uneasiness" about the "expression of religion in the public sphere", by which she means the court's treatment of Islam.⁹ This should not surprise, because reducing the public scope of one (majority) religion is not easily squared with increasing the public scope of another (minority) religion.

In the United States, the legal-social nexus shows a reverse tendency. Here one encounters the world's strictest separation regime in a society whose religious temperature has remained persistently high, if not even increased over time, in defiance of the assumptions of classic secularization theory. The challenge to the American religion–state regime does not so much result externally, from immigration, as in Europe, but from within the society, in terms of the post-1980s Evangelicalist movement that has railed against the "legal secularism" of the postwar period.

Section 2 lays out the regime of legal secularism that was put in place by Supreme Court decisions between the late 1940s and the early 1980s. However, I argue that a strong religion-friendly element of "accommodation" had always marked legal secularism. Secularism and accommodation thus should not be construed as polar opposites, contrary to an influential strand in the literature.¹⁰ Section 3 maps the ways in which legal secularism has recently come apart and is replaced by something that resembles the "modest establishments" of Western Europe.¹¹ In a modest establishment, religion and state cooperate in the fulfillment of important social functions, such as welfare, education, and identity. In particular, I argue that, with respect to access to public facilities and funding, the wall of separation has been "breached"; with respect to symbols in the public square, which has been a second area of mobilization by the Christian Right, the wall has been merely "battered." "Breached" signals a higher level of success, because (under the condition of non-religion being supported in the first) religion *as religion* can now be materially supported by the federal government. With respect to the use of symbols in the public sphere, the federal government, as we shall see, cannot align itself with religion directly but only if the latter is secularized *as culture*. This makes for a lower level of success and has consequently triggered conservative moves to recognize religion directly. There are interesting parallels with

⁷ Many of these majority-restricting decisions were about post-Communist Central or Eastern Europe, most recently on Hungary's controversial church registration law of 2011. See *Magyar Keresztény Mennonita Egyházar and Others v. Hungary*, Eur. Ct. H.R., Apr. 8, 2014.

⁸ Most recently, *S.A.S. v. France*, Eur. Ct. H.R. (Grand Chamber), July 1, 2014. This decision affirmed France's controversial "burqa law" of 2010.

⁹ Julie Ringelheim, *Rights, Religion and the Public Sphere*, in *LAW, STATE AND RELIGION IN THE NEW EUROPE* 283, 294 (Lorenzo Zucca and Camil Ungureanu eds., 2012).

¹⁰ See, especially, Michael W. McConnell, *Accommodation of Religion*, SUP. CT. REV. 1 (1985).

¹¹ See Cécile Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21(1) J. POLIT. PHILO. 67, 68 (2013).

recent high court rulings on Christian majority symbols in Europe, especially by the European Court of Human Rights. But a hallmark of the American scene, which has no parallel in Europe, is attempts by some conservative justices to push the God frontier and make the state identify with religion *as religion*, without any cultural proviso.

2. Legal Secularism

Since 1789, the unchanging core of the American religion–state regime has been the First Amendment’s religion clauses. They pithily state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The first half of this phrase has become known as the Establishment Clause (illogically, as it should really be No-Establishment Clause), and the second as the Free Exercise Clause. Almost each word in the innocent-sounding half-sentence containing the religion clauses is significant, and combined, they make for one of the most contested and legally belabored provisions in American legal history.

Importantly, the First Amendment deals with religion explicitly and separately, apart from other half-sentences in the same amendment, which protect the freedom of speech and assembly in general (and which could, in principle, be construed to cover the fact of religion). The Framers thus seemed to view religion as “special”: especially worthy of protection, but also especially dangerous if exercised by majorities against dissenters or agnostics. The religion clauses thus express a “constitutional dualism,” as Jean Cohen put it succinctly.¹² They contain special protection of religious conscience and free exercise, that other forms of human expression do not enjoy, *and* special restrictions and liabilities for religious organizations, that other types of social organization do not face, to preclude establishment.

As regards “special protection,” it is noteworthy that an alternative formulation, considered at the time, to protect the “rights of conscience” more generally, was explicitly discarded. This would have adequately denoted the Lockean sources of institutionalizing religion in America.¹³ However, it lost against the more specific, yet in protecting not just belief but practice also more encompassing formulation “free exercise of religion.”¹⁴

With respect to “special restrictions,” it must be noted that the Establishment Clause does not just preclude the establishment of churches or of *a* religion, but more generally any law “respecting an establishment of religion.” This is a much more extensive prohibition of contact between state and religion. It allowed for the possibility of a “wall of separation” between religion and state, which made America, alongside France, the only “truly secular” Western state.¹⁵ The American separation regime even erased any distinction between factually privileged majority religions and

¹² Jean Cohen, *Political Religion vs. Non-Establishment. Part II*, 39(6) PHIL. & SOC. CRITICISM 507, 514 (2013).

¹³ See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 90(3) N.Y.U. L. REV. 346 (2002).

¹⁴ See MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 102 (2008).

¹⁵ Elisabeth Zoller, *Laïcité in the United States or The Separation of Church and State in a Pluralist Society*, 13(2) IND. J. GLOBAL LEGAL STUD. 561, 563 (2006).

minority religions that might try to rise to the level of the majority. This distinction and accompanying process had always been the reverse side of French *laïcité*, which had entailed certain privileges for Catholicism as France's majority religion that then had to be extended to minority religions. In erasing any majority–minority distinction, the American variant of strict separation would operate “in an infinitely harder and more rigid manner” than the French.¹⁶ Conversely, the complete removal of majority privileges in American laicism allowed the possibility for aggrieved majority religions, like conservative Evangelism, to adopt the posture of a persecuted minority of “the religious.” In the context of the American race paradigm, with its strong civil rights and antidiscrimination provisions, to play the minority card is highly lucrative, and, as we shall see, the Christian Right would play it with gusto and to great effect. Here is perhaps where the US differs the most from Europe, where—with the exception of France—some form of establishment has been the rule, so that a religious majority posturing as aggrieved minority of “the religious” is simply inconceivable.

The possibility of religious majorities masquerading as minorities grows out of a real tension between the Establishment and Free Exercise Clauses: disadvantages arising under the Establishment Clause can be construed as unconstitutional impairments to the free exercise of religion. Conversely, strong free exercise rights require the minimization of establishment constraints. To point to this tension in the religion clauses has likewise been a preferred strategy of conservative jurists allied with the Christian Right. Their undisputed mastermind, the constitutional lawyer Michael McConnell, thus argued that “religious liberty” is the key value of the First Amendment's Religion Clauses, while the notion of “separation” between church and state does not even appear in the Constitution.¹⁷

There have been recurring attempts to undermine the Establishment Clause. The Christian Right's advocates in the Supreme Court, for instance, who have been gaining strength since the time of Ronald Reagan, hold a minimalist view of the Establishment Clause. According to that view, the only thing the government is not allowed to do is to “coerce anyone to support or participate in any religion.”¹⁸ This view, known as the “coercion theory” (more on this below), boils down to the claim that the only function of the Establishment Clause is to prevent America from becoming like the Islamic Republic of Iran. A complementary strategy was to argue that it is not *contact* between government and religion, but only a *prioritization* of one religion over others—that is, “establishment” in the narrow sense—that is barred under the Establishment Clause. Steven Bruce convincingly rebutted such a “conservative” view in pointing out that already by 1789 only five states continued to have legal establishments, and all were “multiple.”¹⁹ According to Bruce, this fact supports a “liberal” reading of the Establishment Clause as being “opposed . . . (to)

¹⁶ *Id.*, at 592.

¹⁷ McConnell, *supra* note 10, at 1.

¹⁸ *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J. dissenting).

¹⁹ STEVEN BRUCE, *THE RISE AND FALL OF THE NEW CHRISTIAN RIGHT: CONSERVATIVE PROTESTANT POLITICS, 1978–1988*, at 37 (1988).

government support for religion per se.”²⁰ However implausible it may be, an anodyne reading of the Establishment Clause made it possible to turn it on its head. The clause now could—some even argued: should—go along with the state’s privileging of religion over non-religion. While the attempts to minimize, if not undermine, the Establishment Clause have varied over the last few decades, its status as the main legal enemy of the Christian Right has persisted.

Between the late 1940s and the mid-1980, “legal secularism”²¹ was the dominant approach in American religion–state relations. It was, indeed, a “legal” secularism as it was brought about by the Supreme Court’s “incorporation” of the First Amendment’s religion clauses, which initially had constrained only the federal government, into state law. Previously, the court had defended religion as an integral part of a “Christian civilization.” Now, religion came to be “viewed with suspicion” through the prism of “civil liberties.”²² However, unlike French, American secularism was never militantly antireligious. Rather, to quote Will Herberg, it was the “secularism of a religious people,”²³ without religion and secularism ever kept strictly separate but instead permeating one another. Legal secularism had little in common with the reign of “secular humanism” as an “*ersatz* religion,” as this period tends to demonized by some intellectual leaders of the Christian Right.²⁴ Instead, it followed the ideal of the “procedural republic,” in which the state is “neutral” about questions of the good life, and in which there is a “priority of the right over the good.”²⁵

Michael McConnell was particularly responsible for setting up “separation” and “accommodation” as opposing approaches to religion–state relations in America.²⁶ In reality, separation and accommodation are better understood as elements of a package. Already Tocqueville saw this, when he explained the “quiet sway” of religion over America precisely through “the complete separation of church and state.”²⁷ Today’s market theory of religion makes much the same point.²⁸ Worth recalling in this context, and symptomatic of the complementary rather than antagonistic relationship between separation and accommodation, are two early landmark Supreme Court rulings, *Everson v. Board of Education* (1947) and *Zorach v. Clauson* (1952). *Everson* became famous not just for “incorporating” the Establishment Clause into state law but also for its notion, emblematic of the entire period of legal secularism, that the Establishment Clause “was intended to erect ‘a wall of separation between church and

²⁰ *Id.*

²¹ FELDMAN, *supra* note 2, ch. 5.

²² David Sikkink, *From Christian Civilization to Individual Civil Liberties*, in *THE SECULAR REVOLUTION* 310, 311 (Christian Smith, ed., 2003).

²³ WILL HERBERG, *PROTESTANT-CATHOLIC-JEW* 271 (1960).

²⁴ NEUHAUS, *supra* note 1, at 82.

²⁵ Michael Sandel, *Religious Liberty: Freedom of Choice or Freedom of Conscience*, in *SECULARISM AND ITS CRITICS* 73, 73 (Rajeed Barghava ed., 1988).

²⁶ McConnell, *supra* note 10.

²⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (George Lawrence trans., 1969).

²⁸ Stephen R. Warner, *Work in Progress toward a New Paradigm for the Sociological Study of Religion in the United States*, 98(5) *AM. J. SOC.* 1044 (1993).

State’.”²⁹ Moreover, the court influentially took the Establishment Clause to be a comprehensive “no-aid” maxim, which “means at least this”:

neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.³⁰

At the same time as the “wall” between church and state had to “be kept high and impregnable,” *Everson* (which validated transportation subsidies for children enrolled in Catholic schools) stressed that the state had to be “neutral” toward religious believers (and non-believers) rather than being “their adversary.”³¹ After recapitulating, through the prism of the Holocaust, the dark story of the persecution of religious minorities in Europe and later in colonial America, the *Everson* court took the point of the First Amendment to be “protection against governmental intrusion on religious liberty.”³² This might have come straight from the “accommodation” rulebook!³³

Conservative critics usually contrast *Everson*, as a classically separationist ruling, with *Zorach v. Clauson* (1952) as a paragon of “accommodation.” The word “accommodation” does indeed appear in *Zorach*, its “purpose” being described as “facilitating the free exercise of religion.”³⁴ This Supreme Court decision, which is the single most favored by the Christian Right and quoted wherever separationism and secularism are to be repudiated, contains very peculiar wording, unfathomable to any present or past European high court: “We are a religious people whose institutions presuppose a Supreme Being.”³⁵ In *Zorach*, the court considered freeing part of the school day for children’s extracurricular religious instruction a measure of “respect” for the “religious nature of our people,” which “accommodates the public service to their spiritual needs.”³⁶ But this did not mean bidding farewell to the “wall of separation” stipulated in *Everson*. Instead, the *Zorach* decision stayed *within* a separationist framework: “There cannot be the slightest doubt that the 1st Amendment reflects the philosophy that church and state should be separated. . . . The separation must be complete and unequivocal. . . . The prohibition is absolute.”³⁷

After the removal of mandatory prayer and bible readings from public schools in the early 1960s, legal secularism’s undisputed peak was the Supreme Court’s *Lemon v. Kurtzman* (1971) decision. It invalidated state aid to religious elementary and secondary schools. Material state aid for religious groups or institutions was, along with the display of religious symbols in the public sphere, one of the two permanently controversial issues surrounding the Establishment Clause. In this case, a purely

²⁹ *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 16 (1947).

³⁰ *Id.*, at 18.

³¹ *Id.*

³² *Id.*, at 13.

³³ McConnell, *supra* note 10, at 1.

³⁴ *Id.* at 3 *et seq.*

³⁵ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (Douglas, J., majority op.).

³⁶ *Id.*, at 313 *et seq.*

³⁷ *Id.*, at 312.

hypothetical “entanglement” between state and religion was deemed to be an unconstitutional “establishment of religion.” Concretely, *Lemon* incriminated state statutes that partially reimbursed parochial school teachers’ salaries, textbooks, and instructional materials, even if those were to be used only in specified secular subjects and for secular purposes—the problem was their mere “potential” to draw state and religion too close together. Teachers are not “neutrals,” the court argued, and “(a) comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed.”³⁸ In addition to this hypothetical “entanglement,” there was also a “divisive political potential of these state programs,”³⁹ and the threat of “development by momentum.”⁴⁰ To add insult to the injury of religionists, the court declared that “religion must be a private matter . . . and that . . . lines must be drawn.”⁴¹ That religion is private was the Leitmotif of legal secularism all along. But rarely had it been stated so directly. This decision introduced the famous *Lemon* Test, which would guide the court’s establishment decisions over the next two decades. It required a law to have a “secular purpose,” to neither “advance” nor “inhibit” religion, and not to entail “an excessive government entanglement with religion.”⁴²

However, even the maximally secularist *Lemon* court did not discard the *Zorach* approach that “some relationship” between state and religion “is inevitable.” As if sensing that from now it would have to drive in the reverse gear, the court conceded that “the line of separation, far from being a ‘wall’, is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”⁴³

The best proof that legal secularism’s insistence on drawing a line and privatizing religion was never far away from accommodation is the famous *Sherbert v. Verner* (1963) ruling.⁴⁴ Following on the heels of the early 1960s’ controversial interdictions of school prayer and bible readings, *Sherbert* was one of the Supreme Court’s most accommodationist decisions on religion ever, though it was interestingly grounded in the Free Exercise Clause. Following *Sherbert*, the success rate of “marginal religious groups” in court increased significantly.⁴⁵ The link between “separation” in the Establishment Clause and “accommodation” in the Free Exercise Clause is obvious. Both concepts draw on the original notion that religion is “special”: the threat of religion is seen to originate mostly from majority religion, which is to be restricted under the Establishment Clause; by contrast, threats aimed at religion mostly concern minority religions (like in this case, the Sabbatarians, a small Protestant sect that considers Saturday, rather than Sunday, the holy day of rest), which need special protection under the Free Exercise Clause. As we shall see, this constellation came

³⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

³⁹ *Id.*, at 622.

⁴⁰ *Id.*, at 624.

⁴¹ *Id.*, at 625.

⁴² *Id.*, at 612–13.

⁴³ *Id.*, at 614.

⁴⁴ *Sherbert v. Verner*, 374 U.S. 308 (1963).

⁴⁵ Frank Way & Barbara Burt, *Religious Marginality and the Free Exercise Clause*, 77(3) AM. POLIT. SCI. REV. 652 (1983).

to be completely reversed once the Christian Right came to exert its influence post-1980, when religious minority rights suffered a setback under a diluted Free Exercise Clause and religious majorities imposed themselves under a weakened (if not de facto annulled) Establishment Clause.

3. Toward modest establishment

The Christian Right turned out politically unsuccessful,⁴⁶ but it had one major legal effect: it helped sway the Supreme Court to the right. The causality is obvious. Under Republican presidents, from Ronald Reagan on, the court was staffed by appointees near and dear to the Christian Right, which exerted an ever-growing influence within the Republican Party. Reagan brought William Rehnquist (1986), Antonin Scalia (1986), and Anthony Kennedy (1988) into the court; George Bush Sr. brought in Clarence Thomas (1991), and Bush Jr. appointed John G. Roberts (2005) and Samuel Alito (2006). Interestingly, none of these new appointments was Evangelical—in fact, all are Roman Catholics. But all were decidedly critical of the legal secularism epitomized by *Lemon*, and all repudiated the “wall of separation” between religion and state in favor of a rapprochement between the two.

Jean Cohen pointed out that in the American context of a religiously vital society, a rapprochement between state and religion would lead “toward the theocratic rather than the Erastian end of the spectrum.”⁴⁷ This is in contrast to Erastian Europe, where a strong state is more likely to impose itself over religion in the context of a secularized society. This is an analytical (cum speculative) point that strikes me as correct in principle, and it is proved by some astonishingly theocratic positions of some conservative Supreme Court justices (more on this below).⁴⁸ However, “theocracy” is just an overly shrill label. Instead, it is more empirically adequate to argue that the direction of the American regime has been toward the “modest establishments” of Western Europe, where (with the partial exception of France) a wall of separation had never existed. Cécile Laborde defined a “modest establishment” by the elements of “adequate protection of religious freedoms; official support of religion(s) by the state; public funding of religious education and state aid to religious groups.”⁴⁹ “Establishment” in this

⁴⁶ See CHRISTIAN JOPPKE, *THE SECULAR STATE UNDER SIEGE: RELIGION AND POLITICS IN EUROPE AND AMERICA* 101–110 (2015).

⁴⁷ Jean Cohen, *Political Religion vs. Non-Establishment: Reflections on 21st-Century Political Theology, Part I*, 39(4–5) PHIL. & SOC. CRITICISM 443, 460 (2013).

⁴⁸ Note in this context that Kevin Phillips, half-mockingly, called the political regime in place under President George W. Bush “theocratic,” with the Republican Party as the “first religious party in U.S. history.” See KEVIN PHILLIPS, *AMERICAN THEOCRACY*, at xi (2007).

⁴⁹ Laborde, *supra* note 11, at 68. Under the label of “modest establishment,” Laborde fuses what are in fact two separate religion–state regimes, the “established church” type, as in England or Scandinavia, and the “positive accommodation” type, as in Germany, the Netherlands, Austria, or Spain, where the state grants public status to all religions that meet certain criteria of size, organization, and continuity. For the notion of “positive accommodation” regime, see Alfred Stepan, *The Multiple Secularisms of Modern Democratic and Non-Democratic Regimes*, in *RETHINKING SECULARISM* 114, 123–125 (Craig Calhoun, Mark Juergensmeyer, & Jonathan VanAntwerpen, eds., 2011). It would be more correct to say that the US is moving toward a “positive accommodation” regime, but for the sake of simplicity I will stick with Laborde’s concept of “modest establishment.”

sense is not to be mistaken for the alignment between state and *one* religion. Instead, it means cooperation between state and religions, irrespective of their majority or minority status. Naturally, not all of the elements of Laborde's definition of "modest establishment" are met by a transformed American religion–state regime. But a move toward a closer relationship between religions (plural!) and state is unmistakable.

To put things into perspective, until the appointments of Justices Roberts and Alito in 2005 and 2006, respectively, there was no clear conservative majority on religion–state relations on the Supreme Court (and after Antonin Scalia's death in 2016 it has been lost again); instead, the court was deeply divided between liberal "separationists" and conservative "integrationists,"⁵⁰ and its decisions could go in either direction, often unpredictably. John Witte and Joel Nichols speak of a "massive jumble of divided and discordant opinions,"⁵¹ and Noah Feldman finds there is "no single, unified theory or logical reason (that) can explain the arrangements that we now have . . . disorder reigns."⁵² However, as even the classically separationist decisions of the Supreme Court, as we saw, were shot through with ambiguity and always included a modicum of accommodation, and as case particularism was explicitly favored by the court over a clear line,⁵³ "disorder" is exactly what one should expect in this domain.

The pressure of the Christian Right has always been more on the Establishment than the Free Exercise prong of the First Amendment religion clauses (even though, as we shall see, the latter could not go unaffected). This is because the project was to move religion, particularly (but not exclusively) majority religion, closer to the state, desiring to obtain state recognition and support which are explicitly denied in the Establishment Clause. While the Free Exercise Clause is at heart a minority protector, the Establishment Clause is a majority blocker.⁵⁴ This is why the latter came to be subject to "particularly controversial" judgments,⁵⁵ which often offended the strong religious sentiments of a large majority of Americans.

In the Christian Right's attack on the Establishment Clause, one must distinguish between three directions. The first is to re-inject religion into the core of the public school experience, from which it had been blithely shut out in the early 1960s. The second is to grant religious groups "equal access" to government funding and public facilities (such as public school buildings for religious meetings). And the third is to secure religion a symbolic presence in the public forum, to counteract the secularist vice of a "naked public square."⁵⁶ As I shall discuss below, only with respect to the public school curriculum did the Supreme Court hold its secularist line, although with a good measure of ambiguity that reflects the advances of anti-separationist revisionism. With

⁵⁰ Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1 (2007).

⁵¹ JOHN JR. WITTE & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT*, at xxi (2011).

⁵² FELDMAN, *supra* note 2, at 216.

⁵³ See *Lemon v. Kurtzman* 403 U.S. 602, 614 (1971).

⁵⁴ Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60(3) GEO. WASH. L. REV. 685, 690 (1992).

⁵⁵ KENT GREENAWALT, *RELIGION AND THE CONSTITUTION. VOL. 2: ESTABLISHMENT AND FAIRNESS* 2 (2009).

⁵⁶ NEUHAUS, *supra* note 1.

respect to funding and access to state facilities, I argue, the “wall of separation” has been “breached”; with respect to symbols, it has been merely “battered.”

3.1. The ambivalent defense of secularism in the public classroom

Claudia Haupt perceptively argued that with respect to religion in the public school curriculum, the United States has held onto a strict “shut-out model,” while Europe, in its slower march toward institutional secularism, has settled on a milder “opt-out model.”⁵⁷ The European approach is embodied in *Folgerø and Others v. Norway*, decided by the European Court of Human Rights in 2007. Here, the ECtHR conceded that Norway, where Lutheran Protestantism is the official state religion of which over 85 percent of Norwegians are adherents, was allowed to give “priority to tenets of Christianity over other religions and philosophies of life” in its public school curriculum.⁵⁸ However, its main diction was that the children of atheists or other religionists had to be granted “full,” and not merely “partial,” exemption from a recently introduced “Christianity, Religion and Philosophy” course. This followed from the parental education right under the European Convention of Human Rights. This judgment reflects a continued European line that even under a more secularist distancing between state and majority religion, the state was still allowed to be closer to some religions than to others, provided that the liberties of dissenters or agnostics are fully protected.

Religious favoritism, even as mild and minority-protective as in *Folgerø*, remains anathema in the United States. When something akin to the European opt-out model was briefly considered in the Supreme Court’s *Lee et al. v. Weisman* decision of 1992, it was firmly rejected for indirectly pressuring non-religious students, or those of other religions, to “opt in,” to stick with the metaphor. With respect to religion in the public classroom, the Supreme Court has remained “remarkably firm and constant,” and this on the separationist side of the divide.⁵⁹ *Lee* prohibits state-led prayers at public high school graduation ceremonies, based on a case in Providence, Rhode Island.

However, behind the façade of continuity there has been a significant shift of doctrine which bears the imprint of the conservative attack on legal secularism. Significantly, the majority opinion by Justice Anthony Kennedy, who notably is among the critics of legal secularism in the Supreme Court, shoved aside the secularist Lemon test in favor of his own long-held “coercion” theory. According to this theory, the only thing that government is not allowed to do under the Establishment Clause is to “coerce anyone to support or participate in any religion.”⁶⁰ Apart from the limiting case of coercion, the correct stance of the state is “accommodation, acknowledgment, and support of religion” as “an accepted part of our political and cultural heritage.”⁶¹ This sounds much like European-style “moderate establishment,” as Laborde would

⁵⁷ Haupt, *supra* note 5, at 1018.

⁵⁸ *Folgerø and Others v. Norway*, Eur. Ct. H.R., June 29, 2007, at 17.

⁵⁹ CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 160 (2007).

⁶⁰ *County of Allegheny v. ACLU*, 492 U.S. 573, 659 (1989) (Kennedy, J. dissenting).

⁶¹ *Id.*, at 657.

call it. Kennedy's coercion theory is an explicit repudiation of the "no aid" principle enunciated in legal secularism's foundational *Everson* case—the argument being that the latter "would require a relentless extirpation of all contact between government and religion" that has become anachronistic in the "modern administrative state"⁶² that reaches deeply into peoples' lives.

The coercion theory amounted to a significant weakening of the Establishment Clause, and on its basis Kennedy would consistently side with those who attacked the "wall of separation" with respect to state funding and the public recognition of religious symbols. Constitutional scholar Steven Shiffrin aptly characterized it as "a communitarian perspective favoring majority religions over minority religions because the majority is deemed entitled to express their religious views through the state."⁶³

The irony is that in *Lee v. Weisman* the coercion theory, which was meant to be a religion-friendly instrument of accommodation, had rather harsh and notably anti-majoritarian implications. Participation in the contested graduation ceremony, one must know, was voluntary, and the prayer in question—entrusted by the school principal to a liberal Jewish rabbi—was nonsectarian, spiked with secular references to "America where diversity is celebrated and the rights of minorities are protected,"⁶⁴ not to mention that it was barely two minutes long. Still, through its being held in the school context, the prayer "bore the imprint of the State," which in this way helped "enforce a religious orthodoxy."⁶⁵ Most importantly, "pressure," however "subtle and indirect," was exerted on students to "stand as a group or, at least, maintain respectful silence."⁶⁶ The "public" and "peer pressure" at play here was obviously at best psychological, but, as Kennedy argued for the court, this "can be as real as any overt compulsion."⁶⁷

Lee v. Weisman was a Janus-faced decision: while its content affirmed legal secularism, its form moved away from it. Thus it had to enrage both, the staunch religionists on the court but also the (thinning) defenders of legal secularism. As for the secularists, Justice Souter, while naturally agreeing with the outcome, took the occasion to incant what in retrospect must appear as legal secularism's swan song. By now, the voices on the court were growing strong (and would soon prevail) that the Establishment Clause permitted the "nonpreferential" state promotion of religion.⁶⁸ "Neutrality" in this view thinned down from obligation for the state to stay away from religion to the much weaker mandate to be evenhanded and fair when dealing with religion and irreligion; in some respects, neutrality might even be bracketed by a preference for religion over irreligion. In the European context, this line corresponds to the "positive accommodation" regimes of Germany or the Netherlands, which adopt a middle ground between French-style strict separation and English- or

⁶² *Id.*

⁶³ SHIFFRIN, *supra* note 1, at 29.

⁶⁴ *Lee et al. v. Weisman*, 505 U.S. 577, 581 (1992).

⁶⁵ *Id.*, at 590 and 592, respectively.

⁶⁶ *Id.*, at 593.

⁶⁷ *Id.*

⁶⁸ *Id.*, at 612 (Souter, J., concurring, refers to Chief Justice Rehnquist in this respect).

Scandinavian-style formal establishment regimes.⁶⁹ In Souter's hopeful view, this possibility, which in the American context amounts to anti-separationist revisionism, was rebutted in *Lee*. Conversely, because what was rejected in *Lee* was supporting religion in general and not just supporting a particular religion, the case "affirm(ed)" the "no aid" principle that had been central to legal secularism since *Everson*.⁷⁰ However, this alleged "affirmation" of a long obsolete, strongly secularist position was at best unintentional and ephemeral, and it remained limited to the narrow context of the public school classroom.

There is, of course, one nagging exception to the legally ordained exclusion of religion from the American public school classroom: the Pledge of Allegiance. This is the one religious element in the American curriculum where a radical "shut-out" could never be achieved, at best a European-type "opt-out." Or is the pledge's best-known line, that America is "one Nation under God," not "religion" but merely "patriotism"? This was the issue in *Elk Grove Unified School District v. Newdow et al.* (2004).⁷¹ It seems inconceivable that the Pledge of Allegiance, this centerpiece of ceremonial Americanism, could ever be found unconstitutional. But its invocation of "God" raises prickly issues under the Establishment Clause. The court in *Elk Grove* predictably retained the Pledge in its scandalizing form, if only on procedural grounds that avoided the substantive religion question. However, three judges argued "on the merits," albeit in instructively different ways, that the phrase "under God" in the Pledge was constitutional. For Clarence Thomas, siding with Antonin Scalia, then the staunchest religionist on the Supreme Court, it was obvious that the "under God" formula was religious, had it been inserted belatedly into a previously purely secular version of the Pledge. Logically, the added value could only be religious. Indeed, the 1954 House Report introducing the change stated that it "reflected the traditional concept that our Nation was founded on a fundamental belief in God."⁷² Further consider that, when the Supreme Court ruled, back in 1943, and on the basis of the first, secular version of the Pledge, that states were not allowed to compel students to take the Pledge, it called the unconstitutional element "compulsion to declare a belief." Now that "under God" was added, Thomas argued plausibly, "[i]t is difficult to see how this does not entail an affirmation that God exists."⁷³

By contrast, Justices O'Connor and Rehnquist sought to salvage the phrase "under God" by declaring it to have a cultural rather than religious meaning, namely to signal patriotism. This happened to be the main way in which Supreme Court jurisdiction has recently permitted the American state to associate itself symbolically with religion. Close parallels for this can be found in Europe, where in the famous ECtHR decision in *Lautsi*, the Christian crucifix on Italian school walls was deemed constitutional under the secular cover of "perpetuat(ing) a tradition."⁷⁴ In *Elk Grove*, Chief Justice

⁶⁹ See Stepan, *supra* note 49, at 123–125.

⁷⁰ *Lee et al. v. Weiman*, 505 U.S. 577, 610 (1992) (Souter, J.).

⁷¹ *Elk Grove Unified School District v. Newdow et al.*, 542 U.S. 1 (2004).

⁷² *Id.*, at 3.

⁷³ *Id.* at 4 (Thomas J., concurring).

⁷⁴ *Lautsi and Others v. Italy*, Eur. Ct. H.R., Grand Chamber, March 18, 2011, ¶ 68.

Rehnquist cited a long list of presidential invocations to “Almighty God,” from George Washington to Lincoln, Roosevelt, and Eisenhower, among others, and he held them all to be “patriotic” but not religious. Still, the main legal task for the pledge defenders was showing how “under God” was different from the “religious exercise” that had been declared unconstitutional in *Lee v. Weisman*. For Rehnquist, the recitation of “under God” was “in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: ‘From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.’”⁷⁵ But this way of rendering “under God” descriptive, and thus emptying it of religious commitment, is unconvincing. As Kent Greenawalt noted, “The language of the pledge is not historical. It sounds as if the Nation is ‘under God,’ not that historically many citizens have believed that the nation is under God.”⁷⁶

In a separate opinion, Justice O’Connor, not unlike Rehnquist, called the pledge “merely descriptive”: “[I]t purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority.”⁷⁷ But if the “Nation” is declared to be “subject to divine authority” (which, by sheer logic, implies that the United States is ruled by God, and thus a theocracy), one must ask, first, how can this *not* entail “individual submission,” and thus necessarily carry religious meaning? Second, the dissociation of the pledge from “individual submission” to God, and the claim that it is not a “serious invocation of God,” is unconvincing because it dodges the nature of a pledge, which is a commitment that resists trivialization. In particular, O’Connor tried to trivialize the inevitably religious meaning of the pledge by equating it with “ceremonial deism,” if not blind and non-committal “rote repetition.” Kent Greenawalt⁷⁸ correctly objected to this: “in a pledge, we are undertaking to affirm the content of the pledge. That is what a pledge is.” But then the individual “pledge[s] allegiance to . . . one Nation under God . . .,” no matter how one twists and tweaks the meaning of this phrase.

The religious element of the Pledge, painstakingly repressed in favor of the “patriotic,”⁷⁹ manages to slip back in when rebutting the charge that a “particular religion” is thereby favored. Surely, Buddhism is not being accommodated by the invocation of God; but some form of exclusion is unavoidable, argues Justice O’Connor:

The phrase “under God,” conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion . . . without favoring any individual religious sect or belief system.⁸⁰

But then the Pledge does “acknowledge religion”, after all!

⁷⁵ Elk Grove, 542 U.S. at 14 (2004) (Rehnquist J., concurring).

⁷⁶ GREENAWALT, *supra* note 55, at 98.

⁷⁷ Elk Grove, 542 U.S. at 9 (2004) (O’Connor J., concurring).

⁷⁸ GREENAWALT, *supra* note 55, at 100.

⁷⁹ Elk Grove, 542 U.S. at 9 (2004) (O’Connor J., concurring). O’Connor mentions in this context that teachers, not chaplains, are employed for the recital of the Pledge.

⁸⁰ *Id.*, at 10–11.

3.2. Breaching the wall: Access and funding

Haupt, in her Europe–USA comparison, noted that there are “fewer parallels” between Europe and the United States in the domain of access and funding than with respect to religion in public schools, and that “permissible practices in the United States remain much more restricted than in Europe.”⁸¹ However, this difference must be seen against a rather high threshold of persistently permissible practices in Europe, where in some countries the state even raises church taxes, the resistance to which had been the precise ground for the move toward disestablishment in late eighteenth-century America. In addition, the public funding of religious organizations is common in Europe, and important welfare, social service, and health functions are routinely farmed out to churches and religious organizations. Finally, the funding of religious schools, historically the biggest establishment conflict in the United States, is common practice in Europe, where the conflict is more over doing this in an evenhanded way, which requires including the new minority religions such as Islam. The United States remains far removed from this reality, but significant strides away from the previous regime, which had offered no support to religion at all, have nevertheless been made.

One must know that the tight grip of legal secularism was nowhere felt more painfully than with respect to material resources denied by the state to Christian or other religious constituencies, but accessible to secular groups. In turn, the breaching of the wall of separation with respect to access to public money and facilities must be considered the Christian Right’s single biggest success. It was interestingly achieved by playing the minority card, and by mobilizing the free speech clause of the First Amendment. The lead case is *Rosenberger v. University of Virginia* (1995), which was pleaded before the Supreme Court by legal scholar Michael McConnell. In *Rosenberger*, the Supreme Court decided that the denial of university funding for an evangelical student newspaper, while such funding (drawn from a general student tax) was available to a non-religious student newspaper, constituted unlawful “viewpoint discrimination” under the Free Speech Clause of the First Amendment.⁸² Under previous high court rulings, religious groups were only guaranteed “equal access” to public facilities (such as public classrooms for religious meetings); the novelty of *Rosenberger* was to extend this logic to funds. This was a small step. But it made all the difference. As Justice Souter pointed out in his dissenting opinion, “(u)sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause,” and he drew support from James Madison’s famous “Memorial and Remonstrance” (1775) that had thundered against “three pence only” as sufficient for a no-establishment violation.

Underlying this breach of the wall of separation is a new concept of neutrality, and one that moves closer to the “open” or “positive” neutrality that one finds in the European religion–state regimes, like the German, that subscribe to “modest

⁸¹ Haupt, *supra* note 5, at 1035.

⁸² *Rosenberger et al. v. Rector and Visitors of University of Virginia et al.*, 515 U.S. 819 (1995).

establishment.” Neutrality no longer connotes secularity (as in *Lemon*) and the prohibition to aid (or hinder) religion (as in *Everson*). Instead, it connotes evenhandedness (or non-preferentialism) in the treatment of religion and non-religion. The one difference to Europe is that in the post-separationist US neutrality’s benchmark of evenhandedness is “non-religion,” whereas in Europe’s modest establishments it is “other religions.” The American move was possible once the focus had shifted from the Establishment Clause logic to prevent state contact with religion to the Free Speech logic that the religious viewpoint had to be treated equally to other viewpoints. Constitutional scholar Stanley Fish put it crisply: “So the rule is changed from ‘no aid to religion’ to ‘no aid that is not also given to secular entities’; evenhanded equality in aid replaces the older policy of prohibiting aid.”⁸³ Under this logic, there is no limit to supporting religion other than that support is not available to non-religious causes.

However, there was a price to pay for breaching the wall of separation with respect to state aid: religion was no longer special, but just one of several “viewpoints” that had to be treated equally. Neutrality as evenhandedness had to be disastrous when applied to the Free Exercise Clause, which previously had protected minority religions from the crutches of general (and thus neutral) laws under the premise that religion was “special”—in this respect, especially in need of protection. Accordingly, it is no coincidence that the advances of majority religions on the Establishment Clause front (*nota bene*, in the minority-protective guise of preventing “viewpoint discrimination”) went along with a serious setback of minority religions on the Free Exercise front. This is exemplified in perhaps the most infamous of all Supreme Court decisions on religion: *Employment Division v. Smith* (1990). It affirmed the denial of unemployment compensation to two social workers (delicately specializing in drug rehabilitation) who had smoked peyote, however as a part of a religious ceremony of the Native American Church of which they were members. Importantly, the “seriously held belief” of the plaintiffs was not in question.⁸⁴ However, as Justice Scalia argued for the court majority, “(w)e have never held that an individual’s religious beliefs . . . excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.”⁸⁵ Oregon’s anti-drug law, under which the plaintiffs had lost their jobs, was a “neutral law of general applicability,” and to break it for the sake of religious belief would make the latter “superior to the law of the land, and in effect . . . permit every citizen to become a law unto itself.” Accommodation was still possible, argued Scalia, but only through the “political process.” If this put minorities at a “relative disadvantage,” this was an “unavoidable consequence of democratic government.”⁸⁶

Masterminded by Justice Scalia, *Employment Division v. Smith* shows the same crude defense of the majority principle that Scalia brought to bear in Establishment Clause

⁸³ Stanley Fish, *Is Religion Special?*, N.Y. Times, July 26, 2010, opiniator.blogs.nytimes.com/2010/07/26/is-religion-special/.

⁸⁴ “(P)eyote plant embodies their deity, and eating it is an act of worship and communion”: *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 919 (1990) (Blackmun J., dissenting).

⁸⁵ *Id.* at 878 *et seq.* (per Scalia J., majority opinion).

⁸⁶ *Id.*, at 890.

cases, where he attacked the blocking of religious majority preferences by separationist rules. Pairing both types of cases, under the Free Exercise and Establishment Clauses, one notices a fundamental reversal of the constellation: under legal secularism, religious majorities were blocked by the Establishment Clause while minorities were strongly protected by the Free Exercise Clause. Now the situation had reversed: minorities were vulnerable under a diminished Free Exercise Clause, but majorities had their free go under an obliterated Establishment Clause. A classic paper on the “supply side” school of religion studies, which analyzed over 2000 court cases after *Employment Division*, confirms that the latter “open(ed) the door for majoritarian oppression of minority rights.”⁸⁷

3.3. Battering the wall: Symbols

Religious symbols in the public sphere have been a major stake in the much-publicized return of “public religion” in the West.⁸⁸ It is noteworthy that in this respect Europe had two battles, while America only had one. About Europe, Julie Ringelheim astutely observed that its turn to a higher degree of institutional secularity, under an increasingly assertive European Court of Human Rights, “works best when the issue at stake is that of preserving the respective autonomy of the state and religious communities.” This, however, “tends to presuppose that religion and state belong to two distinct spheres of social life.”⁸⁹ It reads much like Alfred Stepan’s “twin tolerations” as the minimal form of secularity that a democratic regime requires.⁹⁰ But it also flags specific difficulties when the neat separation between public and private cannot be sustained. Accordingly, Europe had two battles over religious symbols: one over minority religions clamoring for their place in the public sphere (the notorious headscarf affairs)⁹¹ and another over majority religions which had always been in the public sphere, but stood to be forced out or at least reduced in their privileges for the sake of secularity. Interestingly, America had no Islamic headscarf conflicts, or similar minority claims to manifest their religion in public. This is because, on the demand side, most immigrants to America have been Christian, not Muslim. And on the supply side, the legal threat to minority religious freedoms, which emanated from the Supreme Court’s *Employment Division v. Smith* decision, was moderated through religion-friendly legislation, while a long-established legal requirement of “reasonable accommodation” in the workplace also worked against many such cases ever going to court.⁹² In America there was thus only a single religious symbols battle, which was over Christian majority symbols as deployed within the ambit of the state.

⁸⁷ John Wybraniec & Roger Finke, *Religious Regulation and the Courts: The Judiciary’s Changing Role in Protecting Minority Religions from Majority Rule*, 40(3) J. SCIENTIFIC STUDY OF RELIGION 427 (2001).

⁸⁸ The first and still most influential statement is JOSÉ CASANOVA, *PUBLIC RELIGION IN THE MODERN WORLD* (1994). Ringelheim, *supra* note 9, at 293.

⁸⁹ ALFRED STEPAN, *ARGUING COMPARATIVE POLITICS*, ch. 11 (2001).

⁹¹ See CHRISTIAN JOPPKE, *VEIL: MIRROR OF IDENTITY* (2009).

⁹² See Emmanuelle Bribosia, Julie Ringelheim & Isabelle Rorive, *Reasonable Accommodation for Religious Minorities*, 17(2) MAASTRICHT J. EUR. & COMP. L. 137, esp. 139–144 (2010).

Noah Feldman argued that “value evangelicals” (his word for the Christian Right) won the “war over institutions and economics,” as outlined in the previous section, but that they lost the “culture war” over symbols in the public sphere. However, this happened to be the battle that they “care(d) most about.”⁹³ Feldman’s claim of no success on the symbols front must be qualified, particularly in the light of case law right after the writing of his book. If there has been no “breaching” of the wall of separation, as with respect to access and funding, a “battering” of the wall is still undeniable.

The central importance of symbols for the Christian Right stands to be underlined. One of their most serious theorists, Richard John Neuhaus,⁹⁴ actually argued that the “naked public square” he so much worried about is “impossible”—either it is filled by the state hyping itself up “as church”, pushing “secular humanism” as idolatrous “*ersatz* religion”;⁹⁵ or it is filled by its rightful owner, the “very new-old language of Christian America.”⁹⁶ *Tertium non datur*. In a different key yet to the same effect, Michael McConnell argued that liberalism was “foremost a regime of fair procedures,”⁹⁷ not of ultimate values, and thus insufficient to motivate and bind people. “[A]ny democratic form of society must inevitably reflect the values of its people,”⁹⁸ which in America happen to be religious values. From this followed that a “preferential treatment for religion in some matters is desirable.”⁹⁹ Whether depicted as in competition with or complementary to the liberal state, religion’s presence in the public sphere mattered centrally to the Christian Right.

The best known and most reviled or ridiculed of all religious-symbol cases remains *Lynch v. Donnelly* (1984), whose forced hermeneutics of “crèches” and “plastic reindeers” has become proverbial. The decision validated a state-financed Christmas display in a small Rhode Island town, on the argument that even the most incriminated element, a Christian crèche or nativity scene, in this particular context, served a “secular purpose,” namely, to “celebrate the Holiday”¹⁰⁰ and “engender a friendly community spirit of goodwill in keeping with the season.”¹⁰¹ Legally, the case is important for the “endorsement” theory of the Establishment Clause, which Justice O’Connor presented in a concurring opinion. It marks an important step in the move away from legal secularism, if not the destruction of the Establishment Clause itself. Crucially, O’Connor’s Endorsement Test does away with the need under the Lemon Test to identify the “secular purpose” of a law or policy to let it pass constitutional muster. Instead, the question becomes whether the measure constitutes an “endorsement” or “disapproval” of religion on the part of the state, which thereby excludes some people: “Endorsement sends a message to nonadherents that they are outsiders, not

⁹³ FELDMAN, *supra* note 2, at 216, 218.

⁹⁴ NEUHAUS, *supra* note 1.

⁹⁵ *Id.* at 82.

⁹⁶ *Id.* at 93.

⁹⁷ McConnell, *supra* note 10, at 16.

⁹⁸ *Id.*

⁹⁹ *Id.* at 22.

¹⁰⁰ *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (per Burger J.).

¹⁰¹ *Id.*, at 685.

full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”¹⁰²

The endorsement test, which would become the court’s mainstay in subsequent Establishment Clause decisions, fundamentally shifts the central value to be furthered by the Establishment Clause, from “liberty” to “equality.”¹⁰³ With its focus on equality, endorsement was a timely formula that articulated the dominant constitutional value of the time and was minority-sensitive, reflecting the “paradigm of race” with its concern about combating racial inequality.¹⁰⁴ The tenor of endorsement is essentially minority protection. Because “disapproval” of religion was also outlawed, this test even allowed religious majorities to refashion themselves as aggrieved minorities, and thus fit perfectly into the larger strategy of the Christian Right. But perhaps the most important victory for “values evangelicals” and the Christian Right, signaled by the shift to endorsement, was to do away with the detested “secular purpose” requirement of the Lemon Test, which had rested on legal secularism’s central idea that, in some respects, the state should “disfavor” religion.¹⁰⁵ Under the endorsement test, the new policy was that the state “must treat religion and nonreligion equally.”¹⁰⁶ This subverted the original purpose of the Establishment Clause, which had been the separation of religion and state. To make the point, Feldman¹⁰⁷ presents a hilarious scenario of the state getting away, under the endorsement test, with paying all clergy of the country if it only paid “ballet teachers and university professors under the rubric of a fund for ‘general moral and aesthetic education.’” In its minority-sensitive garb, endorsement analysis allowed the uncanny possibility of a forward-looking “egalitarian establishment of religion.”¹⁰⁸

Although *Lynch* was steeped in minority-protection rhetoric, its concrete outcome was crudely majoritarian, as was the Supreme Court’s entire move away from legal secularism. It is worth noting that the mayor of Pawtucket, RI, had declared that the point of his crèche was to “keep Christ in Christmas,” and that his opponents’ attempt to get Christ out would be “a step towards establishing another religion, non-religion that it may be.”¹⁰⁹ This was unmistakably the language of the Christian Right, which scored an important victory in *Lynch*.

However, there was an important concession to be made for the favoring of religious majority preferences under the endorsement test, which is the transformation of a religious into a cultural symbol. This is why in *County of Allegheny v. ACLU* (1989), which was the first Establishment Clause case decided on the basis of O’Connor’s

¹⁰² *Id.* at 688 (Justice Sandra O’Connor J., concurring).

¹⁰³ See Feldman, *supra* note 13 and Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90(3) CAL. L. REV. 673 (2002).

¹⁰⁴ Feldman, *supra* note 103, at 703.

¹⁰⁵ FELDMAN, *supra* note 2, at 205.

¹⁰⁶ *Id.*

¹⁰⁷ Feldman, *supra* note 103, at 678.

¹⁰⁸ *Id.*, at 729.

¹⁰⁹ *Lynch v. Donnelly*, 465 U.S. at 700 (1984) (Brennan J., dissenting).

endorsement test, the Christian crèche in a Pittsburgh courthouse would *not* pass constitutional muster: its meaning was deemed not cultural but religious in this specific contest.¹¹⁰ As Ira Lupu put it, the endorsement theory “replace[d] the bright line of separationism with an uncertain screen, through which many symbols and practices of an obvious religious character will pass.”¹¹¹ But it still did not go far enough for some. Also in *Allegheny*, Justice Kennedy reiterated his coercion theory (discussed above), which was supported by three more justices in this case and thus emerged as a serious competitor to the endorsement theory. The coercion theory has the advantage of doing away with inquiry into the meaning of symbols, “religious” or “secular,” for the simple reason that *qua* “symbols” they would *all* be validated because of their incapability to “coerce.” Accordingly, Kennedy’s critique of the endorsement theory was that it would invalidate too many “traditional practices recognizing the part religion plays in our society,” from the National Day of Prayer to the Pledge of Allegiance and the national motto “In God we trust.” This is not quite correct, because the requirement under the endorsement test was rather to transform these practices from “religious” into “cultural.” Endorsement was a centrist doctrine, allowing liberals to get on board, and it precisely reflected Justice O’Connor’s middle-of-the-road position on the court. But it amounted to a brake on the religious conservatives on the court. By contrast, coercion theory was the religious conservatives’ battle horse for the state to recognize, even favor religion as religion, *without* any cultural proviso.

The God frontier and the notion, truly shocking for legal secularists, that the state can favor religion over non-religion were mightily pushed in *Van Orden v. Perry* (2005). The bone of contention was a six-foot-tall, Ten Commandments monolith outside the Texas State Capitol, which had been donated to the state by a civic organization half a century earlier. While surrounded by two dozen other historical markers and monuments, the religious nature of this monument was obvious, at a minimum, from the large and capital spelling of the first line engraved in it, “I AM the LORD thy God.” Interestingly, the case was decided on the same day as a quite similar case, *McCreary County v. ACLU of Kentucky* (2005), which was also about a Ten Commandments exhibit. But whereas the Kentucky courthouse exhibit had been a “deliberate act of provocation,”¹¹² which made it easy for the court to reject it, this could not be said about the Texas monument, had it stood at its place “unchallenged” for many years, and the court eventually approved it.¹¹³

For our purposes, the most interesting part of *Van Orden* is the “plurality opinion” by Chief Justice Rehnquist. Rather provocatively, Rehnquist declared that a “preference for religion over irreligion” was not a violation of the Establishment Clause.¹¹⁴

¹¹⁰ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹¹¹ Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 240 (1994).

¹¹² EISGRUBER & SAGER, *supra* note 59, at 133.

¹¹³ *Van Orden v. Perry*, 545 U.S. __ (2005) (syllabus), at 3. This was one reason cited by “swing” Justice Breyer to warm up to the Texas monument, but to say “nay” to the rather more recent Kentucky exhibit.

¹¹⁴ *Van Orden v. Perry*, 545 U.S. __ (2005), at 5 (per Rehnquist J., plurality opinion, joined by Scalia, Kennedy, and Thomas, JJ). A “plurality opinion” is an opinion joined by most judges in a particular case, although it falls short of a majority. It is thus not binding for further court decisions.

When the Chief Justice opined that “[o]ur institutions presuppose a Supreme Being,” he was notably *not* quoting the very similar, famous line in *Zorach v. Clauston* (1952). Instead, his statement has to be taken as a freestanding, late-twentieth-century affirmation of the notion that God has a special relationship with America, amounting to a position that Jean Cohen would qualify as “theocratic.”¹¹⁵ It was thus an understatement to say, as Justice Stevens did in his dissent, that the plurality in *Van Orden* “wholehearted(ly)” validated “an official state endorsement of the message that there is one, and only one, God”;¹¹⁶ Rehnquist’s statement that America’s state institutions “presuppose” God was a touch stronger. However, there was still an element of secular moderation in Rehnquist’s plurality opinion, when he pointed to the “undeniable historical meaning” of the Ten Commandments, beyond their narrowly religious meaning. And Rehnquist importantly held the public schoolroom off limits for religious symbols and prayer alike.¹¹⁷ This apparently annoyed the staunchest religionist on the court, Justice Scalia, who, in a punchy one-paragraph concurring opinion, would have “prefer(red) to reach the same result” by an even more bluntly anti-separationist line: “(T)here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”¹¹⁸

Notably, *Van Orden*’s God-mongering “plurality opinion” was just that, an opinion expressed by the biggest number of judges on the court, but not by their “majority”. It thus failed to set precedent for future decisions of the court. To pass constitutional muster, the Texas Ten Commandments monument still had to convey, at least to a single but decisive judge, “a broader moral and historical message reflective of a cultural heritage.”¹¹⁹ That is, the transformation of a religious symbol into a cultural one is still required to deflect the Establishment Clause challenge. As this requirement denies religion *qua* religion, this is a stronger qualification than the one on the “access and funding” front, where on the condition that non-religion is *also* being supported, “religion” can be supported by the state. I therefore conclude that with respect to religious symbols, the wall of separation has been battered but not breached.

4. Conclusion

While the Christian Right has passed its political zenith, its legal zenith may not have arrived yet. The irony is that the judiciary had previously been the stronghold of the legal secularism which is now being pushed out by an increasingly conservative and anti-separationist Supreme Court.¹²⁰ Slowly but persistently like a glacier, the court’s

¹¹⁵ Cohen, *supra* note 47.

¹¹⁶ 545 U.S. __ (2005), at 7 (Stevens J., dissenting).

¹¹⁷ *Id.* at 11 (Rehnquist J.).

¹¹⁸ *Id.* at 1 (Scalia J., concurring).

¹¹⁹ *Id.* at 6 (Breyer J., concurring).

¹²⁰ This may change with the replacement of Scalia under a Democratic President—which, at the time of writing (August 2016), continues to be blockaded by the Republican-dominated Senate.

gradual reconstitution under Republican presidencies beholden to the Christian Right outlasts the latter's electoral fortune. If the staunchest religionists on the court flirt with theocratic positions, this is doubly ironic because the Supreme Court, with its ultimate power of judicial review the true "voice of the popular sovereign" in America,¹²¹ itself may be considered a "priesthood" of sorts, guarding that "most sacred of texts: the Constitution."¹²² From this angle, to see American institutions under the stewardship of God may actually be an act of modesty and self-limitation! To openly invoke God is still an unthinkable position for any European high court to take, which correspond closer to Ran Hirschl's view of high courts as driven by a "secularist tilt"—not meant by him as a compliment.¹²³

Founded under the banner of the "wall of separation," the American state was once the most radical among secular nations in its denial of any influence of religion, including the majority religion. Under the pressure of the Christian Right, which has slowly worked its way into America's highest court, the old separationist approach is giving way to a new "integrationist" approach.¹²⁴ According to integrationism, the religious society, which America *de facto* is and always has been, should be formally reflected in its laws and institutions. Steven Gey is still optimistic that the integrationists will not succeed, for two reasons: first, because their vision is "deeply inconsistent with the country's basic history and traditions";¹²⁵ and, second, because of a changing "religious demography" that, as a very result of the political excesses of the Christian Right, is boosting "secularists" as the "fastest growing component" of the American populace.¹²⁶

Indeed, even on its own terms, the new integrationism is still embedded in an overall separationist framework. There is no impending return to prayer or anti-evolutionism in America's public schools. And with respect to funding and symbols, state support and recognition are "only incidentally religious," as Wald and Calhoun-Brown argue.¹²⁷ The authors overlook, however, a slight but important asymmetry between the two, which I tried to capture with the notions of "breaching" versus "battering." Wald and Calhoun-Brown refer to the fact that, with respect to state funding, the pre-existence of non-religious beneficiaries is required for religious beneficiaries to be "neutrally" treated; and, with respect to state recognition, the refashioning of religious symbols into cultural ones is required for the state to at least indirectly associate and identify itself with religion. The funding-related qualification, however, is a weaker qualification than the symbol-related one, because on the symbol front religion *as* religion must be denied, which is not the case (in fact, would make no sense) with respect to funding. Hence, we witness a mere "battering" of the wall of separation with respect to symbols, but a more pervasive "breaching" with respect to funds.

¹²¹ PAUL KAHN, *POLITICAL THEOLOGY* 13 (2011).

¹²² *Id.* at 9.

¹²³ RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 18 (2010).

¹²⁴ Gey, *supra* note 50.

¹²⁵ *Id.* at 42.

¹²⁶ *Id.* at 45; for empirical confirmation, see ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* (2010).

¹²⁷ KENNETH D. WALD & ALLISON CALLHOUN-BROWN, *RELIGION AND POLITICS IN THE UNITED STATES* 102 (2011).

One must also consider that, even in Justice Scalia's majority-pandering, the rapprochement between state and religion is non-denominational, referring to "God" in the abstract. This is more inclusive than European church–state regimes which, openly or latently, favor the Christian religion, and where American-style deism is largely unknown. Non-denominationalism reflects the deep structure of American religiosity that has largely immunized it from civil strife and has made religion compatible with democracy since the days of Tocqueville. If one brackets the more belligerent statements by the Christian Right, there is no sign that what Tocqueville famously called the "agreement" between democratic politics and religion in America is giving way to something less desirable.¹²⁸ In relaxing its formal distance from religion, the American state—to repeat, in its own non-denominational way—has become a bit more like the "modest establishments"¹²⁹ of Europe, within a securely secular framework that is only lightly touched but not rocked by the occasional theocratic rhetoric.

As it moved from the separationist to the accommodationist pole, the biggest change in the American religion–state regime has certainly been with respect to the relative standing of religious majorities and minorities: majorities have gained through a diminished (or rather: sidelined) Establishment Clause, while minorities have lost protections under a Free Exercise Clause that is no longer taken to exempt them from general laws. This seems to be directly opposite to the movement of religion–state relations in Europe, where, due to the mildly but steadily secularizing thrust of the ECtHR, religious majorities have lost some of their privileges, while religious minorities have gained in standing (the ECtHR's negative track record on Islamic headscarves notwithstanding). This dual trend is particularly visible in southeastern Europe, some of whose governments, beginning with Greece in 1993, were targets of some of the toughest ECtHR decisions, which had both secularizing *and* minority-protecting effects.

However, the very distinction between "majority" and "minority" religions is fairly meaningless under the non-denominational deism that is *de rigueur* in American public life and the cornerstone of its "civil religion";¹³⁰ and the distinction becomes even more pointless in light of the sociological fact of persistent denominational pluralism. Moreover, the grossest disadvantages for religious minorities after the Supreme Court's notorious *Employment Division v. Smith* (1990) decision have been rectified through the political process.¹³¹ And Islam—to name that most vilified minority religion in the West, particularly in Europe, even within the ambit of the ECtHR—plainly figures *within* the monotheistic preference zone carved out by Justice Scalia. In his Inaugural Address in 2009, Democratic President Obama depicted America as "a

¹²⁸ TOCQUEVILLE, *supra* note 27, at 288.

¹²⁹ Laborde, *supra* note 11.

¹³⁰ Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

¹³¹ See WITTE & NICHOLS, *supra* note 51, at 161–163. See also the more recent Supreme Court decision in *Burwell v. Hobby Lobby*, 572 U.S. ___ (2014), which amounts to also *legally* reasserted religious freedom rights (here controversially attributed to corporate bodies like firms)—at the price, however, of bringing strong religious freedoms on a collision course, in particular, with gay rights and antidiscrimination norms.

nation of Christians and Muslims, Jews and Hindus, and non-believers.”¹³² This is as much a description as a vision, to which there is no serious alternative, and America seems still better equipped than most other countries to live up to it.

In its move away from legal secularism America has grappled with a problem faced by all Western countries in the context of strong multicultural sensibilities and minority protections, namely, the problem of giving majorities their due recognition, even apart from the field of religion.¹³³ It is thus instructive to compare the American religious symbol cases with a recent European case, in which, for a change, the substantive parallels clearly outweigh their differences. In *Lautsi v. Italy* (2011) (*‘Lautsi II’*), the Grand Chamber of the ECtHR defended the right of the Italian state to mandate the placing of Christian crucifixes in public schools.¹³⁴ This decision overturned an earlier decision by a lower chamber of the same court, which had outlawed the crucifix as an offense to state neutrality and secularism.¹³⁵ The earlier decision (*‘Lautsi I’*) had been the briefly celebrated apex of a previous trend in the court to distance majority religions from the state for the sake of secularism. *Lautsi I* signaled “the counter-majoritarian impasse that an activist international court ultimately faces,”¹³⁶ and clearly had constituted an anomaly in the ECtHR’s recent decisions on religion, which overall were much less interventionist (for which stands its context-sensitive and defensive “margin of appreciation” approach).

In *Lautsi II*, the ECtHR conceded that the crucifix is “above all a religious symbol.” This qualification, one should note, had been sufficient for other high courts, particularly the German Constitutional Court in 1995 (in its famous *Crucifix* decision),¹³⁷ but even the ECtHR, in its first *Lautsi* decision, to rule out any association of the crucifix with the state. However, the *Lautsi II* court also seems to have sided with the Italian government’s view that the meaning of the crucifix, in certain contexts (as in the public school), could be cultural (dubbed “identity-linked”), and that in this case it was the state’s right to “perpetuate a tradition.”¹³⁸ The interpretation of the crucifix as a symbol of Italian majority culture, which propels it straight over the daunting negative religious liberty hurdle set by the European Human Rights Charter, resembles closely the US Supreme Court’s transformation into culture of crèches and Ten Commandments monuments, which let them take the Establishment Clause hurdle.

Recently, the same symbol, the Christian crucifix, in the shape of a huge Latin cross placed on public land in the Californian Mojave Desert, passed constitutional muster in America, by being attributed a secular meaning, namely that of a “national

¹³² President Obama in his Inaugural Speech, Jan. 21, 2009, Washington, D.C., *quoted in* DENIS LACORNE, RELIGION IN AMERICA 103 (2011).

¹³³ See the interesting reflections on “dominant ethnicity” and its beleaguered status in the West by ERIC KAUFMANN, THE RISE AND FALL OF ANGLO-AMERICA 287 *et seq.* (2004). And see its apparent resurgence, as sensibly diagnosed and normatively charted by LIAV ORGAD, THE CULTURAL DEFENSE OF NATIONS: A THEORY OF MAJORITY RIGHTS (2015).

¹³⁴ *Lautsi and Others v. Italy*, Eur. Ct. H.R. (Grand Chamber), Mar. 18, 2011.

¹³⁵ *Lautsi v. Italy*, Eur. Ct. H.R., Nov. 3, 2009.

¹³⁶ Koenig, *supra* note 4, at 67.

¹³⁷ 1 BvR 1087/91.

¹³⁸ *Lautsi and Others v. Italy*, Eur. Ct. H.R., Mar. 18 2011, ¶¶ 66–68.

memorial” for American soldiers who had died in World War I.¹³⁹ However, a cross in a remote desert is not the same as a cross in every classroom. Such a sectarian symbol, which excludes not only non-believers but also non-Christians, would be unthinkable in the American public school system, even under a Supreme Court recently turned post-separationist: conservative Chief Justice Rehnquist, to repeat, explicitly ruled out “religious messages or symbols” in the “public schoolroom” in *Van Orden* (2005). At the same time, it would be unthinkable in Europe for constitutional justices, who adjudicate in thoroughly secularized and non-church-going societies, to call on the state to directly identify itself with religion, without the cultural detour, as a vocal minority on the current Supreme Court has done. When Joseph Weiler ridiculed the Italian government’s “secular canard” of culturalizing Christianity in the *Lautsi* case,¹⁴⁰ one wonders: did he prefer an American-style calling Italy a nation under God?

Weiler, who incidentally defended a “holy alliance”¹⁴¹ between conservative Eastern European governments in the *Lautsi II* case, delivered what must be considered the Strasbourg court’s most important doctrinal innovation: that “secularism” is a “conviction” protected by the European Convention on Human Rights. This astonishing proposition was then adopted by the court to bring the atheist plaintiff of Finnish origin, Mrs. Sole Lautsi, under the protection of the Convention. However, in effect, the move demoted secularism to one among many beliefs or ideologies that compete in a pluralistic society—a “religion” of sorts, much like American Evangelicals and Fundamentalists have always considered “secularism” and “humanism” as a “religion” by another name. But how to integrate a religiously diverse (and, in Europe, predominantly non-religious) society, if not on the basis of a modicum of secularism, understood as a minimal distancing of the state from the phenomenon of religion? While not necessarily a friend of secularism, Charles Taylor has convincingly demonstrated that the post-feudal, “direct-access” state of citizens requires secularism, because otherwise it could not treat all citizens equally.¹⁴² But then secularism cannot be merely a “conviction” or an “ideology”; rather, it is “overarching principle of the constitutional state.”¹⁴³ This simple truth applies to Europe and America alike, and it sets limits to the current scholarly *doxa* of critiquing secularism and accommodating religion, it sometimes seems, at any price.

¹³⁹ *Salazar et al. v. Buono*, 559 U.S. ___, 11 (2010).

¹⁴⁰ Joseph H.H. Weiler, *Lautsi: Crucifix in the Classroom Redux*, 11(1) EUR. J. INT’L L. 1, 2 (2010).

¹⁴¹ See Pasquale Annicchino, *Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity*, 6 RELIGION & HUM. RT. 213 (2011).

¹⁴² Charles Taylor, *Modes of Secularism*, in SECULARISM AND ITS CRITICS 31 (Rajeev Bhargava ed., 1998).

¹⁴³ Lorenzo Zucca, *Lautsi—On a Decision by the ECtHR Grand Chamber*, 11(1) INT’L J. CONST. L. 218, 222 (2013).