

2010

Response: The Continuing Relevance of the Establishment Clause: A Reply to Professor Richard C. Schragger

Caroline Mala Corbin

University of Miami School of Law, ccorbin@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Caroline Mala Corbin, *Response: The Continuing Relevance of the Establishment Clause: A Reply to Professor Richard C. Schragger*, 89 *Tex. L. Rev. See Also* 125 (2010).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Texas Law Review

See Also

Response

The Continuing Relevance of the Establishment Clause: A Reply to Professor Richard C. Schragger

Caroline Mala Corbin*

There is no doubt, as Professor Richard C. Schragger points out, that the Supreme Court's Establishment Clause principles are underenforced.¹ How else to explain, for example, why the Supreme Court has held that the state may not endorse religion or favor some religions over others,² yet government officials regularly make religious pronouncements,³ prayers to Jesus Christ occur during presidential inaugurations,⁴ and our national pledge

* Associate Professor of Law, University of Miami School of Law.

1. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEXAS L. REV. 583, 585 (2011). Professor Schragger discusses both the underenforcement of the Establishment Clause, where the Court could but does not enforce Establishment Clause norms, and the irrelevance of the Establishment Clause, where the Establishment Clause does not apply because state action is lacking. *Id.* at 587–615. Because Professor Schragger's analysis focuses more on underenforcement than irrelevance, I will follow suit. Thus, I discuss the Court's failure to rigorously enforce the *Lemon* purpose prong and the ban on endorsement rather than the right of religious groups to lobby and politicians to solicit from religious groups (a concern with religious-political alliances), as the latter two are private actions to which the Constitution does not apply.

2. See, e.g., *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (noting that “the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

3. Schragger, *supra* note 1, at 598 & n.61.

4. Terry Mattingly, *Prayer in the Political Arena Comes Under Many Watchful Eyes*, SCRIPPS HOWARD NEWS SERV., Sept. 6, 2008, at B3, available at 9/6/08 PRESSATLC B3 (Westlaw) (noting that Reverend Franklin Graham at George W. Bush's first inauguration closed his prayer with “May this be the beginning of a new dawn for America as we humble ourselves before you and acknowledge you alone as our Lord, our Savior and our Redeemer. . . . We pray this in the name of the Father, and of the Son, the Lord Jesus Christ, and of the Holy Spirit. Amen.”); Rachel Zoll, *Religious References at Obama's Inauguration Certainly Ran the Gamut*, ASSOCIATED PRESS, Jan. 24, 2009, at B3, available at 1/24/09 PRESSATLC B3 (Westlaw) (reporting that “[Pastor] Warren said Jesus' name in four languages—English, Spanish, Arabic and Hebrew—and ended his invocation with ‘The Lord's Prayer,’ from . . . Jesus Christ's Sermon on the Mount.”).

and national motto both invoke God?⁵ In addition, the Court does not regulate religious–political alliances and has been unwilling to examine the actual intent of lawmakers, despite a prohibition on laws passed with a predominantly religious purpose.⁶

In his excellent article, Professor Schragger offers several possible explanations for his examples of underenforcement. To start, the Supreme Court may be underenforcing its constitutional principles for pragmatic reasons: If too unpopular, decisions striking down a much beloved religious practice may go unenforced, and the Court’s prestige and legitimacy called into question.⁷ Alternatively, Professor Schragger argues, enforcement might trigger such a backlash that it would cause more harm than good.⁸ In other words, underenforcement may better accomplish the Establishment Clause’s goal of minimizing divisiveness. Professor Schragger also argues that the Court is not institutionally competent to ferret out religious motives in part because actual motive is to some extent unknowable, and in part because it requires delimiting a precise line between secular and religious justifications, a task that courts are reluctant to perform, especially given “a world of disputed first principles about the appropriate foundations of the law.”⁹

As powerful as these explanations may be in many circumstances, I would like to offer some additional ones. The Court’s reliance on plausible reasons rather than actual reasons may be more simply explained by the fact that state actions with an objectively persuasive secular justification do not cause the type of problems that the Establishment Clause aims to avoid. Meanwhile, the Court’s reluctance to rule on the religious pronouncements of individual government officials may be due to the private speech rights that government workers retain despite their public role. Finally, fear of another kind of backlash—a backlash against religious minorities—may motivate underenforcement of existing Establishment Clause doctrine.

5. *Cf.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6–7 (2004) (discussing the origins of the Pledge of Allegiance and congressional revisions that added “under God” to its text); *id.* at 29 (Rehnquist, C.J., concurring) (recounting the history of “In God We Trust” and its placement on legal tender).

6. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

7. *See* Schragger, *supra* note 1, at 617 (noting Justice Scalia’s expression of this concern (citing *McCreary Cnty.*, 545 U.S. at 893 (2005) (Scalia, J., dissenting))).

8. *See id.* at 619.

9. *Id.* at 624. Professor Schragger also argues that Establishment Clause principles may be underenforced because, at least with regard to private speech, they are less important than free speech and the democratic-process values that free speech furthers. *See id.* at 626 (“[S]peech rights trump nonestablishment concerns.”). This might better be an argument for irrelevance, since under current doctrine the Establishment Clause does not generally apply to private speech. *See* *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (noting the difference between “government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect” (emphasis omitted)).

Nonetheless, pragmatic concerns about judicial legitimacy and political backlash remain, as well as concern about the courts interfering with democratic deliberation. With these issues in mind, Professor Schragger makes several suggestions for managing establishment, though often with significant caveats.¹⁰ He ultimately recommends “decentraliz[ing] establishment,” an approach whose main thrust is that challenges to federal actions should be scrutinized more closely than local challenges.¹¹ He argues that, among other things, this decentralization will better ensure religious pluralism, a key component of disestablishment, and better limit religious divisiveness, a major goal of disestablishment.¹² I am not, however, as persuaded as Professor Schragger that the structural benefits of decentralization are worth the trade-off of partially abandoning disestablishment at the local level. In addition, decentralizing establishment, with its greater attention to backlash and greater lenience toward endorsement, gives short shrift to another major goal of the Establishment Clause: protecting religious minorities.

I. Alternate Explanations for Underenforcement

A. Doctrine

One of Professor Schragger’s main examples of the underenforcement of Establishment Clause doctrine is the Court’s reluctance to examine actual purpose. Under the *Lemon v. Kurtzman*¹³ test, state action violates the Establishment Clause if it is not predominantly motivated by a secular purpose.¹⁴ Professor Schragger interprets the current doctrine to mean that whenever a legislature votes for a law for predominantly religious reasons, the Establishment Clause has been violated.¹⁵ As a consequence, the Court

10. First, courts could abandon rather than underenforce Establishment Clause doctrine, and rely on other constitutional doctrines instead, although such an approach would be unable to vindicate all disestablishment values. Schragger, *supra* note 1, at 630–35. Second, courts could keep the current doctrine but be especially sensitive to issues of backlash. *Id.* at 635. While Professor Schragger questions the usefulness of this approach given the impossibility of predicting the consequences of any particular decision, he nonetheless concludes that “a general theory of judicial review that emphasizes the Court’s role in lowering the stakes of politics is attractive in the Establishment Clause context.” *Id.* at 639. Third, courts should allow religious symbols and focus their Establishment Clause restrictions on the state’s funding of religion. *Id.* at 640–41. Yet, there is no guarantee that striking religious symbols is more divisive or that a permissive approach towards symbols will not prefigure a permissive approach towards money. *Id.* at 641.

11. *Id.* at 642.

12. *Id.* at 643.

13. 403 U.S. 602 (1971).

14. *Id.* at 612–13.

15. Schragger, *supra* note 1, at 585–86 (using the Court’s failure to prevent legislatures from adopting laws on the basis of religious reasons as an example of the underenforcement of the Establishment Clause). In other words, to pass a law based primarily on the belief that God requires

regularly underenforces the Establishment Clause because, except in cases that are on their face obviously motivated by religion,¹⁶ it does not scrutinize what actually motivates passage of a law that, for example, provides assistance to the homeless.¹⁷

As Professor Schragger acknowledges, the Court's wariness about delving into actual intent is not limited to the Establishment Clause.¹⁸ Unique to the Religion Clauses, however, is the Court's reluctance to distinguish between a religious and a secular purpose in difficult cases.¹⁹ After all, is a law justified by "public reasons"—an Enlightenment concept that itself reflects a particular religious worldview—ultimately relying on religious or secular reasons?²⁰

However, there may be a more straightforward explanation for the Court's reliance on an objectively determined purpose rather than actual purpose when applying the first prong of the *Lemon* test: Laws that are perceived as having been passed with a predominantly secular purpose, even when the actual purpose is religious, do not cause the types of harms that the Establishment Clause was designed, or at least today is widely understood, to prevent.²¹ First, because civil strife tends to ensue whenever the state favors one religion over others, the Establishment Clause protects the stability of the civil society.²² Second, the Establishment Clause protects the religion that becomes established from the corruption and degradation that so often

it would violate the Establishment Clause. *See id.* at 592 ("Government actions that are animated solely by a religious purpose . . . are unconstitutional under the *Lemon* test.").

16. Patently religious cases include state-sponsored prayer and state-sponsored Ten Commandments displays. *Id.* at 594.

17. Nor do the courts police in any way religious groups that lobby for laws based on their religious commandments. *Id.* at 585–86. However, actions of private groups are not covered by the Establishment Clause, and the focus of this reply is the underenforcement of the Establishment Clause, not its irrelevance. *See supra* note 9.

18. Reliance on actual purpose would require pinpointing what counts as the actual purpose behind legislation passed by dozens of people, each of whom might have a different actual purpose. And this is assuming courts could determine what motivates particular legislators. *See* Schragger, *supra* note 1, at 620–21 (discussing the Court's reluctance to engage in "judicial psychoanalysis" (quoting *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005))). Reliance on actual purpose would also create the dilemma of how to analyze legislation that had been passed anew with a different legislative history.

19. *Id.* at 621.

20. *See id.* at 622–23 ("Behind the 'reason' of Enlightenment political philosophy there was often a foundational deism of a particularly Protestant kind.").

21. While the original understanding of the Establishment Clause is open to debate, these goals comport with the current understanding of the Establishment Clause. *See infra* notes 22–24 and accompanying text.

22. *See, e.g., McCreary Cnty.*, 545 U.S. at 876 ("The Framers and the citizens of their time intended . . . to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate" (internal citation omitted)).

accompany an alliance with the state.²³ Third, the Establishment Clause protects those who do not share the established religion's beliefs, as, currently and historically, persecution or discrimination too often follows when the state prefers one religion to others.²⁴

None of these goals are threatened by state action whose objective purpose seems secular, such as a law to aid the homeless, even if secretly all legislators were actually motivated by the teachings of Jesus Christ. Such a law appears secular, minimizing any divisiveness.²⁵ Compared to a state-sponsored crèche or a mention of God, whose religious significance has been diluted by claims that the symbols are not deeply religious, it does not risk degrading religion because there is no representation of religion or claims about religiosity. And religious minorities do not risk having religious law imposed on them because they can understand the law in secular terms, i.e., it is ethical to help homeless men, women, and children.²⁶ Thus, interpreting the *Lemon* test as only requiring the appearance of a predominantly secular motive suffices to accomplish Establishment Clause goals. For this reason, one might argue that *Lemon* never in fact required examination of actual psychological intent of individual legislators rather than intent gleaned from evident facts.

But what about laws that bar stem-cell research or discriminate against gays and lesbians?²⁷ These are laws that are motivated predominantly by religious reasons, yet have not been struck down on Establishment Clause grounds. Here, Professor Schragger's example of underenforcement has more traction. Yet the underenforcement problem is not that the courts have been unwilling to uncover actual motive. Rather, the problem is that the courts are too willing to find a predominately secular justification when it is

23. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 640 n.10 (1988) (Blackmun, J., dissenting) ("The First Amendment protects not only the State from being captured by the Church, but also protects the Church from being corrupted by the State and adopted for its purposes.").

24. See, e.g., Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 923 (2004) ("[T]he protection and equal status of minority faiths and adherents is a significant purpose of religious freedom, even if not the sole or conclusive one.").

25. Professor Schragger quotes Justice Souter as arguing that there is "no reason for great constitutional concern" when a lawmaker has a "secret [religious] motive," . . . because a secret motive does not constitute a "divisive announcement that in itself amounts to taking religious sides." Schragger, *supra* note 1, at 621 (alteration in original) (citing *McCreary Cnty.*, 545 U.S. at 863).

26. *McCreary Cnty.*, 545 U.S. at 863 ("A secret motive stirs up no strife and does nothing to make outsiders of nonadherents . . .").

27. For example, a majority of states will not grant marriage licenses to gays and lesbians. See *infra* note 57 and accompanying text. And while all states now allow single gays and lesbians to adopt, see *infra* note 30, several limit second-parent and joint adoptions to married couples. *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NAT'L CENTER FOR LESBIAN RTS., 2 (Oct. 2010), <http://www.nclrights.org/site/DocServer/adptn0204.pdf?docID=1221>.

obvious that secular concerns do not predominate.²⁸ In other words, there has been a failure to enforce the requirement of an evident and predominant secular justification. Granted, this underenforcement claim is more a difference in emphasis, but it is a difference nonetheless.

Furthermore, even this type of underenforcement may be fading. More than one court has struck down laws discriminating against gays and lesbians as failing rational basis scrutiny. Most recently, a district court in California, after noting the religious belief “that gay and lesbian relationships are sinful,” ruled that “Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license.”²⁹ Similarly, a Florida appeals court ruled that there was no rational basis for prohibiting gays and lesbians from adopting children.³⁰ While requiring a rational and, therefore, presumably secular justification for legislation is not equivalent to requiring a predominantly secular justification, at least some courts seem to be moving in the direction of closer scrutiny of the reasons behind religiously motivated laws that disadvantage gays and lesbians.

B. Free Speech Concerns

Another major example Professor Schragger gives of the Court’s underenforcement is religious endorsement by government officials. While an administrative agency cannot assert that “America is a Christian Nation,” government officials have,³¹ and former President George W. Bush even stated that he was called by God to run for the presidency.³² Notably, most endorsement cases involve government displays rather than speech by individual government officials. In explanation, Professor Schragger acknowledges some reasons other than political pragmatism, such as justiciability concerns about challenging fleeting remarks not likely to be repeated.³³

28. The argument that gays and lesbians should not get married for the sake of any potential children is often made. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (“[T]he Legislature could rationally proceed on the common-sense premise that children will do best with a mother and father in the home.”). All reputable studies, however, have refuted the claim that having gay parents harms children. *E.g., Timothy J. Biblarz & Judith Stacey, How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 17 (2010).

29. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 985, 1003 (N.D. Cal. 2010), *appeal pending*, No. 10-16696 (9th Cir. argued Dec. 6, 2010), *certifying question to Cal. Sup. Ct.*, 628 F.3d 1191; *see also id.* at 1002 (“A private moral view that same-sex couples are inferior to opposite-sex couples is not a proper basis for legislation.”).

30. *Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010). Florida was the last state that barred individual gays and lesbians from adopting children. *See Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, *supra* note 27, at 2 (“Until recently, Florida was the only state that categorically prohibited lesbians and gay individuals from becoming adoptive parents by statute.” (citation omitted)).

31. Schragger, *supra* note 1, at 598 & n.61.

32. *Id.*

33. *Id.* at 599.

I would like to mention another explanation. Doctrinally, the Supreme Court has repeatedly observed that “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”³⁴ Thus, official state monuments are government speech subject to Establishment Clause analysis, while statements made by candidates on the campaign trail are private speech protected by the Free Speech Clause.

Speech by elected officials, however, is more complicated because, unlike government displays or candidate statements, it resists categorization as purely government speech or purely private speech. Despite its mixed nature, it may be that courts do not police religious rhetoric made by government officials because they view it more along the lines of private speech, where religious speech is actually protected.³⁵ After all, government officials do not completely forfeit their free speech rights when they enter public service. Otherwise, a President would have to give up his or her religious practices upon assuming office. Still, it is not an entirely satisfactory conclusion, because the government component of the speech creates an air of endorsement, especially in contexts like national inaugurations.

There is no easy solution to the challenge of how to treat speech that is both private and governmental³⁶: Should the Court attempt to disentangle the private and public components, or should it come up with a different set of rules for this type of mixed speech?³⁷ In any event, given judicial tolerance for official legislative prayers, God in the national pledge and motto, and state religious displays,³⁸ the underenforcement of endorsement norms is not limited to the mixed private–government speech of government officials.

34. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

35. A statement made by the President that he was called by God to run perhaps ought to be considered private speech.

36. Free speech claims by government employees also must address this complicated issue. Until the recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court would balance the competing public and private interests. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (explaining the balancing test). *Garcetti*, however, established the rule that speech made pursuant to official duties would count as government speech. 547 U.S. at 421. It is not clear whether it follows that speech not made pursuant to official duties is always private speech, or even whether Establishment Clause doctrine would adopt these rules.

37. See generally, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (discussing mixed speech as a category separate from private or governmental speech).

38. See Schragger, *supra* note 1, at 604 n.102 (noting the Court’s decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), which rejected an Establishment Clause challenge to legislative prayer); *id.* at 599–600 (detailing the Court’s avoidance of the question of whether the words “under God” in the Pledge of Allegiance violated the Establishment Clause in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)); *id.* at 604 & n. 101 (discussing instances in which religious displays have been “grandfathered in” or considered *de minimis*”).

Thus, Professor Schragger is spot-on in his analysis of a de facto establishment and an unofficial but powerful privileging of not only religion but of certain religions over others, namely Christianity, or at the very least, monotheistic religions. It is here that his explanations and prescriptions are most needed.

C. *Backlash Against Protecting Religious Minorities*

In Professor Schragger's political pragmatism explanation for underenforcement,³⁹ he mentions two types of possible backlash. For both, court decisions enforcing Establishment Clause norms may be so unpopular that they cause more harm than good. First, he discusses the Supreme Court's worry about its own prestige and abilities as a political actor, and how it may be undermined by an unenforceable decision.⁴⁰ Second, he posits that full compliance could actually be more damaging to the goals of the Establishment Clause than the state action originally challenged.⁴¹ So, for example, ordering removal of an extant Ten Commandments monument may cause more political divisiveness than letting it stand.⁴²

However, avoiding political divisiveness is not the only Establishment Clause value. Consequently, the concern that backlash would further divide the country along religious lines should be joined by the fear of undermining other establishment goals in making a case for underenforcement. In other words, it is possible that courts decide against full compliance lest it exacerbate the corruption or degradation of the favored religion or worsen the position of religious minorities. In his discussion on managing establishment, Professor Schragger notes that many believe *Roe v. Wade*⁴³ may have hurt women and their reproductive rights by helping to spark the growth of the religious right.⁴⁴ Similarly, perhaps part of the Court's calculus is that full enforcement of the Establishment Clause may unleash so much wrath against those who it is supposed to protect or provoke such a reactionary response that religious minorities would actually fare better with an underenforced Establishment Clause. Professor Schragger may mean to encompass the effects on religious minorities as part of his discussion of political divisiveness, but he does not do so explicitly. His failure to consider with care this important part of the Establishment Clause also raises concerns about his suggestions for managing establishment.

39. *Id.* at 617–20.

40. *See supra* note 7 and accompanying text.

41. *See supra* note 8 and accompanying text.

42. Schragger, *supra* note 1, at 618, 619–20 (discussing the “political nondivisiveness” motivation in Justice Breyer’s concurrence in *Van Orden*, which upheld the display of a Texas monument containing the Ten Commandments).

43. 410 U.S. 113 (1973).

44. Schragger, *supra* note 1, at 635 (noting the theory that “a politically active Religious Right developed in response to the liberalizing ‘anti-religion’ decisions of the Warren Court”).

II. Assumptions Underlying Decentralized Establishment

Professor Schragger offers several approaches for managing establishment in the face of political realities, including (1) abandoning certain establishment norms,⁴⁵ (2) ruling with an eye to possible backlash, and (3) enforcing limits on funds to religion much more strictly than limits on endorsement of religion. In the end, Professor Schragger advocates decentralizing establishment, by which he means that challenges to local actions would be scrutinized more deferentially than challenges to federal action.⁴⁶ According to Professor Schragger, this structural approach to establishment, which incorporates aspects of the previous proposals, will promote “American-style religious pluralism,” reduce political tensions, and prevent “a stable oppressive faction in the whole.”⁴⁷

It is an intriguing proposal, with many fascinating complexities. Yet, some of the assumptions underlying Professor Schragger’s favored solution of decentralizing establishment deserve a closer look. First, it assumes the decrease in decentralization caused by full enforcement of Establishment Clause norms is more detrimental than the partial abandonment of these norms. Second, it privileges the Establishment Clause goal of avoiding divisiveness over other Establishment Clause goals. Third, it assumes that funding of religion is more problematic than endorsement of religion.

A. Decentralization Benefits Outweigh Abandonment Harms

Among its benefits, decentralization provides two structural means of ensuring that no one religious sect dominates. First, decentralization of political power promotes pluralism, including religious pluralism.⁴⁸ Second, a decentralized political structure also means one religious group cannot take over the central authority and exert its influence (and vice versa) because there is no one central authority.⁴⁹ These are both praiseworthy goals, but I wonder if their importance is not overstated, and if the trade-off of partial abandonment of enforcing establishment norms at the local level is worth it.

Certainly the proliferation of sects is one way to ensure that no single one becomes dominant, and decentralization contributes to their

45. See *supra* note 10 and accompanying text. Professor Schragger first suggests that if Establishment Clause doctrine cannot be enforced, perhaps it should be abandoned, especially since other constitutional doctrines like equal protection would pick up the slack. Schragger, *supra* note 1, at 632–34. But given that the Establishment Clause already embodies an equal protection component, there is no reason to think that the reasons currently causing underenforcement would be any different for enforcement of equal protection. People who feel strongly about the issue are unlikely to be much more receptive to removing God from the pledge and national motto because the equality component is more explicit.

46. See *supra* note 11 and accompanying text.

47. Schragger, *supra* note 1, at 642–43.

48. *Id.* at 643.

49. *Id.*

multiplication. Nonetheless, does having the courts enforce uniform establishment norms at the local level really alter the decentralized nature of our political structure to such a degree that it would affect the dynamics leading to diverse associations? Especially if the establishment norms were designed to encourage religious diversity by removing government coercion or influence in the religious sphere?

In short, it is not altogether clear which background conditions better encourage religious diversity within a locality: a decentralized regime where, because disestablishment is weakly enforced, the government endorses the dominant religion, or a similar regime except that disestablishment norms here as elsewhere are more rigorously enforced, so that no one particular religion is favored by the state.

Nor does decentralizing establishment necessarily encourage religious diversity across localities. The reality is that if enforcement of Establishment Clause norms is partially abandoned at the local level, the overwhelming majority of American communities will favor Christianity. Yet arguably the religious diversity most needed in the twenty-first century United States is not one Christian sect checking another, but other religions checking Christianity.

B. Privileging Avoidance of Divisiveness

Professor Schragger also argues that decentralizing establishment will reduce the political stakes and therefore will reduce political divisiveness. Deferential scrutiny of challenges at the local level means local and state controversies will no longer become national issues, which will lessen or at least contain the potential backlash and divisiveness that can follow.⁵⁰ In addition, because there will be multiple sites for decision making about religious disputes instead of just one, the stakes of any one controversy simply will not be as high.⁵¹ But again, I wonder whether uncertain backlash is preferable to certain underenforcement. Furthermore, the focus on divisiveness misses other important Establishment Clause concerns.

1. *Uncertainty of Backlash.*—It is true that making a federal case out of a religious issue may risk divisiveness and backlash. An unpopular decision may spur a reactionary political movement⁵² or even a constitutional amendment that would preclude full enforcement at a later date. Decentralized decisions may help to avoid this, particularly if they are made with an eye to political backlash, as Professor Schragger suggests.

50. *See id.* at 643 (noting that decentralization reduces religious tension by avoiding the national politicization of local religion–state controversies).

51. *See id.* at 643–44 (noting that by accounting for scale, decentralizing establishment might be able to reduce the political stakes).

52. *See, e.g., supra* note 43 and accompanying text.

Yet Professor Schragger acknowledges the tremendous difficulty in predicting backlash.⁵³ It is possible that fuller enforcement of the Establishment Clause may trigger forces that work against its goals. At the same time, it is also possible that consistent, uniform enforcement may help entrench Establishment Clause norms across the country.⁵⁴ The same uncertainty bedevils the gay rights movement, whose experience is particularly suggestive since opposition to homosexuality is so intimately tied to religious views. Accordingly, has judicial recognition of a constitutional right to same-sex marriage advanced or hindered the civil rights of gays and lesbians? Of course, this question assumes that judicial decisions have influence.⁵⁵ But if they do, what has followed greater enforcement of equal protection? On the one hand, one could argue that but for the 1993 Hawaii Supreme Court decision holding that laws prohibiting same-sex marriage are subject to strict scrutiny under the Equal Protection Clause of the Constitution of the State of Hawaii,⁵⁶ Congress would never have passed the Defense of Marriage Act,⁵⁷ and over half of the states would not have amended their constitutions to explicitly limit marriage to one man and one women.⁵⁸ On the other hand, perhaps this early decision and others like it⁵⁹ helped pave the way to the legalization of same-sex marriage in six states,⁶⁰ and contributed to the sea change in the public's attitude toward gays

53. Schragger, *supra* note 1, at 637 (“It . . . seems unlikely that Justices will be able to accurately predict when a decision will generate a backlash.”).

54. Or, alternately, full enforcement might produce a backlash along the lines of Professor Michael Klarman's argument that while *Brown v. Board of Education*, 347 U.S. 483 (1954), did not advance the civil rights struggle as much as many believe, the reaction to the violence sparked by *Brown* did. Schragger, *supra* note 1, at 637 (citing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 441–42 (2004)).

55. See Schragger, *supra* note 1, at 637–38 & nn.250–53 (discussing the influence of *Brown* and *Roe*).

56. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

57. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). The Defense of Marriage Act of 1996 (DOMA) essentially bans same-sex marriage for federal purposes by defining marriage as a union between a man and woman. 1 U.S.C. § 7 (2006). DOMA also gives states the right to allow or ban same-sex marriage and the right to refuse to recognize same-sex marriages performed in other states. 28 U.S.C. § 1738C (2006).

58. *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF ST. LEGISLATURES (June 27, 2011), <http://www.ncsl.org/default.aspx?tabid=16430> [hereinafter *Same-Sex Marriage*] (identifying states with constitutional language defining marriage). In addition, thirty-nine states have statutes banning same-sex marriage. See *id.* (identifying states with statutes that define marriage as between a man and a woman).

59. E.g., *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (holding that the right to marry the partner of one's choosing is a fundamental right and a ban on same-sex marriage is subject to strict scrutiny); *Baker v. State*, 744 A.2d 864, 885–86 (Vt. 1999) (holding that the denial of benefits to same-sex couples equal to those of married couples violates the Vermont constitution).

60. Massachusetts, Connecticut, California, Iowa, New York, Vermont, New Hampshire, and the District of Columbia allow same-sex couples to marry. *Same-Sex Marriage*, *supra* note 58; see

and lesbians.⁶¹ Again, the relationship between the courts, political actors, and the public is a complicated one, with influences flowing in multiple directions. But given the recent and popular repeal of Don't Ask, Don't Tell⁶² and predictions that public support for same-sex marriage is an inevitability,⁶³ perhaps the fear of backlash is overstated.

2. *Other Establishment Clause Goals.*—Privileging the value of political nondivisiveness, as Professor Schragger advises, also overlooks other Establishment Clause values.⁶⁴ Professor Schragger praises Justice Breyer's concurrence in *Van Orden v. Perry*⁶⁵ as an example of the Court attempting to lower the political stakes. In *Van Orden*, Justice Breyer "interpreted the Establishment Clause as a mandate to avoid sectarian strife"⁶⁶ and reasoned that removing the Ten Commandments would cause more strife than letting them stand.⁶⁷

also Sandhya Somashekhar, *New York Legalizes Same-Sex Marriage in Win for Gay Rights Activists*, WASH. POST, June 24, 2011, http://www.washingtonpost.com/politics/new-york-senate-votes-to-legalize-same-sex-marriage-in-win-for-gay-rights-advocates/2011/06/15/AG3XDqjH_story.html (updated June 25, 2011). Several other states either recognize same-sex marriages performed in other states, allow civil unions, or provide benefits to same-sex couples. *Same-Sex Marriage*, *supra* note 58. The status of same-sex marriage in California depends on the outcome of litigation surrounding Proposition 8. *Id.*

61. In 1996, 27% supported and 65% opposed same-sex marriage. *Support For Same-Sex Marriage Edges Upward: Majority Continues to Favor Gays Serving Openly in Military*, PEW RES. CENTER (Oct. 6, 2010), <http://people-press.org/report/662/same-sex-marriage>. In 2011, a mere fifteen years later, a majority of Americans support same-sex marriage. Nate Silver, *Gay Marriage Opponents Now in Minority*, FIVETHIRTYEIGHT (Apr. 20, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/>.

62. A CNN poll of the American public found 72% favored allowing gays and lesbians to serve openly in the military, with 23% opposed. CNN OPINION RESEARCH POLL 4 (Nov. 17, 2010), <http://i2.cdn.turner.com/cnn/2010/images/11/17/rel116e.pdf>.

63. Vice President Joe Biden, for example, has remarked, "I think the country [is] evolving. . . and I think there's an inevitability for a national consensus on gay marriage." David Lightman, *Biden Sees Gay Marriage Consensus*, MIAMI HERALD, Dec. 25, 2010, *available at* <http://www.miamiherald.com/2010/12/25/1988041/biden-sees-gay-marriage-consensus.html>; *see also* Nathan Black, *Christians Need to Prepare for Normalization of Gay Marriage*, THE CHRISTIAN POST (Feb. 26, 2011), <http://www.christianpost.com/news/christians-need-to-prepare-for-normalization-of-gay-marriage-49195/> (reporting that the President of the Southern Baptist Theological Seminary recently acknowledged, "I think it's clear that something like same-sex marriage is going to be normalized, legalized, and recognized in the culture." (internal quotations omitted)).

64. *See infra* note 65; *cf.* Schragger, *supra* note 1, at 639 ("[A] general theory of judicial review that emphasizes the Court's role in lowering the stakes of politics is attractive in the Establishment Clause context.").

65. 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

66. Schragger, *supra* note 1, at 637; *see also id.* at 620 (noting that "[o]ne could agree that . . . the principle of nondivisiveness requires the Court to permit the display [of the Ten Commandments] in *Van Orden*," and adding that "[t]his result would be justified by a norm of nonestablishment that privileges the value of political nondivisiveness and understands the Court to be a central contributor to that state of affairs").

67. *Id.* at 636–37.

But as discussed above, the consequences of a decision are extremely difficult to predict. Perhaps in the short term, allowing a Ten Commandments monument would be less divisive in a community where most people want to keep it, if only because the Christian majority is willing and able to make more of a ruckus than the religious minorities who live there. In the long term, however, a clear rule that state-sponsored displays of the Ten Commandments carry a presumption of unconstitutionality⁶⁸ might better avoid the endless litigation and conflict surrounding the issue.⁶⁹ Additionally, a presumptive rule against government-sponsored religious monuments in general would prevent religious groups from competing for scarce government resources.

Even assuming that a permissive approach to state Ten Commandment monuments reduces conflict, minimizing political strife is only one goal of the Establishment Clause. The Establishment Clause strictures on keeping church and state separate are also meant to prevent the debasement of the favored religion.⁷⁰ It degrades religion to insist that the predominant effect of displaying a sacred text or symbol is not religious but secular,⁷¹ which Justice Breyer argues in his concurrence.⁷² Likewise, allowing prayers but

68. In other words, state-sponsored Ten Commandments would be presumed unconstitutional in a context that very clearly highlights some secular import, such as a display in an art museum or a discussion in a world religions class. Cf. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705, 714, 758 (2010) (arguing that courts should adopt a rebuttable presumption of religious meaning when confronted with a “facially religious phrase”).

69. Professor Schragger acknowledges this concern when he observes, “The very ambiguity of the Court’s decisions may inflame the ongoing political and cultural debate.” Schragger, *supra* note 1, at 369; see also Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 974–75 (2010) (noting that in the twenty-five years following *Marsh v. Chambers*, 463 U.S. 783 (1983), “legislative prayer has grown into a fissure that now divides county boards, state legislatures, and city councils across the country” and that “[l]itigation has . . . become an omnipresent threat and a frequent reality”).

70. It is also meant to prevent corruption of the favored religion. See *supra* note 23 and accompanying text.

71. See, e.g., Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1, 13 (1984) (“To suggest that the [crèche] . . . is not a religious symbol clearly demeans the religion of those who erected it.”).

72. See *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (“Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablet’s message to predominate.”). Likewise, it does religion no honor to describe invocations to God in the national pledge and national motto as patriotic rather than religious statements, as courts upholding them against Establishment Clause challenges invariably have done. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O’Connor, J., concurring) (describing such references as being employed “for essentially secular purposes,” such as “commemorat[ing] the role of religion in our history”).

insisting that they be nondenominational means watering down religion to an extent unacceptable to many.⁷³

In addition, the Establishment Clause is not just about preventing conflicts between sects; it is also about protecting minority religions. Establishment Clause challenges often represent a less powerful religious minority challenging a government benefit to a more powerful religious majority. In the *Van Orden* Ten Commandments case, the government endorsed Christianity,⁷⁴ the ascendant religion in Texas and the United States. By favoring and valorizing Christianity, this endorsement arguably treats all other religions as second class. Thus, Justice Breyer's concurrence can be read as allowing the dominant religious group to retain its privilege at the expense of less powerful religious groups. Granted, courts cannot make decisions that are so despised that they are unenforceable.⁷⁵ At the same time, protecting minorities sometimes means decisions that the majority will not like and will complain about. Consequently, finding the Ten Commandments monument unconstitutional or otherwise enforcing establishment norms may be unwelcome. Nonetheless, if a state monument causes the types of harm that the Establishment Clause is understood to protect against, then, barring political unfeasibility, the court should order its removal. Between minimizing strife and protecting minorities, the latter should prevail, especially if the former is speculative.

C. *Funding More Problematic Than Endorsement*

While it is not clear whether there is something about decentralization itself that would lead to higher scrutiny for funding rather than endorsement, Professor Schragger also argues that government funding of religion causes more establishment ills than government endorsement of religion.⁷⁶ Yet for many of the reasons Professor Schragger himself mentions, focusing

73. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 380 (1992) ("By stripping all the specific elements of different faiths and denominations and attempting to keep only the common elements that all faiths share, tolerant governments produce a mishmash that no faith can accept or believe in.").

74. While the Ten Commandments are also part of the Jewish faith, the Jewish version is different than the version usually challenged. For example, typically, the First Commandment in the Jewish faith is, "I am the Lord your God who brought you out of the land of Egypt," whereas the version in *Van Orden*, "I am the LORD thy God," makes no mention of the Exodus. Steven Lubet, 15 CONST. COMMENT. 471, 475 (1998) (providing the Jewish version of the First Commandment); *cf. Van Orden*, 545 U.S. at 717–18, 718 n.16 (Stevens, J., dissenting) ("There are many distinctive versions of the Decalogue [and] . . . these differences may be of enormous religious significance.").

75. Although, since the Supreme Court had held that other religious displays violated the Establishment Clause, e.g. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 601–02 (1989) (holding that the display of a crèche in a county courthouse violated the Establishment Clause), proclaiming a Ten Commandments monument unconstitutional does not seem to fall into that category.

76. Schragger, *supra* note 1, at 644 (arguing that the "funding of religious [institutions and organizations] . . . is generally more dangerous than local religious endorsements").

enforcement efforts in this way may not better reduce religious tensions.⁷⁷ Furthermore, this claim about the relative effects of funding versus endorsement also underestimates the harms of endorsement.

There are a couple of reasons why stricter enforcement of funding and laxer enforcement of endorsement may not reduce tensions as much as Professor Schragger predicts. First, while forcing public officials and the courts to take sides in highly emotional and fraught battles over religious symbols can cause divisiveness, further underenforcement will not eliminate the courts' involvement in these issues. Even Professor Schragger would draw the line somewhere: I do not imagine that he would approve of Christian crosses atop every government building or on every public school wall. So really the question is not whether the courts must make these decisions, but where to draw the line when they do. In the end, instead of conflicts about whether to allow nonsectarian prayers before legislative sessions—the issue resolved by the underenforcing *Marsh v. Chambers*⁷⁸—the conflicts will be about whether to allow sectarian prayers before legislative sessions.⁷⁹

Second, Professor Schragger argues for stricter enforcement of funding because “while government expression is important, it does not have the political effect of money.”⁸⁰ If people care deeply about religious symbols, however, religious groups may well compete for government endorsement to the same degree they compete for government money. In any case, Professor Schragger cannot have it both ways: Either religious symbols matter and so will heighten tension and cause competition, or they do not.

Plus, people may actually object less to government funding of religion than to government endorsement of religion. As Professor Schragger recognizes, funding religion does not preclude the possibility of treating all religions equally. While in reality the funding would flow unevenly, at least in theory all belief systems are eligible. That is not the case with government religious symbols. For example, it is impossible for a national motto to endorse Christianity, Judaism, Islam, Buddhism, Hinduism, Wicca, secular humanism, and atheism all at once. In addition, funding can more readily be

77. *Id.* at 640 (asserting that “regulating symbols unnecessarily heightens religious tensions” and that striking down the government’s religiously infused speech both increases religious factions and “foster[s] grievances that can be [politically] exploited”). Furthermore, money “raises the political stakes” for religious groups and for politicians more than mere symbols. *Id.* at 640–41.

78. 463 U.S. 783 (1983).

79. *See, e.g., Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1268 (11th Cir. 2008) (challenge to sectarian legislative prayer); *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 586–87 (7th Cir. 2007) (challenge to legislative prayers); *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 278–80 (4th Cir. 2005) (challenge to a policy limiting legislative prayers to members of monotheistic religions); *see also Turner v. City Council of Fredericksburg*, 534 F.3d 352, 353–54 (4th Cir. 2008) (city council member’s challenge to a policy requiring that legislative prayers be nondenominational).

80. Schragger, *supra* note 1, at 640.

justified than endorsement. In the school voucher case, for example, the purpose of government funding was to improve the educational opportunities of children with no other immediate options.⁸¹ Again, this is not the case with government-sponsored symbols: endorsement does not improve the education or welfare of anyone, and there are always secular alternatives available. Our national motto “In God We Trust,” for example, could easily be “E Pluribus Unum”⁸² or “Liberty And Justice For All.”

Finally, Professor Schragger underestimates the establishment harms of government-sponsored religious symbols. Government endorsement of religion not only triggers religious conflict, it also creates religious hierarchies. Government endorsement sends the message that those who do not conform to the favored mainstream religious beliefs are less valued, or as James Madison put it: “It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”⁸³ This can affect both how religious minorities view themselves and how they are viewed by others. State endorsement may make religious minorities feel alienated and therefore less likely to participate in civic and community affairs.⁸⁴ State endorsement may also exacerbate discrimination against religious minorities.⁸⁵ Members of mainstream religions often already feel some distrust or suspicion of those who do not share their views on religious truth;⁸⁶ state endorsement may help cement these negative views. After all, “In God We Trust” as a national motto implies that true Americans trust in God and “everybody else is a little . . . un-American.”⁸⁷

81. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (describing the intent of a scholarship program to provide assistance to the poor in a challenged school system).

82. And in fact, our national motto was “E Pluribus Unum” until it was changed during the Cold War. Act of July 30, 1956, Pub. L. No. 84-851, 70 Stat. 732 (codified at 36 U.S.C. § 302 (2006)). “Under God” had been added to the Pledge of Allegiance two years earlier. Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (codified at 4 U.S.C. § 4 (2006)).

83. James Madison, *A Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in JAMES MADISON: WRITINGS 29, 33 (Jack N. Rakove ed., 1999).

84. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 709 n.181 (2002) (“[T]he harm of endorsement is the actual reduction in political equality that results from the psychological impact of the endorsement message on favored and disfavored citizens alike.”).

85. *See generally* Caroline Mala Corbin, *Nonbelievers and Government Religious Speech*, 97 IOWA L. REV. (forthcoming).

86. 59% of registered voters said it was important to them that the President of the United States has a personal relationship with Jesus Christ, and a sizeable portion of Americans admit they would not vote for a religious minority, even if qualified and nominated by their own party: 48% would not vote for a Muslim; 24% would not vote for a Mormon; 51% would not vote for an atheist. *See Obama and God*, PRINCETON SURV. RES. ASSOCIATES INT’L, 7 (July 11, 2008), available at <http://www.psrai.com/filesave/0807%20ftop%20w%20methodology.pdf> (reporting responses to questions regarding views on presidential candidates and religion).

⁸⁷ *See* Laycock, *supra* note 73, at 380 (“By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American.”).

Consequently, nonconforming religious minorities will be considered the less preferable candidate for political office, employment, or anything else.

Endorsement does not only undermine the equality of religious minorities, it may undermine their religious liberty as well. Imagine, for example, that a town council opens its sessions with a monotheistic prayer. A member of the town council or a citizen who does not share those beliefs is confronted with a choice. She can either join the prayer and act contrary to her belief system. Or she can refuse to join, out herself as a religious minority, and suffer the consequences. And the consequences can be severe.⁸⁸ Thus, government endorsements can put pressure on members of minority religions to act contrary to their religious conscience. This is no minor injury. Arguably, government funding of religion can also impose these pressures,⁸⁹ but that should lead to the conclusion that neither funding of religion nor endorsement of religion should be countenanced under the Establishment Clause.

III. Conclusion

This short Response has obviously not attempted to grapple with all the many intricacies of Professor Schragger's rich and nuanced arguments. Instead, it offers a few supplemental explanations for the Court's underenforcement of Establishment Clause norms and suggests that closer attention to other Establishment Clause values, especially its goal of protecting religious minorities, might lead to conclusions different than those drawn by Professor Schragger.

88. People in the United States have shown themselves to be reluctant to vote for, hire, or associate with religious minorities. *See supra* notes 84–86 and accompanying text.

89. Parents in school districts with voucher programs may find themselves in this predicament: Do they send their children to a failing public school, or do they take advantage of the voucher program and send them to a religious school which will teach their children beliefs contrary to their own religion?