ESSAYS

WHY CHURCH AND STATE SHOULD BE SEPARATE

ERWIN CHEMERINSKY*

A couple of years ago, I argued a case at the United States Supreme Court involving the constitutionality of the Ten Commandments monument that sits between the Texas State Capitol and the Texas Supreme Court.[1] The monument is six feet high and three feet wide,[2] and atop it in large letters and words it states, "I am the Lord, thy God."[3]

In the days before the argument at the Supreme Court, the case received a great deal of media attention.[4] Some of the reports mentioned that I was the attorney who would be arguing the case against the monument before the Court,[5] and as a result, I received a large amount of what can only be described as hate mail.[6] Some of it, in its viciousness, was shocking.

By itself, what this showed me was that there are some people who care very deeply about having religious symbols on government

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* Alston & Bird Professor of Law and Political Science, Duke University. This Essay was originally delivered as a lecture at the College of William & Mary in March 2007.

1. Van Orden v. Perry, 545 U.S. 677, 681 (2005).

2. *Id.*

3. *Id.* at 736 app. (Stevens, J., dissenting). In fact, the actual monument reads: "I AM the LORD, thy God." *Id.* at 707.

4. *See, e.g.*, Linda Greenhouse, *The Ten Commandments Reach the Supreme Court*, N.Y. TIMES, Feb. 28, 2005, at A12; Sylvia Moreno, *Supreme Court on a Shoestring: Homeless Man Takes on Texas Religious Display*, WASH. POST, Feb. 21, 2005, at A1.

5. *See, e.g.*, Greenhouse, *supra* note 4; Moreno, *supra* note 4.

6. *See* Transcript of Oral Argument at 20, *Van Orden*, 545 U.S. 677 (No. 03-1500), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1500.pdf.

property. But there were also more subtle lessons to be learned. The State of Texas was arguing in front of the U.S. Supreme Court that it wanted the Ten Commandments monument to remain because of the historical importance of the Ten Commandments as a source of law.[7] I was easily and quickly convinced, however, that this was not at all the reason why the people who were sending me hate mail wanted the monument there. They wanted the Ten Commandments there because it was a religious message and a religious symbol. After all, it was not that long ago that the Chief Justice of the Alabama Supreme Court, Roy Moore, was removed from office because of a two and a half ton Ten Commandments display in the Alabama State Courthouse.[8] He defied a court order to keep the Ten Commandments there,[9] obviously not because he thought it was an important historical symbol. Rather, he wanted it there because it was a religious symbol, and it had come to be taken as a symbol of his religion.[10]

As a result of my experience in the Ten Commandments case, I was saddened but not surprised when I heard of the controversy surrounding President Gene Nichol's decision to remove the cross from the Wren Chapel at the College of William & Mary.[11] The people who had wanted to keep the Ten Commandments at the Texas State Capitol were, at least philosophically, the very same people who would want to keep the cross atop the altar in the chapel at William & Mary. Their goal was not to keep the cross because of some historical message, but rather because they believed that as a religious symbol, it should be on display.[12]

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7. *See* Brief for Respondent at **32-36, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 263793.

8. Jeffrey Gettleman, *Monument Is Now Out of Sight, but Not Out of Mind*, N.Y. TIMES, Aug. 28, 2003, at A14; *see also* Moore v. Judicial Inquiry Comm'n, 891 So. 2d 848, 862 (Ala. 2004).

9. Glassroth v. Moore, 242 F. Supp. 2d 1068, 1068 (M.D. Ala. 2003); *see also* Shaila K. Dewan, *The Big Name in Alabama's Primary Isn't on the Ballot*, N.Y. TIMES, May 30, 2004, at N16.

10. *See* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1299 (M.D. Ala. 2002).

11. Fred Kunkle, *School's Move Toward Inclusion Creates a Rift*, WASH. POST, Dec. 26, 2006, at B1. President Nichol indicated that he "wanted to make the chapel welcoming to students of all faiths," and removed the cross in October 2006. *Id.*

12. *See id.*

What underlies the debate, whether it is over the Ten Commandments at the Texas State Capitol grounds or the cross in the chapel at William & Mary, is the profound question of whether to have a secular government or whether to have a government that affiliates with and advances religion. The underlying issue is that stark. The reason that I agreed to handle the Ten Commandments case is that I believe deeply that our government should be secular. It should not be affiliated with any religion and it should not advance any religion. But I also know that those who are on the other side believe just as deeply that they want their government to be religious, not secular.

This Essay will discuss the role of religion in a public university. In order to do that effectively, I will begin by discussing more generally the appropriate role of religion in the government, and then, based upon those principles, I will address the role of religion in public universities.

This Essay is divided into three Parts. In Part I, I will discuss the competing visions of the First Amendment's Establishment Clause. Part II then suggests what I believe is the preferable vision: one that tries, to the greatest extent possible, to separate church and state. In this context, I will move to a discussion in Part III of the appropriate role of religion in a public university.

I. COMPETING VISIONS OF THE ESTABLISHMENT CLAUSE

The controversy over the cross in the chapel at William & Mary is obviously part of a larger constitutional and cultural debate. The provision of the Constitution at stake is found in the First Amendment. It says: "Congress shall make no law respecting an establishment of religion ...."[13] In 1947, the United States Supreme Court held that although the provision refers to Congress, it applies equally to state and local governments.[14] There is an ongoing debate among the Justices and among constitutional scholars regarding the best understanding of the Establishment Clause. What I find interesting is that each of the Justices—and each of the scholars—can invoke quotes from Framers of the Constitution to support a

13. U.S. CONST. amend. I.

14. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

particular conception of the clause. I think that Justice Robert Jackson got it right, albeit in another context, when he said, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[15] Research will reveal little more than competing quotations that each side cites to support its position.

There are three major competing views of the Establishment Clause. One view is strict separation.[16] This says that, to the greatest extent possible, we should separate church and state. The idea is that our government should be secular.[17] The place for religion is in the private realm—in our homes; in our churches, synagogues, or mosques; in our own consciences; and in our own daily behavior. Those who believe that this is the right interpretation of the Establishment Clause think that Thomas Jefferson got it right when he coined the phrase that there should be "a wall of separation between church and state"[18]—a wall that the Supreme Court later declared both "high and impregnable."[19] It is interesting that when the Supreme Court in 1947 held that the Establishment Clause applied to state and local governments, all nine Justices then on the Court endorsed this notion that there should be a wall

15. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (discussing the intended scope of the executive power).

16. *See* Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 35-36 (2005) (describing the strict separationist view).

17. Professor Lupu argues that strict separation was the dominant theory for the Establishment Clause from 1947 to 1980. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233 (1994); *see, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) (limiting aid to parochial schools); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) (banning prayer in public schools); Engel v. Vitale, 370 U.S. 421, 435 (1962) (banning prayer in public schools).

18. Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Jefferson's letter to the Danbury Baptist Association). This was the first reference in the Supreme Court to "Jefferson's now ubiquitous ... statement." Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 AKRON L. REV. 623, 638 n.67 (2007). For the original text of the letter, see Letter from Thomas Jefferson to Messers. Nehemiah Dodge et al., a Comm. of the Danbury Baptist Ass'n (Jan. 1, 1802), *available at* http://www.loc.gov/loc/lcib/9806/danpost.html.

19. *Everson*, 330 U.S. at 18.

separating church and state.[20] Today, it is highly questionable whether a majority of the Court would endorse this view.

There is a second vision of the Establishment Clause, much different from the first. This view argues that the Establishment Clause commands that government should be neutral with regard to religion.[21] The government should not favor religion over secular matters, or for that matter, secularism over religion.[22] The government should never favor one religion over others; it should simply be neutral.

Over the last quarter century, those who take this second approach have often thought of it as a requirement that the government should not symbolically endorse religion, or a particular religion. Sandra Day O'Connor was the first Justice to put the test in this way.[23] She did so over a quarter century ago, coining the symbolic "endorsement" test.[24] Under this test, the question is whether the government is, from the perspective of a reasonable observer, symbolically endorsing religion or a particular religion.[25]

Those who take this approach say that religion is an enormously important part of American history and of American society today. Religion should not be excluded, but neither should it be favored. Given the diversity of religious beliefs, it is essential that the government always be neutral among them.[26]

A third competing vision, quite different from the first two, is called the accommodationist perspective. This view says that we should accommodate religion and government, and accommodate

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20. *Id.* at 15; *id.* at 31-32 (Rutledge, J., dissenting); *see also* Lee v. Weisman, 505 U.S. 577, 600-01 (1992) (Blackmun, J., concurring) (discussing the agreement between the majority and dissent in *Everson* with Jefferson's conception of strict separation).

21. *See* Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961); Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990).

22. *See* Rubin, *supra* note 16; *see also* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9-13 (1989) (invalidating tax exemption for religious periodicals); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (invalidating law prohibiting teaching of evolution).

23. *See* Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

24. *Id.* ("The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.").

25. *Id.*

26. *See, e.g.*, Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms*, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816-18 (2001).

government support for religion.[27] This approach says that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation.[28] Nothing else violates the Establishment Clause besides this.

Those who take this approach quote a Supreme Court decision from a few decades ago that states, "We are a religious people whose institutions presuppose a Supreme Being."[29] Those who take this approach are fond of pointing to George Washington's Thanksgiving Proclamation,[30] or even to Thomas Jefferson talking about the rights that come from our Creator.[31] They believe that, to a large extent, it is permissible for religion to be a part of government, so long as the government does not go so far as to literally establish a church or coerce religious participation.

Now, I have presented these three views to you in quite an abstract manner. But almost any issue of the Establishment Clause that you can think of, including the controversy over the cross in the William & Mary chapel, comes down to these three approaches. Let me give some examples to make this concrete rather than abstract.

Nineteen years ago, in 1989, the Supreme Court decided *County of Allegheny v. ACLU*.[32] This was decided as two companion cases that came to the Supreme Court together.[33] One involved a county courthouse that showcased a nativity scene in its large stairway display case during the December holiday season.[34] The other involved a Pittsburgh city building.[35] In front of the building, a menorah was placed during the holiday season, as well as a Christmas tree and a proclamation about the importance of tolerance during the holiday season.[36] The Supreme Court held that

27. *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14.

28. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

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

30. GEORGE WASHINGTON, THANKSGIVING PROCLAMATION (1789), *reprinted in* 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, SEPTEMBER 1789-JANUARY 1790, at 131-32 (Dorothy Twohig ed., 1993); *see also* Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

31. *E.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

32. 492 U.S. 573 (1989).

33. *Id.* at 578.

34. *Id.* at 579.

35. *Id.* at 578.

36. *Id.* at 581-82.

the nativity scene was unconstitutional, but the menorah was constitutional.[37]

Stated that way, it may seem strange: surely the Supreme Court was not favoring Jewish religious symbols over Christian ones. But the way in which the Court came to this result was the product of a division among the Justices with respect to the three theories of the Establishment Clause. Four Justices took the accommodationist perspective.[38] Justice Anthony Kennedy wrote for them; he was joined by Chief Justice Rehnquist, Justice White, and Justice Scalia.[39] Justice Kennedy expressly espoused the accommodationist philosophy: the government only violates the Establishment Clause if it is creating a church or coercing religious participation.[40] Religious symbols on government property do not do that.[41] For these Justices, both the nativity scene and the menorah, or any religious symbol, would be permissible.[42]

Three of the Justices would have found both the nativity scene and the menorah unconstitutional.[43] These would be the strict separationist Justices. At that time, the three were Justices Brennan, Marshall, and Stevens.[44] Their view was that, although a private business and even a private university can put up religious symbols, such symbols do not belong on government property.[45] Certainly, a nativity scene is quintessentially a religious symbol.[46] In fact, it is a profoundly important religious symbol for those of the Christian faith.[47] A menorah is also a religious symbol; it is a symbol of the Jewish holiday of Hanukkah.[48] It is about a particular event in Jewish history, when Jews were endangered and had only enough oil for one night, but it burned for eight days.[49] This is

37. *Id.* at 621.
38. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).
39. *Id.*
40. *Id.* at 662-63.
41. *Id.* at 664.
42. *See id.* at 679.
43. *Id.* at 637 (Brennan, J., concurring in part and dissenting in part).
44. *Id.*
45. *Id.* at 637-38.
46. *Id.*
47. *See id.* at 651 (Stevens, J., concurring in part and dissenting in part).
48. *Id.* at 582-83 (majority opinion).
49. *Id.* at 583.

forever memorialized in the menorah, as it is lit night by night for the eight nights of Hanukkah.[50] Justices Brennan, Marshall, and Stevens said that both the nativity scene and the menorah are religious symbols and should not be on government property.[51]

This left Justices Blackmun and O'Connor. They were the neutrality Justices. Their view was that the government violates the Establishment Clause only if the government is symbolically endorsing religion, or a particular religion.[52] For them, the nativity scene in the county courthouse violated the Establishment Clause because it was a religious symbol of one religion on government property.[53] Interestingly, Justice O'Connor earlier had said that there could be nativity scenes on government property as long as they were accompanied by symbols of other religions and secular symbols.[54] For them, a nativity scene standing alone on government property was an impermissible symbolic endorsement of Christianity.[55]

By contrast, they found that the menorah was permissible because it was surrounded by other symbols.[56] There was a Christmas tree.[57] There was a proclamation about tolerance in the holiday season.[58] There was an overall holiday display. According to Blackmun and O'Connor, the reasonable observer would not see the menorah as part of a religious display, but as part of a holiday display.[59] Consequently, there was no symbolic endorsement for Judaism.[60] Thus, the Court very much divided along the lines of these three Establishment Clause theories.

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50. *Id.*

51. *Id.* at 637 (Brennan, J., concurring in part and dissenting in part).

52. *Id.* at 601 (majority opinion); *id.* at 625 (O'Connor, J., concurring). Although Blackmun and O'Connor agreed, Blackmun delivered the majority opinion.

53. *Id.* at 612 (majority opinion); *id.* at 626-27 (O'Connor, J., concurring).

54. *Id.* at 626 (O'Connor, J., concurring) ("In *Lynch*, I concluded that the city's display of a crèche in its larger holiday exhibit in a private park in the commercial district had neither the purpose nor the effect of conveying a message of government endorsement of Christianity or disapproval of other religions." (citing Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring))).

55. *Id.* at 612-13 (majority opinion); *id.* at 627 (O'Connor, J., concurring).

56. *Id.* at 617 (majority opinion); *id.* at 635 (O'Connor, J., concurring).

57. *Id.* at 617 (majority opinion); *id.* at 632 (O'Connor, J., concurring).

58. *Id.* at 632 (O'Connor, J., concurring).

59. *Id.* at 617-18 (majority opinion); *id.* at 635-36 (O'Connor, J., concurring).

60. *Id.* at 619 (majority opinion); *id.* at 636 (O'Connor, J., concurring).

Two years ago, I argued in the Supreme Court about the Texas Ten Commandments monument.[61] As I approached that case, I counted the Justices exactly along the lines of these three theories. Going in, I felt that three of the Justices were strict separationists: Justices Ginsburg, Souter, and Stevens. In many opinions over the years, they had espoused the strict separationist philosophy.[62] I also knew that there were four accommodationist Justices: Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas.[63] Just as I was fairly confident that Justices Stevens, Ginsburg, and Souter would vote on my behalf, I knew that, realistically, there was no chance I would get the votes of Rehnquist, Scalia, Kennedy, or Thomas. That left the two Justices then on the Court who took the neutrality approach: Justices O'Connor and Breyer.[64] My brief and presentation of oral argument to the Supreme Court was all about why this six-foot high and three-foot wide Ten Commandments monument should be seen as a symbolic endorsement of religion.[65] I was pretty confident that I would get Justice Breyer's vote; in most religion cases, he had gone along with Justices Stevens, Souter, and Ginsburg.[66] I thought the case would turn on Justice O'Connor.

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61. Van Orden v. Perry, 545 U.S. 677 (2005); *see supra* notes 1-3.

62. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 867-68 (2000) (Souter, J., dissenting) (Stevens and Ginsburg joining in his dissent); Agostini v. Felton, 521 U.S. 203, 242 (1997) (Souter, J., dissenting) (Stevens and Ginsburg joining in his dissent).

63. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763-64 (1995). Although the *Capitol Square* majority included Justices O'Connor, Souter, and Breyer, the portion of the opinion expressing the accommodationist perspective, written by Justice Scalia, was joined only by Chief Justice Rehnquist and Justices Kennedy and Thomas. *Id.* at 756.

64. For a contrast of the neutrality approach with the accommodationist approach, see *id.* at 772-73 (O'Connor, J., concurring) (Breyer joining in her concurrence).

65. *See* Reply Brief for Petitioner at **3, 16-17, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 429975; Transcript of Oral Argument, *supra* note 6, at 9-10.

66. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844 (2005) (Justices Stevens, Ginsburg, and Breyer joining Justice Souter in upholding a preliminary injunction barring the display of the Ten Commandments); Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Souter, J., dissenting) (Justices Stevens, Ginsburg, and Breyer joining Justice Souter in arguing that tuition assistance for children attending religiously affiliated schools violates the Establishment Clause); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (Justices Souter, Ginsburg, and Breyer joining Justice Stevens in finding that student-led prayer at public schools violates the Establishment Clause); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting) (Justices Stevens, Ginsburg, and Breyer joining Justice Souter in arguing that UVA was compelled by the Establishment Clause to deny a religious group publication funding).

Therefore, I was not surprised when, in June of 2005, I learned that I lost 5-4.[67] I was surprised, though, when I found out that I got Justice O'Connor's vote, but lost because of Justice Breyer.[68] Of course, he did not go along with Chief Justice Rehnquist's plurality opinion.[69] Chief Justice Rehnquist, as I expected, wrote an opinion joined by Justices Scalia, Kennedy, and Thomas.[70] He wrote that religious symbols on government property do not violate the Establishment Clause.[71] Justice Breyer concurred in the judgment to allow the Ten Commandments monument to stay, but not for the reasons in the plurality opinion.[72] In fact, Breyer agreed with the dissenting Justices, including Justice O'Connor, that the proper test is whether there was symbolic endorsement of religion.[73] But, he found that this particular Ten Commandments monument was not a symbolic endorsement of religion.[74] It had been in place since 1961;[75] it had been paid for by the Fraternal Order of Eagles, not the State of Texas;[76] and there were many other monuments on the Texas State Capitol grounds.[77]

So, until the summer of 2005, when Chief Justice Rehnquist died and Justice O'Connor retired, there were three Justices who were strict separationists, two who took the neutrality approach, and four who took the accommodationist approach.[78]

All of this also explains the controversy regarding the cross in the chapel at William & Mary. If one is a strict separationist, one would

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67. *Van Orden*, 545 U.S. at 677, 679, 692.

68. *Id.*

69. *Id.* at 679.

70. *Id.*

71. *Id.* at 690 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.").

72. *Id.* at 699-705 (Breyer, J., concurring).

73. *Id.* at 699-700.

74. *Id.* at 703 ("I believe that the Texas display—serving a mixed but primarily nonreligious purpose, not primarily 'advanc[ing]' or 'inhibit[ing] religion,' and not creating an 'excessive government entanglement with religion,'—might satisfy this Court's more formal Establishment Clause tests." (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971))).

75. *Id.* at 712 (Stevens, J., dissenting).

76. *Id.* at 701 (Breyer, J., concurring).

77. *Id.* at 702. In fact, the monument was located in "a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas." *Id.*

78. *See supra* notes 62-64 and accompanying text.

argue that the cross is an inherently religious symbol. A few years ago, the Ninth Circuit, in a case that involved a cross on public property on a hill outside of San Diego, held that the cross is the preeminent symbol of Christianity;[79] especially for Catholics, it is a symbol of profound religious importance. Thus, if you are a strict separationist, you would say that the place for a cross is in a student's dorm room, a faculty office, a person's home, and maybe a person's lawn, a church, or a private business, but not in a public university.[80]

If one takes the neutrality approach, the question is: what would a reasonable observer think upon seeing the cross in the chapel at William & Mary?[81] Would the reasonable observer think that it was there for religious purposes, or just for historical purposes? One could argue over that point; my own sense is that a cross in a chapel is a religious message, not a historical message, but I understand that one could disagree.

Of course, the accommodationist approach would say that religious symbols on government property are fine.[82] Even a religious symbol as profoundly sectarian as a cross is allowed because it is not actually establishing a church or coercing religious participation.

Now, with regard to the Supreme Court, a different Court exists today than the one before which I argued *Van Orden v. Perry*[83] two years ago. Chief Justice Rehnquist was replaced by Chief Justice John Roberts;[84] Justice Sandra Day O'Connor was replaced by Justice Samuel Alito.[85] This new Court has not dealt with an Establishment Clause issue, but most commentators, liberal and conservative, think that this is the area most likely to see a major

79. Ellis v. City of La Mesa, 990 F.2d 1518, 1527 (9th Cir. 1993) (holding that crosses on public property violated California's Constitution since they represented the "preeminent symbol of Christianity").

80. *See supra* notes 16-20 and accompanying text. In fact, one of the plaintiffs in *Ellis* was John Murphy, a Catholic who was offended by the display of the cross on public property. *See Ellis*, 990 F.2d at 1523.

81. *See supra* notes 21-26 and accompanying text.

82. *See supra* notes 27-31 and accompanying text.

83. 545 U.S. 677 (2005).

84. Maura Reynolds, *Roberts Is Sworn In as Chief Justice: Much of Washington's Attention Has Already Turned to the Other Court Vacancy, Which Could Be Much More Contentious*, L.A. TIMES, Sept. 30, 2005, at A1.

85. Jeff Zeleny, *Alito Now 2nd Bush Justice: Roberts Swears Him In After Partisan 58-42 Senate Vote*, CHI. TRIB., Feb. 1, 2006, at C1.

shift in constitutional doctrine.[86] Most likely, John Roberts believes in the same approach that William Rehnquist did—the accommodationist approach; most agree that Samuel Alito endorses that view as well.[87] Today, there may very well be five Justices who believe in that accommodationist approach, and if so, we could soon see radical changes in the law regarding the Establishment Clause.

II. THE CASE FOR STRICT SEPARATION

In this Part, I would like to discuss why the strict separationist approach is the preferable one with regard to the Establishment Clause. There are many reasons for this: I could make an originalist argument, saying that Thomas Jefferson really meant it when he spoke of a wall of separation between church and state, and that his words reflect the original meaning of the drafters.[88] I could argue that I believe that the Framers saw themselves as children of the Enlightenment, where reason would replace religion as a basis for decision.[89] I could also argue that many came to the United States to avoid religious persecution, and that the Framers wanted to avoid what was in England—an official state church.[90] But I must admit,

86. *See, e.g.*, Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and "Majority Religion"*, 21 WASH. U. J.L. & POL'Y 323, 341 (2006) ("[A]nd ... the Roberts Court will begin from the forward position secured by the Rehnquist Court and move the church-state line even more radically in the pro-religion direction."); Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 50 (2005) ("The replacement of Rehnquist by John Roberts ... portends a realignment on these cases that will probably lead the Court at least in the direction of the *Van Orden* plurality...." (citations omitted)).

87. *See, e.g.*, Sekulow & Manion, *supra* note 86, at 50 & nn.118-19 (speculating that the addition of Roberts and Alito will move the Court toward Chief Justice Rehnquist's *Van Orden* plurality).

88. *See supra* note 18 and accompanying text.

89. *See generally* DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 39-45, 49-51 (2006) (explaining that Deists were a product of the Enlightenment who believed in "human inquiry as well as a self-confident challenge of traditional political, religious, and social ideas," and that chief among them were "Franklin, Washington, Adams, Jefferson, Madison and Monroe").

90. *See* FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 17-19, 40-45 (2003) ("Whatever their theological differences, the Protestant immigrants held one shared conviction: religious freedom was essential for a people desiring to define and practice the one true faith. From their past, the various English transplants brought with them a keen appreciation of the tension running between church and state."). *See generally* Edwin S. Gaustad, *Geography and Demography of American Religion*, *in* 1 ENCYCLOPEDIA OF

in all honesty, that I believe one could find just as much evidence and just as many quotations from the Framers for each of the other two theories. This is why I believe that we cannot resolve modern constitutional issues by looking back at history; history is far too equivocal for that. The Framers were not of one mind with regard to religion.[91] Indeed, the Framers varied greatly among themselves in the degree of their own religious observance.[92]

Aside from that, I do not think one can take the world as it existed in 1791, when the First Amendment was first adopted, and apply it to the issues of 2008. We are a far more religiously diverse society than the Framers could have ever imagined. The country, at its founding, was an entirely Christian nation.[93] Today, there are more religions than I could possibly list.[94] Thus, I do not make the argument for strict separation based on the Framers' intent, although I think I could; instead, I make it in terms of what I think are the underlying goals of the Establishment Clause, thus asking:

THE AMERICAN RELIGIOUS EXPERIENCE 71, 72-73 (Charles H. Lippy & Peter W. Williams eds., 1988) (discussing how persecution in Europe provided an impetus for religious groups to seek freedom in the New World).

91. *See* HOLMES, *supra* note 89, at 39-45, 49-51, 143-49, 154-60 (comparing the differing religious beliefs and motivations of several of the Framers); LAMBERT, *supra* note 90, at 241-53 (describing the impact that varying religious views had on shaping the Constitution); MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING 52-73 (2002) (discussing religious viewpoints and their influences upon the Framers).

92. *See* HOLMES, *supra* note 89, at 39-45, 49-51, 143-49, 154-60 (comparing the differing religious beliefs and motivations of several of the Framers); TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS 125-43 (1987) (describing the religious beliefs of five of the most influential founding fathers); MICHAEL NOVAK & JANA NOVAK, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHERS OF OUR COUNTRY 119-42 (2006) (describing the religious convictions of George Washington).

93. SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 124 & n.1 (2d ed. 2004) ("Indeed, Puritanism provided the moral and religious background of fully 75 percent of the people who declared their independence in 1776." (citation omitted)); *see* LAHAYE, *supra* note 92, at 68-70 (noting that the "four million citizens who shared in the founding of this republic were not only Christian, but also overwhelmingly Protestant").

94. *See, e.g.*, Newell S. Booth, Jr., *Islam in North America*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE 723 (Charles H. Lippy & Peter W. Williams eds., 1988); Robert S. Ellwood, *Occult Movements in America*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE, *supra*, at 711; John Y. Fenton, *Hinduism*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE, *supra*, at 683; C. Carlyle Haaland, *Shinto and Indigenous Chinese Religion*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE, *supra*, at 699; Charles S. Prebish, *Buddhism*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN RELIGIOUS EXPERIENCE, *supra*, at 669.

what are the objectives that the constitutional provision was meant to achieve?

Strict separation is desirable for several reasons. First, I think that it is a way of ensuring that we can all feel that it is "our" government, whatever our religion or lack of religion. If government becomes aligned with a particular religion or religions, those of other beliefs are made to feel like outsiders. Justice O'Connor captured this better than anyone in her writings for the Court. She said that the Establishment Clause is there to make sure that none of us is led to feel that we are insiders or outsiders when it comes to our government.[95] I do not know if any of you have had the experience of going to a banquet where a minister or priest of a different religion stands up and gives a very sectarian benediction or invocation. It makes one feel very out of place, as though one does not belong there. The same thing happens if our government becomes aligned with a particular religion. Some of us are made to feel that we just do not belong in that place. If there were a large Latin cross atop a city hall, those who were not part of religions that accept the cross as a religious symbol would feel that it was not "their" city government.

When I argued in front of the Supreme Court in the Ten Commandments case, I said, "Imagine that [a] judge put the Ten Commandments right above his or her bench. That would make some individuals feel like outsiders."[96] In the same way, how would one who does not accept God, or one who does not believe that there is one God, feel about walking into the Texas Supreme Court or the Texas State Capitol and seeing "I am the Lord, thy God," and seeing underneath it, "Thou shalt have no other gods before me"?[97] It seems to me that if we want our citizens to feel that the government is open for everyone—that it is their government—we need our government to be strictly secular.

A second important reason to favor strict separationism is that it is wrong to tax people to support the religion of others. James

95. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, and not full members of the political community, and an accompanying message to adherents that they are insiders ....").

96. Transcript of Oral Argument, *supra* note 6, at 17-18.

97. Van Orden v. Perry, 545 U.S. 679, 707 (2005) (Stevens, J., dissenting).

Madison captured this best in Virginia, where he talked about why he believed that it was, in his words, "immoral" to tax people to support religions in which they did not believe.[98] Each of us has our own religion, or maybe we decided that we do not have any religion, but should our tax dollars go to advance a religion in which we do not believe? What if it is a religion that teaches things that we find abhorrent? Should we have our tax dollars go to that? Certainly we have the right to give our money to support any religion or any cause we want, but it is wrong to be coerced to give our tax dollars to religions we do not believe in. That is why strict separation is best: it allows people to choose how to spend their money, rather than permitting the government to use it against their own wishes.

A third reason that strict separation is best is that it prevents the coercion that is inherent when the government becomes aligned with religion. World history, to say nothing of the history of this country, shows us that inherently, when the government becomes aligned with religion, people feel coerced to participate.[99] Sometimes it can be in the context of public schools. A few years ago, a controversy arose regarding the words "under God" in the Pledge of Allegiance.[100] My daughter was then attending a Los Angeles public school. When she came home at the beginning of her second week of kindergarten, she wanted to demonstrate to her mom and me that she could say the Pledge of Allegiance. She put her hand over her heart, and she recited it, including the words "under God." My wife turned to me and said, "I thought that the Ninth Circuit said that students weren't supposed to say 'under God.'"[101] My daughter, having no idea what the Ninth Circuit was, said, "Oh, you have to say that or else you get sent to the principal's office." That is certainly not what the teacher told the kids, but what my daughter

98. *See* James Madison, *Memorial and Remonstrance Against Religious Assessment* (June 20, 1785), *in* 8 THE PAPERS OF JAMES MADISON 295, 298-306 (Robert A. Rutland et al. eds., 1973) (urging the Commonwealth of Virginia not to enact a bill providing support to religious groups through the levy of a tax).

99. *See, e.g.*, HENRY KAMEN, THE SPANISH INQUISITION: AN HISTORICAL REVISION 10-11 (1997) (discussing the status of *conversos*—Jews or Muslims who had been forced to convert to Christianity—and the continuing pressure to conform in fourteenth century Spain).

100. *See* Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), *rev'd*, 542 U.S. 1 (2004); *see also* Linda Greenhouse, *Supreme Court To Consider Case on "Under God" in Pledge to Flag*, N.Y. TIMES, Oct. 14, 2003, at A1.

101. *See Newdow*, 292 F.3d at 612.

internalized during her first week of kindergarten is that you do what the teacher says or the punishment is that you go to the principal's office. What the teacher told her was that you say the words "under God." She was five years old at the time, but notice the coercion. It was very subtle coercion, but it was there. Certainly, this is why the Supreme Court has repeated for forty-five years that prayer, even voluntary prayer, does not belong in public schools.[102]

Once the government becomes aligned with religion, coercion becomes so easy. We have seen this at public universities. Cadets at the Air Force Academy talk movingly about being forced to participate in Christian religious ceremonies, even if they are not Christians.[103] This is the danger if we do not separate church and state.

A fourth reason why strict separation is the best theory is to protect religion. Roger Williams, a co-founder of Rhode Island, talked about this prior to the drafting of the Establishment Clause.[104] He wanted to separate church and state not to safeguard the state from religion, but to protect religion from the state.[105] The reality is that the more the government becomes involved in religion, the more the government will regulate religion and, consequently, the greater the danger is to religion. There is also the danger of trivializing religion.[106] I have often thought, for religious people, the problem with saying the nativity scene is secular—and that is why it should remain on government property—is that it trivializes a profound religious symbol. To say that a cross is just there for secular purposes ignores how important the cross is as a religious symbol.

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102. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (holding that the Establishment Clause forbids prayer at public school graduations); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down a statute authorizing "moments of silence" at public schools as violating the Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (finding that the Establishment Clause barred reading Bible passages in public schools); Engle v. Vitale, 370 U.S. 421 (1962) (holding that states may not compose official prayer to be read in public schools).

103. Josh White, *Intolerance Found at Air Force Academy*, WASH. POST, June 23, 2005, at A2.

104. *See* JAMES P. BYRD, JR., THE CHALLENGES OF ROGER WILLIAMS 121-27 (2002) ("In the process of corrupting the church, Williams believed that Christendom had corrupted biblical exegesis by devising an interpretative method that supported the state's claim to authority over religious matters.").

105. *Id.*

106. *See* Madison, *supra* note 98, at 301.

I do not believe that strict separation is hostile to religion. I strongly believe that we need a robust Free Exercise Clause to guard the ability of people to practice whatever religion they choose, or to practice no religion. But the place for religion should be in the private realm; our government should be strictly secular.

The problem that I have with the neutrality theory, in terms of symbolic endorsement, is as follows: how do you decide whether a reasonable person would see a symbol as religious or secular? How do you determine if a person who walked into the Wren Chapel would see the cross as being there for religious or historical reasons?

I was amused in the Ten Commandments case[107] that the State of Texas argued that the Ten Commandments were there for historical purposes. They argued, "Look at all the other symbols on the ground."[108] They included in their brief an aerial photo of the Texas State Capitol grounds to show all of the symbols.[109] Certainly, we cannot decide what a reasonable observer would think based on the perspective of a reasonable observer in a low-flying airplane.[110] Yet Justice Breyer included that aerial photograph of the Texas State Capitol grounds in his opinion.[111]

The problem with the accommodationist theory is that it really imposes no limits on the ability of the government to support religion, or of religion to become a part of government. If one were to take this approach—and there well may be five Justices on the bench today who would do so[112]—then the government could put a large Latin cross atop a city hall; the government could have voluntary prayer in schools; and the government could give aid to parochial schools, so long as it did not discriminate amongst religions—even if the aid was used for religious indoctrination. To me, that belies the key goals of the Establishment Clause.

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107. Van Orden v. Perry, 545 U.S. 677 (2005).
108. Brief for Respondent, *supra* note 7, at *4 (paraphrasing respondent's brief).
109. *Id.* at add. A.
110. *See* Reply Brief for Petitioner, *supra* note 65, at *3.
111. *Van Orden*, 545 U.S. at 706 app. (Breyer, J., concurring).
112. *See supra* notes 63, 86-87 and accompanying text.

III. THE ROLE OF RELIGION IN PUBLIC UNIVERSITIES

In conclusion, it is important to talk about the role of religion in a public university. I think a university is a very special place. At the risk of mixing metaphors and invoking religion in an Essay in which I am endorsing secularism, I would even say that a university is a sacred place. Many things make a university special, including the commitment to academic freedom—that all ideas should be expressed and debated; and the commitment to diversity in every way—diversity in terms of who is on the faculty, who are the students, and what views are held. The university is truly a place where people of all persuasions and types and views should be present. The public university is also a place where people, at times, *must* be present. Students live in dormitories. Students have to go to class (at least they are supposed to). Faculty have offices. The university is not a place where people can just drop in and out on a whim. We have to be sensitive, therefore, to what is endorsed and espoused by the objects allowed to be present there.

Religion in the public university should be guided by three principles. First, the university must protect the free exercise of religion. I have been focusing on the Establishment Clause, and the reason I do so is because that is the underlying issue about the cross in the William & Mary Wren Chapel; but we should not ignore the free exercise of religion. Universities should carefully protect the free exercise of religion.[113] Universities should ensure that students are excused for religious holidays. That does not mean universities should cancel classes on Good Friday or Rosh Hashanah, but they should excuse students who believe their religion requires them not to attend class. Chapels, too, have an important place at the public university. Often students do not have the ability to go off campus for religious observance, so a chapel provides a convenient place for students to go for their own religious observances and celebrations.

113. *See* Widmar v. Vincent, 454 U.S. 263, 271-72 nn.10-12 (1981) (indicating that public universities should not restrict the equal access of religious groups to public fora on campus and noting that were the university to exclude religious groups, such activity would "risk greater 'entanglement'" with religion (citing Chess v. Widmar, 635 F.2d 1310, 1318 (8th Cir. 1980))).

The second principle that has to be followed at a public university is that there has to be strong protection of religious speech by students. This is distinguished from free exercise generally because speech of all sorts, including religious speech, deserves unique protection in the university.[114] There was a Supreme Court case over a quarter-century ago in which the University of Missouri at Kansas City said that any student group could use campus buildings, unless it was a religious group that wanted to use the building.[115] The Supreme Court got it right in ruling against the University of Missouri.[116] The government should not be able to discriminate against speech based on content, including religious content.[117] If a university is going to open its buildings and facilities to secular student groups, it should open those buildings equally to religious student groups.[118] There should be no discrimination based on the content of the speech.

The third and final principle is that a public university should be strictly secular in all the university does. This fits very much with the strict separationist philosophy, and is also not inconsistent with the neutrality principle.[119] The university should protect the speech of all students, including religious students. The university should protect the right of every student to observe religion in every way he or she wants. But the university itself, in everything it does, should be strictly secular. And so for this reason, religious symbols—that is, symbols of a particular religion—should not be displayed on university property.

I therefore agree with President Nichol's determination that a large Latin cross hanging in a chapel of a public university violates the Establishment Clause, or at least the values underlying the Establishment Clause.[120] It is about the religion becoming a part of

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114. *See* Kleindienst v. Mandel, 408 U.S. 753, 763 (1972) ("This Court has recognized that [the First Amendment] right is 'nowhere more vital' than in our schools and universities." (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))).

115. *Widmar*, 454 U.S. at 264-65.

116. *Id.* at 267.

117. *Id.* at 269 n.6 (noting that religious speech is no different for First Amendment purposes than any other kind of speech).

118. *Id.* at 270-75 (finding that the University must open its facilities to religious and secular groups equally).

119. *See generally supra* notes 16-26 and accompanying text.

120. *See* Andrew Petkofsky, *W&M President Reiterates Reasons for Cross Removal*,

the government. It is about violating the wall that separates church and state.

A cross is a profoundly sectarian religious symbol, associated with Christian religions. Although, as explained above, universities should have chapels to facilitate free exercise of religion, they must be non-denominational so that all students feel welcome and treated equally. There is an enormous difference between a public university having a chapel and it having a Christian chapel (or one that would be perceived that way based on its symbols).

Professor Gerard Bradley argues that removing the cross makes the supporters of the cross feel like outsiders.[121] But there is no stopping point to his argument. By his analysis, it would be desirable to have crosses atop every government building because their absence makes their supporters feel like outsiders. Professor Bradley falsely equates the interests of those who want religious symbols with those who do not. The Establishment Clause, though, does not make them the same. As explained above, I believe that the Establishment Clause requires that the government be secular. Those who want their government to support religion are denied this preference, whereas those who want their government to be secular prevail because that is what the Establishment Clause is all about.

Professor Bradley also challenges the idea that a university should make all feel welcome on campus.[122] He says, for example, that students who object to a "Sex Workers' Art Show," for example, do not have their sensibilities protected.[123] But there is no clause in

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RICHMOND TIMES-DISPATCH, Nov. 17, 2006, at B1. When he was summoned before the Board of Visitors, Nichol explained, "Though we haven't meant to do so, the display of a Christian cross—the most potent symbol of my own religion—in the heart of our most important building—sends an unmistakable message that the chapel belongs more fully to some of us than to others." *Id.*

121. *See* Gerard V. Bradley, *Religion at a Public University*, 49 WM. & MARY L. REV. 1935, 2231-34 (2008).

122. *See id.* at 2221-23 (arguing that a college's actions will inevitably make some feel like "outsiders").

123. *Id.* at 2222. During the Wren Cross debate, William & Mary allowed a traveling "Sex Workers' Art Show" to perform on campus. *See College of William and Mary Hosts Sex Workers Show on Campus*, FOXNEWS, Feb. 23, 2007, http://www.foxnews.com/story/0,2933, 254142,00.html. Many believed that President Nichol's refusal to prohibit the show was one factor that contributed to his eventual resignation. *See* Bill Geroux, *Embattled W&M Chief Resigns; Board Tells Him It Won't Renew His Contract; He'll Still Teach at Law School*,

the Constitution that says that people are protected from all that the government may do that makes them feel like outsiders. Unlike Professor Bradley, I strongly agree with the many pronouncements from the Supreme Court that separation is a core aspect of what the Establishment Clause is about. Historical experience teaches that making people feel like outsiders because of their religion is so pernicious and undesirable that the government should be prohibited from doing so.

Finally, Professor Bradley argues that preventing the government's endorsement of religion in essence gives a "heckler's veto" to those who do not want religious symbols.[124] Although "heckler's veto" has a pejorative connotation, that is exactly what the Establishment Clause does. Lawsuits that successfully prevent prayer in public schools also could be called a heckler's veto. For that matter, any lawsuit that stops the government from doing something that the majority wants can be labeled a "heckler's veto." But a Constitution that limits what government does allows law suits to enforce its restrictions.

Of course, what really underlies my disagreement with Professor Bradley (and his with President Nichol) is a very different view of the Establishment Clause. Professor Bradley, for example, says that he believes that it is the university's role to endorse religion.[125] I vehemently disagree and believe that such government endorsement or support for religion violates the wall that separates church and state. My view, as explained above, is that government should be as secular as possible, leaving religion entirely for the private realm of people's lives. A university, of course, must not discourage or interfere with religion, but nor can it endorse or encourage religious activity.

RICHMOND TIMES-DISPATCH, Feb. 13, 2008, at A1.

124. Bradley, *supra* note 121, at 2240 (arguing that the Establishment Clause test employed by President Nichol to justify removal of the Wren Cross was "tantament to a heckler's veto").

125. *See id.* at 2241 ("[A] public university is obliged by virtue of its supervision of a community's life to "'endorse' religion ...."); *see also id.* at 2249-51.

CONCLUSION

In a Ten Commandments case several years ago, Sandra Day O'Connor said:

> Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.... Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?[126]

President Nichol acted courageously and appropriately to enforce the United States Constitution and maintain the wall of separation between church and state.[127] Those who opposed and attacked him want a form of government endorsement of sectarianism that is fundamentally at odds with the Establishment Clause. Not only is

126. McCreary County v. ACLU, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

127. On February 12, 2008, President Nichol resigned from his post after learning that the College's Board of Visitors would not renew his contract. *See* Geroux, *supra* note 123. The morning of his resignation, Nichol sent an e-mail to the campus community in which he offered his explanation for the Board's actions. Nichol acknowledged that he "altered the way a Christian cross was displayed in a public facility, on a public university campus, in a chapel used regularly for secular College events ... in order to help Jewish, Muslim, Hindu, and other religious minorities feel more meaningfully included as members of our broad community." E-mail from Gene R. Nichol, President, College of William & Mary, to Members of the William & Mary Community (Feb. 12, 2008, 09:42:36 EST) (on file with William and Mary Law Review). Nichol added that the "decision was likely required by any effective notion of separation of church and state." *Id.* In his message, Nichol charged that the Privileges and Elections Committee of the Virginia House of Delegates had threatened to remove Board appointees if Nichol was "not fired over decisions concerning the Wren Cross." *Id.* Defending his decision, Nichol invoked Jefferson's "wall of separation" and stated, "We are charged, as state actors, to respect and accommodate all religions, and to endorse none." *Id.*

such a form of government dangerous, but it is also antithetical to the First Amendment.