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WHEN GOVERNMENT SPEAKS RELIGIOUSLY

E. GREGORY WALLACE*

Religious ideas, symbols, and voices are woven extensively into the tapestry of American public tradition. When the inclusion of religious elements in public life is the result of government action, that tradition collides with constitutional doctrine. The most direct means of inclusion is through various forms of official expression. Government speaks religiously when it uses words or symbols to convey religious ideas or sentiments, such as the delivery of a prayer at a public event or the display of a religious symbol on public property.¹ This includes not only official messages that carry overtly religious meanings but also those that acknowledge or affirm the value of religion to society. Such speech is restrained by the Establishment Clause, but drawing the establishment line between permissible and impermissible messages is enormously difficult.²

Public culture and institutions are replete with “distinctively religious elements”³ attributable to government expression. For example, the pledge of allegiance to a nation “under God”⁴ and our national

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¹ “Government religious speech” and similar terms are used in this Article as shorthand for the broad class of expressions undertaken or approved by the government that may violate the Establishment Clause. Religious messages by private speakers may be attributed to the state if the state exercises sufficient control over the origin or content of those messages. For example, in Lee v. Weisman, school officials decided to include an invocation and benediction in the graduation ceremony, selected a local clergyman to offer the prayers, and gave the clergyman verbal and written guidelines for the content of the prayers. 112 S. Ct. 2649, 2655-56 (1992).

² By contrast, objective or descriptive speech about religion, such as teaching the history of religion or studying the Bible as literature in public schools, does not implicate the Establishment Clause. See School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (objective study of comparative religion, history of religion, or the Bible for literary or historic qualities does not violate First Amendment).


motto "In God we trust" are religious affirmations. Federal law provides for observance of a "National Prayer Day." Twice during the past decade the significance of the Bible has been recognized by executive and congressional proclamations. Religious symbols are displayed on public property during holiday seasons, and religious art is exhibited in public galleries. Government buildings are etched with prayers and Bible verses, crosses are erected on public land, and religious texts or symbols appear on official seals and national monuments. Our cities have religious names such as St. Louis, St. Paul, St. Augustine, Corpus Christi, Zion, Los Angeles, and San Francisco. Legislatures, councils, and official events often open with prayer. Chaplains are employed to serve our legislatures, armed forces, and prisons. Speeches by great political leaders such as Abraham Lincoln contain religious interpretations of national events. The President is sworn into office with his hand on the Bible and the final supplication, "So help me God." Even "Moses the Lawgiver" is displayed above the Supreme Court's bench and court sessions are opened with the cry, "God save the United States and this Honorable Court." As the Court has noted with ample citation, "[o]ur history is replete with official references to the value and invocation of Divine guidance."


8. For example, inscribed on the walls of the Jefferson Memorial is the vow Thomas Jefferson made in 1800: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man." Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), in 10 The Writings of Thomas Jefferson 173, 175 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903).

9. There are 14 references to God among the 699 words in Abraham Lincoln's Second Inaugural Address, given March 4, 1865, which describes the horrors of slavery and the Civil War from the perspective of God's providence and retribution. See Abraham Lincoln's Second Inaugural Address (Mar. 4, 1865), in The Life and Writings of Abraham Lincoln 839-42 (Philip Van Doren Stern ed., 1940). The Address is inscribed on the walls of the Lincoln Memorial.

10. Lynch v. Donnelly, 465 U.S. 668, 675 (1984); see id. at 674 ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.")
Oliver Wendell Holmes once remarked, "We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it." To many, official texts, symbols, and practices that convey religious meanings perform unique and significant functions in our society. These symbols teach historical values and traditions, provide a common sense of identity and social cohesion, bring solemnity to public occasions, and remind us that there are standards and values higher than those of the state. To others, however, such public recognition of religion "stands as a dramatic reminder of their differences with [religious] faith." That is why cases involving government prayer or display of religious symbols typically generate more public controversy than other Establishment Clause disputes. Such cases usually pit those who believe that official affirmation or commemoration of America's religious heritage is both necessary and desirable against those who view such practices as a vehicle for injecting the majority’s religion (usually Christianity) into public life.

The Supreme Court is deeply divided over how to apply the Establishment Clause to government action that expresses or affirms religious sentiments. The most recent decisions, Lee v. Weisman and Allegheny v. ACLU, which involved graduation prayer and holiday displays, generated a total of nine separate opinions reflecting at least four different positions. Separationists on the Court generally consider official religious expression to be unconstitutional unless the words or symbols used have largely lost their religious content over time. Justice O'Connor’s so-called “endorsement test,” on the other hand, would permit religious speech that retains its religious

16. 492 U.S. 573 (1989) (invalidating nativity scene displayed against backdrop of greenery and poinsettias, but permitting menorah displayed alongside secular symbols of the holiday season).
17. See, e.g., Allegheny, 492 U.S. at 613-22 (Blackmun, J.); id. at 637-46 (Brennan, J., concurring in part and dissenting in part); id. at 646-55 (Stevens, J., concurring in part and dissenting in part); Lynch, 465 U.S. at 715-17 (Brennan, J., dissenting). With the retirement of Justices Brennan and Blackmun, Justice Stevens is the remaining separationist voice on the Court. Justice Souter also appears sympathetic to the separationist position. Both have consistently voted for establishment claims in divided cases in recent years, except in Board of Education v. Mergens, 496 U.S. 226 (1990), where Justice Stevens dissented alone.
meaning or significance,\textsuperscript{18} but only if the religious message, within its larger context, is mitigated in favor of one that "sends a message of pluralism and freedom to choose one's own beliefs."\textsuperscript{19} The so-called "coercion test" proposed by Justice Kennedy would allow the government to speak religiously unless it directly or indirectly "coerce[s] anyone to support or participate in any religion or its exercise,"\textsuperscript{20} or unless "governmental exhortation to religiosity ... amounts in fact to proselytizing."\textsuperscript{21} Justices Scalia and Thomas and Chief Justice Rehnquist take a similar view, but would permit the government to engage in nonsectarian religious expression so long as there is no direct coercion, that is, coercion "by force of law and threat of penalty."\textsuperscript{22}

An approach is needed that not only is faithful to the historic values expressed in the Establishment Clause, but also accounts for the unique difficulties related to official expression of religious sentiments in a religiously pluralistic society where government shapes many of the institutions of public culture. This Article suggests a proper Establishment Clause jurisprudence for government religious speech. I will not deal with the related problems of restrictions on private religious speech in public fora,\textsuperscript{23} the limits of government-subsidized private religious speech,\textsuperscript{24} or the role religious sentiments may play in decision

\begin{itemize}
  \item \textsuperscript{18} Allegheny, 492 U.S. at 634 (O'Connor, J., concurring).
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part).
  \item \textsuperscript{21} Id. at 660.
  \item \textsuperscript{22} Lee v. Weisman, 112 S. Ct. 2649, 2681-85 (1992) (Scalia, J., dissenting).
  \item \textsuperscript{23} See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (denying church access to school facilities for viewing film on family and child-rearing issues while generally opening schools for other community activities violates Free Speech Clause); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (student religious groups may use public school facilities for meetings under Equal Access Act without violating Establishment Clause); Widmar v. Vincent, 454 U.S. 263 (1981) (public university's refusal to permit student religious clubs to use of meeting facilities when it has opened those facilities to other student groups violates Free Speech Clause). Restrictions on private religious speakers in public fora often are justified on the ground that it would be an establishment of religion for the government to permit its property to be used for religious purposes. The Court suggested in \textit{Widmar} that the state's interest in complying with the Establishment Clause "may be characterized as compelling," thus warranting forbidding or restricting what otherwise would be free speech. \textit{Id.} at 271. But the Court went on to hold in \textit{Widmar}, as it also did in \textit{Mergens} and \textit{Lamb's Chapel}, that permitting public property to be used for religious purposes under an open access policy would not offend the Establishment Clause. The alternative approach proposed in this Article, of course, would be applicable to that analysis, as well as to situations involving private religious speakers on government property or at official events not considered a "public forum" under Free Speech Clause doctrine.
\end{itemize}
making by public officials. Furthermore, since the approach I propose is adapted to the unique difficulties posed by government religious speech, it will not necessarily apply in the same way to Establishment Clause cases involving funding, regulation, or accommodation of religion.

My position is that government should not be required to act as if God does not exist or religion is irrelevant to public life, but it may not impose religion on anyone through official speech or symbols. This means that the state may not tell people what they must believe or practice in religious matters or take sides on theological questions by suggesting that some beliefs are more or less true than others. It also means that government may not speak in a manner that would oblige anyone to engage in acts that would signify affirmation of religious belief or participation in religious exercise. In short, when government speaks religiously, it must not indoctrinate or coerce. No doctrinal standard, of course, can provide a clear answer for every difficult case or eliminate all line-drawing and close questions of judgment. But perhaps the following analysis can get us beyond easily misunderstood terms like “endorsement” and multipart tests that can be manipulated to reach almost any result.

In Part I of this Article, I discuss why government religious speech is analytically different from other forms of government support of religion and therefore justifies a unique approach to assessing its constitutionality. In Part II, I criticize the various tests the Supreme Court has applied to government religious speech and suggest that the Court has failed to formulate coherent standards for distinguishing between permissible and impermissible religious messages. In Part III, I examine this nation’s colonial and founding periods for principles that may suggest why certain forms of government religious speech were not considered an “establishment” of religion. Finally, in Part IV, I offer an alternative analytical approach that applies historic Establishment Clause values to official religious expression in a pluralistic society.

I. THE MYTH OF “NEUTRALITY” IN GOVERNMENT SPEECH

Government speaks on a wide variety of subjects. Sometimes what it says is unobjectionable; sometimes it engages in political advocacy


26. See generally MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOV-
on highly controversial issues by disseminating official views or criticizing opposing views. While there is no explicit First Amendment restraint on government political speech, the Supreme Court has stated repeatedly that the Free Speech Clause implicitly forbids the state from compelling private citizens to espouse its political viewpoints. Indeed, in West Virginia State Board of Education v. Barnette, the celebrated flag salute case, Justice Jackson announced sweeping protection for all "matters of opinion":

If there is any fixed star in our constitutional constellation, it is that no, official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

He acknowledged, however, that government officials could foster allegiance to the state "by persuasion and example." Thus, in the political context, while government may endorse ideas and persuade
others to adopt its views, it may not compel uniformity of opinion.32

Where religious speech is involved, government is limited by the Establishment Clause. The Establishment Clause operates together with the Free Exercise Clause to safeguard religious decision making from undue imposition or interference by the state. The former forbids the state from imposing its religious preferences, while the latter forbids the state from interfering with an individual's religious practices. Thus, broadly speaking, the Establishment Clause makes explicit as to religion (the right to refrain from practicing the state's religion) what the Free Speech Clause leaves implicit as to opinion (the right to refrain from espousing the state's ideas). The analogy between the two clauses is not perfect, however. While the state can advance certain political views to the exclusion of others, it cannot endorse one religious view over another33 or prefer one religious group or sect over another.34 "[T]he public right," James Madison observed, "[is] very different in the two cases."35 For government to take sides in sectarian or denominational debates over theology would put "at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."36 This means, for example, that the Establishment Clause would bar a city from permanently erecting a large Latin cross on the roof of city hall,37 while there would be no similar prohibition on a year-round sign on city hall urging citizens to "Just Say 'No' to Drugs." The prohibition is grounded

32. It is difficult to know exactly what Justice Jackson meant by the ban against government officials "prescrib[ing] what shall be orthodox." Some commentators have suggested that this prohibition has never been taken literally because officials regularly endorse ideas or views. See Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 206-07 (1992) ("Just say no to drugs," 'End racism,' and 'Have babies, not abortions' are all messages government is free to endorse under current law . . . .") (footnote omitted); Shiffrin, supra note 26, at 568 ("When the ship to be steered is the public school, our fixed star is that officials high and petty can prescribe what shall be orthodox in politics, nationalism, and other matters of opinion."). However, since Justice Jackson conceded that the government could advance its views by "persuasion and example," he obviously meant to forbid something more than official endorsement of certain viewpoints.

33. See, e.g., Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma.").


35. Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 481, 482 (J.B. Lippincott & Co. 1865). See Lee v. Weisman, 112 S. Ct. 2649, 2657-58 (1992) (speech is best protected "by insuring its full expression even when the government participates"); but religious freedom is best protected where government is not a "prime participant" because it might "indoctrinate and coerce").

36. Weisman, 112 S. Ct. at 2658.

in the principle that government must remain "neutral" toward religion. Justice Clark wrote in School District v. Schempp that the ideal of religious liberty is that all religious opinions and sects have "absolute equality before the law" and that "government is neutral... while protecting all, it prefers none, and it disparages none." The neutrality principle is the basis of both the so-called Lemon test and Justice O'Connor's endorsement test for identifying Establishment Clause violations.

The Establishment Clause has been interpreted to require not only neutrality among religions, but also neutrality between religion and its nonreligious alternatives. It is precisely at this point, however, that the neutrality principle becomes problematic when applied to government speech. Whenever the state communicates religious ideas or sen-

39. Id. at 215 (internal quotations and emphasis omitted).
40. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (citations omitted).
42. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in judgment) ("Government may not favor religious belief over disbelief."); Lynch, 465 U.S. at 644 (Brennan, J., concurring) (the Establishment Clause "require[s] neutrality, not just among religions, but between religion and nonreligion"); Wallace v. Jaffree, 472 U.S. 38, 53 (1985) ("[T]he First Amendment embraces the right to select any religious faith or none at all."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("[N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'... or impose requirements which aid all religions as against non-believers... ."); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (declaring that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers"). See also Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001 (1990) [hereinafter Laycock, Nonpreferential Aid] (substantive neutrality means that government must "minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance").

Some have argued that the Establishment Clause does not require neutrality between religion and nonreligion, but rather was meant to forbid only the "establishment of a national religion" and "preference among religious sects or denominations." Jaffree, 472 U.S. at 106 (Rehnquist, J., dissenting). See, e.g., Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982); Daniel L. Dreisbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment (1987). This nonpreferentialist view, however, has been largely refuted by the historical research of Thomas Curry and Douglas Laycock. See generally Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. Rev. 875 (1986) [hereinafter Laycock, Nonpreferential Aid]. See also Lee v. Weisman, 112 S. Ct. 2649, 2667-71 (1992) (Souter, J., concurring) (rejecting the nonpreferentialist position).
timents, it favors religion over nonreligion or irreligion. Indeed, anytime government speaks or acts as if God exists, it endorses a religious claim. The only way to avoid this is for government never to speak religiously. Several commentators have urged that the Establishment Clause be interpreted to require the elimination of all official language or symbols supportive of religion. Kathleen Sullivan, for example, argues that the Establishment Clause mandates an "official agnosticism" requiring a "standing gag order on government's own [religious] speech and symbolism." In her view, the First Amendment's negative bar against an establishment of religion was a political compromise that ended religious division in the political sphere and affirmatively "established" a liberal, secular public order where public disputes may be resolved "only on grounds articulable in secular terms." "[T]he end of religious strife," she says, "requires not just any Leviathan, but a fully agnostic one." Her solution to the problem of government religious speech is simple: "Banish public sponsorship of religious symbols from the public square." The argument is that the establishment of a secular state means that government is constitutionally required to be impartial between religion and irreligion, but not between religion and secularism. Thus, Justice Blackmun, writing for the majority in Allegheny, could assert that "the Constitution mandates that the government remain secular," explaining that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." Government remains secular or "neutral," so the argument goes, by speaking neither for nor against religion. Secular speech is considered "neutral" speech, that is, it favors neither theism nor atheism and encourages neither belief nor disbelief. A complete ban on official religious speech or symbolism therefore is not discrimination against religion, but "proper treat-

43. Sullivan, supra note 32, at 206.
44. Id. at 197.
45. Id. at 198 n.10.
46. Id. at 207. See also Douglas Laycock, The Benefits of the Establishment Clause, 42 DePaul L. Rev. 373, 379 (1992) ("[G]overnment cannot even persuade about religion, cannot engage in religious observances, and cannot display religious symbols, even if it's not coercing anybody.["]"); Laycock, Nonpreferential Aid, supra note 42, at 920-22 (suggesting that government-sponsored religious symbols or ceremonies are inherently preferential and coercive); Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 8 (1986) (arguing that the national motto "In God we trust" and the names of cities such as Los Angeles and Corpus Christi are unconstitutional); Ira C. Lupu, Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution, 18 Conn. L. Rev. 739, 746 n.30 (1986) (urging the elimination of "all references to God in public life").
47. 492 U.S. at 610. See Laycock, Neutrality Toward Religion, supra note 42, at 1002 (asserting that for constitutional purposes, atheism is as much a religious belief as theism).
ment"—because that is exactly what the establishment of a secular public order entails.\(^0\)

Unfortunately, it is not that simple. There are at least three objections to the argument that this is what the Establishment Clause requires. First, as a matter of history, the Establishment Clause was never meant to create a purely secular state.\(^1\) The founders clearly rejected the idea that certain forms of government religious speech impermissibly involved the State in religious matters. I discuss this point more fully in Part III of this Article. Second, the assumption that government must remain "officially agnostic" to end political and social polarization along religious lines is both wishful thinking and plainly wrong as a matter of Establishment Clause jurisprudence. Third, the claim of neutrality is illusory because secular or nonreligious speech is not always "neutral" toward religion.

In regard to the second objection, it is true, as Kenneth Karst has emphasized, that controversies over the government's display of religious symbols can deeply divide local communities.\(^2\) The display of religious symbols or other forms of official recognition of religion, however, do not have to polarize communities. Part of the reason for these controversies is the Supreme Court's own ambivalence toward religious symbols and the confusion and misperception that its opinions have engendered.\(^3\) The potential for divisiveness could be significantly reduced if the Court, in analyzing official pronouncements and symbols that support religion, would formulate a more consistent and accessible constitutional rationale that furthers the ideal of religious pluralism rather than majoritarianism or "agnosticism."

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49. *See infra* notes 276-306 and accompanying text.

50. *See Karst, supra* note 14, at 504-10. In our increasingly pluralistic society, religious division or polarization includes not only disagreements among or within religious traditions, but also between religious believers and those who claim no particular religious faith. Modern church-state disputes tend to transcend the divisions among Protestant, Catholic, and Jew which were significant in the nineteenth and first half of the twentieth century, and instead pit religious traditionalists against cultural progressives. *See James D. Hunter, Culture Wars: The Struggle to Define America* 67-132 (1991) (arguing that the politically consequential divisions are no longer born out of theological disagreements between Protestants and Catholics or Christians and Jews, but rather from more fundamental disagreements over the sources of moral authority between "orthodox" and "progressive" factions within both religious and secular traditions); *id.* at 131-32 (thus "progressively oriented Protestants, Catholics, Jews, and secularists share more in common with each other culturally and politically than they do with the orthodox members of their own faith tradition (and vice versa)").

Of course, the Court's sometimes bewildering Establishment Clause jurisprudence does not deserve all, or even most, of the blame for local controversies over the public display of religious symbols. Professor Karst rightly observes that these controversies often are rooted in the struggle for dominance of one worldview over another.52 His contention that religious groups are primarily to blame for polarizing communities during such controversies is sometimes true, but the polarization is often as much the result of those who oppose the public display of religious symbols out of intolerance of religion or its public expression. Religious strife will not disappear, however, just because the government stops displaying religious symbols, fires its chaplains, or removes "In God we trust" from its currency. Given the long-standing nature of many of these practices, eliminating them completely would likely provoke even more division. We also must remember that the inevitable tendency to divide along religious lines is precisely what James Madison understood as an extraconstitutional guarantee of religious liberty. Madison believed that division and opposition among multiple religious sects would make overbearing majorities unlikely.53 Besides, partisan controversy is common to the political process for many issues, not just religious matters.54 Perhaps this is why the Supreme Court has abandoned the political divisiveness doctrine as a separate ground for holding governmental action involving religion unconstitutional.55

52. See Karst, supra note 14, at 507-08.
53. See THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) ("A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."); THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) ("In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."). See also WILLIAM L. MILLER, THE FIRST LIBERTY RELIGION AND THE AMERICAN REPUBLIC 112-13 (1985).
54. See Karst, supra note 14, at 506 ("[A]nother name for political controversy is democratic decision-making . . . ."); McConnell, supra note 24, at 413 (suggesting that religious differences have never generated the civil discord seen in political conflicts over such issues as the Vietnam War, racial segregation, the Red Scare, unionization, or slavery).
55. See Lee v. Weisman, 112 S. Ct. 2649, 2655-56 (1992) ("Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases."); Lynch v. Donnelly, 465 U.S. 668, 684 (1984) ("This Court has never held that political divisiveness alone can serve to invalidate otherwise permissible conduct."); id. at 689 (O'Connor, J., concurring) (explaining that while political divisiveness is "an evil addressed by the Establishment Clause," the ultimate inquiry must always focus on "the character of the government activity that might cause such divisiveness"). Professor McConnell observes that the political divisiveness doctrine was particularly pernicious . . . because it armed opponents of religious interests with an invincible weapon: their mere opposition became a basis for a finding of unconstitu-
The third objection questions the validity of the premise that secular speech is "neutral" speech. Some commentators have drawn a distinction between formal and substantive conceptions of neutrality. Formal neutrality means the government must treat religion and its alternatives on equal and nondiscriminatory terms, while substantive neutrality requires the government to minimize its involvement in individual decisions about religion. As a normative solution, the exclusion of all religious ideas, symbols, and voices from the governmental sphere would not be neutral in either sense. A "standing gag order" on all government religious speech would privilege a secular view of reality over a religious view of reality. In the modern regulatory state with its ever-growing influence over personal behavior and public culture, this could have a significant effect on religious decision making.

Secular language is concerned with the natural and mundane. By encompassing only that which is "this-worldly," it can convey the idea that all knowledge and value is confined to the temporal—the temporal is the only reality, or at least the only reality that counts.

57. Will Herberg describes secularism as "the creeping conviction that human life can be lived and understood, in its own terms, without regard to any higher order of reality, that is, without regard to God." Will Herberg, Modern Man in a Metaphysical Wasteland 5 INTERCOLLEGIATE REV. 79, 79 (1968-69). See Steven D. Smith, Separation and the "Secular": Reconstructing the Disestablishment Decision, 67 TEX. L. REV. 955, 1000 (1989) ("Secular beliefs, values, practices, or facts are those that pertain to the affairs of this world or this life; they stand in contrast to beliefs, values, practices, or facts that pertain to other worlds, other lives, or other dimensions of reality."); see also Stanley Iggul, Religious Children and the Inevitable Compulsion of Public Schools, 43 CASE W. RES. L. REV. 773, 781-83 (1993) (distinguishing between irreligious secularism and nonreligious secularism).

Professor Smith correctly notes that the term "secular" should properly be understood inclu-
There is no transcendent Deity in modern secularism, or if such a Being does exist, it remains unknown and unknowable, a *Deus Absconditus* which has no relevance to the here and now. In this way, secular language may be indifferent, uncomprehending, or even hostile toward religion. Sometimes this bias is subtle, as when public schools neglect virtually any mention of how religion has influenced history, science, philosophy, art, culture, and human behavior. But secular language need not be openly antagonistic toward religion to conflict with it; it need only affirm the contrary. For example, exhibits in the Smithsonian’s National Museum of Natural History depicting the origin of the universe and the beginning and development of life on earth do not mention religion or contain any commentary that is critical of religious views on the subject, yet they present a secular perspective that is irreconcilable with the tenets of some religious groups. Both the agnostic and the atheist necessarily speak in secular terms because the secular is the only reality they can affirm. To mandate “official agnosticism,” then, is not necessarily to mandate “official neutrality” between theism and atheism. Of course, secular language may not always affirm that which is antithetical to religion. Secular and religious voices sometimes hold common positions on

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sively to refer to the affairs of this world or life, rather than *exclusively* to mean “not religious.” See Smith, *supra*, at 999-1007. Most religions do not draw a sharp distinction between the sacred and the secular. Rather, they teach that an integral part of true spirituality is to live uprightly and show selfless concern for others in this life, especially to those who are poor, oppressed, or suffering. Theistic faiths also hold that God is immanent in worldly affairs through his providential activity and in the lives of believers through his redemptive activity. Nevertheless, the Supreme Court generally has used the term in the exclusive, “not religious” sense in its Establishment Clause analyses, and that is the meaning I will use in the following discussion. See, e.g., Stone v. Graham, 449 U.S. 39, 41-42 (1980) (“pre-eminent purpose” of enactment must not be “plainly religious in nature”); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (a secular effect is one that “neither advances nor inhibits religion”); School Dist. v. Schempp, 374 U.S. 203, 223-24 (1963) (setting “secular” purposes in opposition to “religious” purposes); *id.* at 276 (Brennan, J., concurring) (government is “secular, and not religious, in its purposes”).

58. For a provocative discussion of how this affects the secularist’s view of law, see Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.


60. Claims that exhibits in the Museum of Natural History portraying the theory of evolution amount to an establishment of the religion of “Secular Humanism” were rejected in Crowley v. Smithsonian Institute, 636 F.2d 738 (D.C. Cir. 1980).

61. The essential difference between the atheist and the agnostic is that the former denies the existence of God, while the latter cannot affirm it.
public matters for different, but not necessarily contrary, reasons. But where these two perspectives collide, requiring the State to speak only in terms of the secular is not neutral.

Two opinions by Justice Robert Jackson present the difficulty of reconciling a regime of total secularism with neutrality in public education. In his dissent in *Everson v. Board of Education,* Justice Jackson maintained that public education should be completely secular—"isolated from all religious teaching"—in order to maintain a "strict and lofty neutrality" toward religion. Two years later, however, in *Illinois ex rel. McCollum v. Board of Education,* he had second thoughts about this disjunction. The plaintiff in *McCollum,* an avowed atheist, sought a court order not only ending the released time program but also banning all teaching that suggested or recognized the existence of a God. The concurring and dissenting opinions in *McCollum* addressed the larger question of whether the State could offer religious instruction in its schools, thus treating the case essen-

62. Prohibitions against murder and stealing are simple examples of public values shared by both secular and religious traditions. For many Americans, the view that murder and stealing should be illegal is rooted in their own religious beliefs, while laws against such are not themselves necessarily religious. That is why these laws can be held in common with people of no faith. See *McGowan v. Maryland,* 366 U.S. 420, 442 (1961) (noting that laws proscribing murder, adultery, and theft which exist for general welfare of society also agree with the dictates of Judeo-Christian religion); *Anderson v. Salt Lake City Corp.,* 475 F.2d 29, 33 (10th Cir.) (upholding the construction next to a courthouse of a monolith bearing the Ten Commandments because "the Decalogue is at once religious and secular"), cert. denied, 414 U.S. 879 (1973).

63. See John H. Mansfield, *Comment on Holmes, "Jean Bodin: The Paradox of Sovereignty and the Privatization of Religion," in Religion, Morality, and the Law 71, 74 (J. Roland Pennock & John W. Chapman eds., 1988) ("Religious answers have been privatized, but not the questions to which they have been proposed. For those who think that heaven and earth should be connected up in some way . . . the decision to base the state on secular values is neither neutral nor indisputably correct.").

64. Public education is of special concern for several reasons. First, attendance is compulsory. Second, public education, as Donald Giannella has observed, "directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values." Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513, 561 (1968). Third, unlike the outside world where students are exposed to other speakers besides the government, the state generally is the sole authoritative voice in the public school. Fourth, younger children usually lack the knowledge, maturity, and reasoning skills needed to evaluate critically what their teachers tell them. Finally, students are rewarded or penalized based on how well they "learn" what they are taught. See Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment,* 57 TEX. L. REV. 863, 875 (1979).

65. 330 U.S. 1 (1947) (narrowly upholding a New Jersey law providing for the transportation of pupils to both public and parochial schools).

66. *Id.* at 24 (Jackson, J., dissenting).

67. 333 U.S. 203 (1948) (invalidating an on-campus "released time" program of private religious instruction in public schools).

68. *Id.* at 234.
tially as one involving official religious speech. In his concurrence, Justice Jackson stressed that the Court “can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools,” but expressed reservations about whether it was possible, or even desirable, “completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction.” Since “nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences,” he believed that complete secularization of all academic instruction in public schools would distort the educational process by leaving students ignorant of such matters, even though the alternative was to expose students, albeit in a limited sense, to the “inspirational appeal of religion.”

Official silence about the religious dimensions of our history and culture, however, is only part of the problem. When the state uses secular language to convey ideas, values, or perceptions of reality that are plainly at odds with deeply held religious beliefs, the effect on impressionable children can be significant. That is why some religious parents and children have objected to secular curriculum materials they saw as actively indoctrinating against their religion.

69. See, e.g., id. at 212 (Frankfurter, J., concurring) (“Illinois has here authorized the commingling of sectarian with secular instruction in the public schools.”); id. at 245 (Reed, J., dissenting) (the question before the Court is “the constitutional limitation upon religious education in public schools”). The majority viewed the case somewhat more narrowly, holding that the program was “beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith,” and thus prohibited by the Establishment Clause as interpreted in Everson. Id. at 210.

70. Id. at 235 (Jackson, J., concurring).

71. Id. at 236.

72. Id. Justice Jackson thought that subjects such as mathematics, physics, and chemistry could be completely secularized, but “[m]usic without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.” Id. He believed, however, that “the inspirational appeal of religion in these guises is often stronger than in forthright sermon.” Id.

73. In Mozert v. Hawkins County Board of Education the defendant school board stipulated that certain passages in the required reading texts offended the plaintiffs’ sincerely held religious beliefs. 827 F.2d 1058, 1061 (6th Cir. 1987). The Sixth Circuit nevertheless rejected the plaintiffs’ free exercise claim on the ground that the mere “exposure” of the children to religiously offensive ideas does not violate the Free Exercise Clause absent any “compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of [the students’] religion.” Id. at 1069. See Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680 (7th Cir. 1994) (secondary or trivial religious references in supplemental reading program did not violate Religion Clauses, despite parents’ claim that reading materials indoctrinated children in values directly opposed to their religious beliefs); Smith v. Board of Sch. Comm’rs, 827 F.2d 684 (11th Cir. 1987) (44 textbooks banned by trial court as supporting religion of secular humanism did not convey governmental disapproval of theism); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir.) (inclusion in school’s curriculum of
The clash of secular and religious voices is found not only in public education, but also in a wide range of public policy issues relating to the family, birth control, abortion, poverty, the environment, law and justice, homosexuality, and euthanasia. To say that the state may inculcate secular beliefs and values that are indifferent or contrary to religion, and then to forbid any official recognition or affirmation of religion, would put religious perspectives at a decided disadvantage in the governmental sphere. Under the liberal regime proposed by Professor Sullivan, however, this is exactly what should happen. Sullivan concedes that secular dogma may look like a countervailing religious faith to the serious religionist who disagrees with it. She nevertheless insists that it is not a "religion" for constitutional purposes, but rather a "philosophy," comparable to the belief systems embodied in the Republican Party platform, the American Civil Liberties Union Policy Guide, and contemporary feminism. As such, secular ideology may provide the substantive values of a liberal public order without discriminating against religion or otherwise implicating the Establishment Clause. Despite the circular feel of Sullivan's argument, I agree that there are important constitutional differences be-

book containing supposedly anti-Christian statements did not violate Religion Clauses), cert. denied, 474 U.S. 826 (1985); Alfonso v. Fernandez, 606 N.Y.S2d 259 (N.Y. App. Div. 1993) (distribution of condoms by public school to unemancipated minor students without opt-out provision or prior consent of parents violates parents' constitutional due process and common law rights, but program does not violate Free Exercise Clause even though it may influence children to violate their religious beliefs). For a summary of various complaints from religious parents and children about public school instruction, see George W. Dent, Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 CASE W. RES. L. REV. 707, 708-10 (1993). Dent concludes that "the teaching to which religious traditionalists object to is not value neutral and often does not even try to be so." Id. at 710. See Inger, supra note 57, at 779 n.37 (the realization that public education inevitably inculcates values "transforms public schools into the stage for passionate struggles").


75. Sullivan, supra note 32, at 200; see id. at 199 ("The culture of liberal democracy may well function as a belief system with substantive content, rather than a neutral and transcendent arbiter among other belief systems."). Professor Stanley Fish maintains that liberalism has a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries.

Stanley Fish, Liberalism Doesn't Exist, 1987 DUKE L.J. 997, 1000.

76. Sullivan, supra note 32, at 200-01.

77. Id. at 201.
tween secular and religious belief systems. My point is not that secularization of the public order is wrong because it amounts to an establishment of secular "religion." Rather, it is wrong because it allows the state to disregard or disparage religion, but not to speak favorably of it. This is not the kind of "neutrality" toward religion that the Establishment Clause endorses. To allow the state to express sec-

78. By failing to distinguish between beliefs and belief systems, Sullivan also overlooks the possibility that certain beliefs within a system may be religious even though that system, on the whole, is not considered a religion for constitutional purposes. For example, to illustrate how liberalism may function as an ideology, Sullivan offers John Rawls' view that the liberal commitment to religious toleration to end religious conflict was, as she describes it, "a substantive recognition that there is more than one path to heaven and not so many as once thought to hell." Sullivan, supra note 32, at 200 (citing John Rawls, The Idea of an Overlapping Consensus, 7 Oxford J. Legal Studies 1 (1987)). However, if Rawls is correct, liberal democracy has embraced what essentially is a religious belief in its commitment to religious toleration, namely, that there is no exclusive way to heaven. It is disingenuous to say that a public philosophy based on the idea that there is more than one way to heaven is "secular" and therefore acceptable in a liberal democracy, but a public philosophy based on the idea that there is only one way to heaven is "religious" and therefore unacceptable. Both positions derive from affirmations about the traditional subject matter of religion and should not be distinguished for Establishment Clause purposes. Of course, if the justification for tolerance that Rawls describes is embodied in the Establishment Clause, then that clause expresses an essentially religious idea or position, making it difficult to claim that the Establishment Clause forbids the state from engaging in religious expression. Once Sullivan has opened the door to liberal democracy functioning as a belief system with substantive content, rather than a neutral arbiter between competing conceptions of the good, her argument that the secularization of the public order does not discriminate against religion unravels. The liberal state, as Professor Foley points out, "necessarily must reject as erroneous any religion that contradicts the basic tenets of liberalism itself," thus discriminating against all religions that are inconsistent with the political doctrines liberalism espouses. Edward B. Foley, Political Liberalism and Establishment Clause Jurisprudence, 43 Case W. Res. L. Rev. 963, 965-66 (1993) (summarizing the Rawlsian approach to church-state relations). Moreover, even within the domain of those religions and other comprehensive philosophies that are reasonable from the liberal perspective, see id. at 966-71, there is no internal requirement for privileging secular ideologies over religious ideologies, or for privileging one religious ideology over another.

79. Even though the Supreme Court has declared that the Establishment Clause prohibits government from showing disapproval or hostility toward religion or from establishing a "religion of secularism," it has never invalidated government action on either ground. See Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (the most "direct infringement" of the Establishment Clause "is government endorsement or disapproval of religion"); School Dist. v. Schempp, 374 U.S. 203, 225 (1963) ("The State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' ") (citation omitted); Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (identifying "Secular Humanism" as a religion). In fact, in Epperson v. Arkansas, 393 U.S. 97 (1968), the Court used the Establishment Clause to strike down an anti-evolution statute designed to eliminate religiously offensive teaching in public schools. Efforts to portray the teaching of secular ideology in public schools as an establishment of a religion of secular humanism have largely failed. See Smith v. Board of Comm'rs, 655 F. Supp. 939, 960-71, 980-83 (S.D. Ala.) (finding that public school curriculum was infused with the tenets of the "religion" of secular humanism), rev'd, 827 F.2d 684 (11th Cir. 1987).

I do not suggest that the Establishment Clause be used to invalidate official action simply
ular ideas no matter how much they convey disapproval or hostility toward religion, while at the same time forbidding any official expression that even marginally supports religion cannot be called even-handed or nondiscriminatory.

It would be highly desirable if government's influence on religious decision making could be diminished by stamping out every official reference or symbol that is religious. This might be possible with a minimalist government, where the risk that secular government speech will distort religious choice is greatly reduced. The effect is different, however, where the state controls many of the inculcative institutions of public culture, such as education and social welfare, and frequently speaks on matters that directly touch religious concerns. When it speaks, government by its sheer size and sway will have a disproportionate influence on public perceptions. Excluding all religious words and symbols from government speech could easily misdirect private decision making in religious matters. For the state to speak only the language of nonreligious viewpoints and ideals would make such positions familiar, easily understood, and believable. Total silence with respect to religion, on the other hand, would marginalize or trivialize religious views by making them seem irrelevant, outdated, or even strange. This could easily misdirect private decision making in religious matters. As one writer explains,

[jt] is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.80

because it offends someone's religious sensibilities. Rather, my argument is that if the Establishment Clause is interpreted to allow official indoctrination with ideas hostile to religion, it is not neutral to construe it as prohibiting speech supportive of religion. The best solution to antireligious elements in government speech is to allow a free exercise claim when enforced exposure to offensive ideas conflicts with a specific religious duty to avoid exposure to such ideas, especially in the public school setting. See Mozert v. Hawkins County Board of Education, 827 F.2d 1058, 1075, 1078 (Boggs, J., concurring); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1541-42 (Canby, J., concurring). But see Dent, supra note 73 (arguing that a free exercise claim should arise when students are merely exposed to ideas offensive to their religion).

80. Walter Moberly, The Crisis in the University 56 (1949) (arguing that so-called religiously "neutral" education "neither inculcates nor expressly repudiates belief in God ... [b]ut it does what is far more deadly than open rejection; it ignores Him"). Similarly, Stephen Carter warns:

[if] its stated zeal to cherish religious belief under the protective mantle of "neutrality," liberalism is really derogating religious belief in favor of other, more "rational" methods of understanding the world. The great risk lying a bit further down this path
The consequences of a serious effort to eliminate all distinctively religious language and symbols from the governmental sphere would be substantial. The government would have to remove inscriptions containing religious language from the walls of the Lincoln and Jefferson memorials in Washington, D.C., change the names of streets, cities, counties, and mountain ranges, expunge from public school textbooks religious affirmations in the Declaration of Independence and other public documents, recall and reissue our national currency without the words "In God we trust," and raze the beautiful chapel at the Naval Academy, to mention just a few examples. Given how deeply such forms of official religious expression are ingrained in our culture, their removal root and branch would send a forceful message of hostility toward religion. The situation might be different if the question was whether these practices should exist from the outset, but that is not the world in which we live.

Professor Sullivan is comfortable with privileging secular ideologies because she believes that certain "self-limiting features" will ensure that "liberal democracy [will never] be a totalistic orthodoxy as threatening as any papal edict." 81 The most important feature she identifies is the free speech guarantee that religious viewpoints may be heard in public debate. This point is echoed by Professor Karst, who reminds us that "a huge proportion of our public life—including expression in public and on matters of public interest—lies outside the institutions of government." 82 Elimination of all official sponsorship of religious symbols still "would leave open a wide array of channels

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81. Sullivan, supra note 32, at 201.
82. Karst, supra note 14, at 527. See Oliver S. Thomas, Comments on Papers by Milner Ball and Frederick Gedicks, 4 NOTRE DAME J.L. ETHICS & PUB. POL'y 451, 451-52 (1990) ("[T]he public square... is not only well clothed in the garb of religion but perhaps a bit overdressed.").
for public religious expression, including the messages of religious proselytizing and religion-based politics.\footnote{Karst, supra note 14, at 528.}

It is true that the consequences of secularizing all official expression could be mitigated by the presence of private religious speakers in the public square.\footnote{Contrary to those who would exclude religiously-based arguments from public discourse, neither the government nor private secular speakers should be the only voices in public life. See generally CARTER, supra note 74; Levinson, supra note 25.} Fortunately, religious messages do not require the aid of government to get across to the public. It is indeed ironic that some who protest the loudest the removal of a nativity scene from city hall never display such scenes on their own front lawns or church grounds. One wonders whether they see the government crèche as a substitute for other ways of delivering the religious message of Christmas to the public. From a constitutional standpoint, however, all of this is besides the point. The meaning of the Establishment Clause is not determined by the number or persuasiveness of other religious voices in the public square. That ample opportunities exist for public expression by private speakers does not make government action itself any more neutral or less discriminatory. Surely, no one would argue that the crèche in Allegheny was any less an establishment of religion because of the availability of alternative channels for public secular expression.

The solution to the very real problems posed by government religious speech is not to eliminate all religious references from the governmental sphere under some ersatz banner of neutrality or a secular public order. Instead, we must look to other principles and values embodied in the Religion Clauses to define the limits of official religious expression. As Justice Goldberg warned in his concurring opinion in \textit{Schepp}, "untutored devotion to the concept of neutrality can lead to . . . a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious," which he said is "not only not compelled by the Constitution, but . . . [is] prohibited by it."\footnote{School Dist. v. Schepp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); }\footnote{"Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings."}
ment speech. Justice Brennan came close,\textsuperscript{86} but even he warned that the elimination of all official religious references would exhibit "a stilted indifference to the religious life of [our] people."\textsuperscript{87} It is unlikely that the Establishment Clause will be interpreted to prohibit religious allusions in presidential speeches or to require removal of the phrase "under God" from the Pledge of Allegiance. References to God inscribed on the walls of the Lincoln and Jefferson memorials in Washington, D.C. or the display of religious art in the National Gallery almost assuredly will survive any Establishment Clause test. Despite doctrinal disagreements over the proper approach to deciding Establishment Clause cases, there is a consensus among the Justices that such practices should remain untouched. What they cannot agree upon is why.\textsuperscript{88}

The modern era of Establishment Clause jurisprudence began with \textit{Everson v. Board of Education},\textsuperscript{89} which interpreted the Establishment Clause as forbidding government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."\textsuperscript{90} Before \textit{Everson} almost no one thought of the United States as a purely secular state. For instance, in its 1892 decision \textit{Church of the Holy Trinity v. United States},\textsuperscript{91} the Supreme Court recited several examples of religious language in official documents to support its declaration that "this is a Christian nation."\textsuperscript{92} This idea was restated in more demographical terms almost forty years later in \textit{United States v. Macintosh},\textsuperscript{93} which affirmed that "[w]e are a Christian people . . . according to one another the equal right of religious freedom, and

\begin{itemize}
\item \textsuperscript{86} Justice Brennan left little room for religious utterances that still retained any significant religious meaning. See infra text accompanying notes 157-69. Justice Blackmun's previously quoted assertion in \textit{County of Allegheny v. ACLU}, that the Constitution mandates a secular state could also be interpreted to require elimination of all official religious references. See supra text accompanying note 47.
\item \textsuperscript{88} These practices typically have defined the outer limits of the Establishment Clause in cases involving government religious speech in a way similar to the provision of police and fire protection for churches in cases involving governmental aid to religion. See \textit{Walz v. Tax Comm'n}, 397 U.S. 664, 671 (1970).
\item \textsuperscript{89} 330 U.S. 1 (1947).
\item \textsuperscript{90} \textit{Id.} at 15; see \textit{id.} at 31-32 (Rutledge, J., dissenting) (purpose of the Establishment Clause "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion").
\item \textsuperscript{91} 143 U.S. 457, 465-71 (1892).
\item \textsuperscript{92} \textit{Id.} at 471. Nearly a century later, when the Court upheld the display of a nativity scene in \textit{Lynch v. Donnelly}, Justice Brennan chided the majority for taking "a long step backwards" to the time when the Court "arrogantly declare[d]" in \textit{Holy Trinity} that "this is a Christian nation." 465 U.S. 668, 717-18 (1984) (Brennan, J., dissenting).
\item \textsuperscript{93} 283 U.S. 605, 625 (1931).
\end{itemize}
acknowledging with reverence the duty of obedience to the will of God.™ Even after Everson we find the often-quoted observation in Zorach v. Clauson95 that “[w]e are a religious people whose institutions presuppose a Supreme Being.”™ In Zorach the Court suggested in dicta that extreme separation of church and state would mean that legislative prayers, religious appeals in presidential messages, courtroom oaths, Thanksgiving proclamations, and “all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.”™

The controversy over government religious speech reached the Supreme Court for the first time in the school prayer and Bible reading cases of the early-1960s.98 Since then, the Court has revisited the issue in cases involving posting of the Ten Commandments in a public school classroom,99 legislative chaplains and prayers,100 the display of nativity scenes or menorahs during holiday seasons,101 teaching creationism in public school classrooms,102 and, most recently, prayer at public school graduation ceremonies.103 The curious and sometimes

94. Id. at 625.
95. 343 U.S. 306 (1952) (upholding an off-campus “released time” program of private religious instruction for public school children).
96. Id. at 313.
97. Id. ("A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"). See also Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 253-55 (1948) (Reed, J., dissenting) (legislative and military chaplains, prayer and Bible reading in District of Columbia public schools, and compulsory chapel attendance at West Point and the Naval Academy are inconsistent with the "no aid" mandate of Everson).
98. See School Dist. v. Schempp, 374 U.S. 203 (1963) (prayer and Bible reading); Engle v. Vitale, 370 U.S. 421 (1962) (prayer). The rights implicated in the flag salute case, West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), were strikingly similar to those in the school prayer and Bible reading cases, but Barnette involved the imposition of political orthodoxy which was objected to on religious grounds.
103. Lee v. Weisman, 112 S. Ct. 2649 (1992). Weisman is not the last word on the matter. Several cases involving graduation prayers have been decided since Weisman. See Friedmann v. Sheldon Community Sch. Dist., 995 F.2d 802 (8th Cir. 1993) (taxpayer did not have standing to enjoin school districts from permitting students to read invocation or benediction at graduation ceremony); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (school policy allowing student volunteers to deliver nonsectarian, nonproselytizing invocation at graduation does not violate Establishment Clause), cert. denied, 113 S. Ct. 2950 (1993); Gearon v. Loudoun County Sch. Bd., 844 F.Supp. 1097 (E.D. Va. 1993) (student-initiated, student-written, and student-delivered graduation prayers violate Establishment Clause); Shumway v. Albany County Sch. Dist. No. 1 Bd. of Educ., 826 F.Supp. 1320 (D. Wyo. 1993) (school district enjoined from refusing to rent gymnasium for private baccalaureate services); Harris v. Joint Sch. Dist. No.
disparate results in these cases can be traced largely to the Court's continued insistence upon governmental neutrality between religion and nonreligion while at the same time allowing for the permanency of at least some forms of official religious expression. The Court has yet to formulate a conceptual test for deciding Establishment Clause cases that satisfactorily reconciles the two. At least five distinct approaches have been used, but none has provided a coherent way to distinguish impermissible symbols or utterances from such widely accepted, "intuitively constitutional"\(^{104}\) practices as placing "In God we trust" on our money or opening court sessions with "God save the United States and this Honorable Court."

\textit{A. The Purpose and Effect Test}

Ten years after \textit{Zorach}, the Supreme Court in \textit{Engle v. Vitale}\(^ {105}\) invalidated the so-called Regents' Prayer in the New York public school

\(^{104}\) See \textit{Lynch}, 465 U.S. at 714 (Brennan, J., dissenting) ("Intuition tells us that some official 'acknowledgment' is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people.'').

\(^{105}\) 370 U.S. 421 (1962). School prayer, of course, involves both government and private student speakers. Government speaks when it composes or otherwise directs the content of the prayer.
system. The prayer stated simply, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." The following year, the Court struck down state-mandated Bible reading and recitation of the Lord’s Prayer in public schools in School District v. Schempp. Justice Clark, writing for the majority, acknowledged a longstanding tradition of official religious expression reaching back to the colonial and founding periods. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Nevertheless, the Court held that laws requiring religious ceremonies in public schools violate the Establishment Clause.

Both Engle and Schempp relied upon findings that the challenged exercises were purely religious in nature. Engle rested upon the narrower principle that the state is without power to determine the particular form of prayer or worship to be used in a state-sponsored religious activity. The Court distinguished state-directed prayer from official religious expressions that are incidental to patriotic activities or part of the "many [ceremonial] manifestations in our public life of belief in God." While this distinction may explain why the Constitution forbids state-led school prayer but permits officials to expose students to religious affirmations in the Declaration of Independence or The Star-Spangled Banner, it cannot reconcile Engle with official prayers offered in other settings. Straightforward application of the rule in Engle would invalidate such similar practices as legislative and military chaplains who compose prayers and direct worship services as a matter of course and the invocation opening the Court’s own sessions. Of course, the Court did not have to decide

106. Id. at 422 (internal quotation omitted).
108. Id. at 213; see id. ("It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people . . .").
109. See 370 U.S. at 430 (Under the Establishment Clause, government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."). Elsewhere in the opinion, the constitutional prohibition was extended to "writing or sanctioning official prayers." Id. at 435 (emphasis added).
110. Id. at 435 n.21.
111. See id. One stanza of The Star-Spangled Banner reads: "Blest with vict’ry and peace may the heav’n rescued land Praise the Power that hath made and preserved us a nation! Then conquer we must when our cause it is just, And this be our motto—’In God is our Trust.’’ Id. at 440 n.5 (internal quotation omitted).
these questions, but nothing suggests that a majority of the Justices considered such practices unconstitutional.\textsuperscript{112}

The Court announced the broader, more sophisticated purpose and effect test in \textit{Schempp}. Strict neutrality between religion and nonreligion means that government action must have a secular purpose and primary effect that neither advances nor inhibits religion.\textsuperscript{113} The purpose and effect inquiry has been further elaborated in the \textit{Lemon} test, which forbids government action that either (1) has no secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) fosters an excessive entanglement between government and religion.\textsuperscript{114} The \textit{Lemon} test has been severely criticized by individual members of the Court,\textsuperscript{115} but it still survives.\textsuperscript{116} Cases applying the \textit{Lemon} test to government religious speech generally have focused on the purpose and effect prongs. Each prong presents significant analytical problems.

The secular purpose requirement has never been clearly defined.\textsuperscript{117} It means that government must have some legitimate nonreligious justification for its action, but the Court has given confusing signals as to whether the relevant inquiry should focus on subjective motivations

\begin{itemize}
\item \textsuperscript{112} The Court in \textit{Schempp} explicitly sidestepped the question of religious services in the military. See 374 U.S. at 226 n.10.
\item \textsuperscript{113} \textit{Id.} at 222 ("[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.").
\item \textsuperscript{114} See \textit{Lemon} v. Kurtzman, 403 U.S. 602, 612-13 (1971).
\item \textsuperscript{116} See \textit{Lamb's Chapel}, 113 S. Ct. at 2148 (invoking the \textit{Lemon} test to determine whether the use of public school facilities after hours to exhibit a religious film would violate the Establishment Clause); \textit{but see id.} at 2149-50 (Scalia, J., dissenting) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, \textit{Lemon} stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."). The most recent case involving government aid to religious institutions, \textit{Zobrest} v. Catalina Foothills School District, 113 S. Ct. 2462 (1993), while not mentioning \textit{Lemon} in its analysis, nevertheless relied on reasoning used in two cases that were decided under the \textit{Lemon} test, \textit{Witters} v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) and \textit{Mueller} v. Allen, 463 U.S. 388 (1983).
\item \textsuperscript{117} See \textit{Aguillard}, 482 U.S. at 613-19 (Scalia, J., dissenting) (urging abandonment of secular purpose requirement because of the Court's failure to adequately explain what "secular purpose" means).
\end{itemize}
or objective goals.\textsuperscript{118} The more important question is whether secular considerations must be exclusive, predominant, or merely sufficient. To require an exclusively nonreligious purpose for government action would necessitate the complete secularization of government speech or foster the corruption of religious language and symbols by demanding they be employed \textit{solely} for secular political ends. It also would rule out free exercise accommodations\textsuperscript{119} and forbid legislators from making religiously-informed judgments or looking to the religiously-informed judgments of their constituents in shaping public policy.\textsuperscript{120} \textit{Schempp} requires that the secular purpose at least be predominant. But that raises a third question: How will courts—let alone legislators, or lawyers for the city council or school board—determine whether secular or religious considerations control?

The outcome in \textit{Schempp} turned upon the finding that the state intended to conduct a distinctively religious ceremony in public schools.\textsuperscript{121} In \textit{Murray v. Curlett},\textsuperscript{122} the companion case to \textit{Schempp}, there was no similar trial court finding as to the challenged Bible reading and recitation of the Lord's Prayer. The State articulated several secular justifications for the practice, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."\textsuperscript{123} Allowing that the state's purpose might not have been "strictly religious," the Court nevertheless concluded that there was an illegal religious purpose due to the "pervading religious character of the ceremony," based largely on the nature of the Bible as an "instrument of religion."\textsuperscript{124} Almost twenty years later, in \textit{Stone v. Gra-
the Court again found a correlation between the religious nature of a particular practice and an impermissible purpose. In *Stone* the state articulated legitimate secular objectives for posting copies of the Ten Commandments in schools, such as instilling moral values and illustrating the connection between the Ten Commandments and our legal system. Rejecting the trial court's finding of a secular purpose for the display, the Court declared that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."

The challenged practices in both *Schempp* and *Stone* failed to meet the secular purpose requirement because they were intrinsically religious. But if the distinctively religious character of a particular activity shows a predominant religious purpose, then any official message or display with religious meaning—a nativity scene, chaplain's prayer, or even Moses holding the Ten Commandments—is unconstitutional, no matter how mundane its setting. As Chief Justice Burger observed in *Lynch v. Donnelly*, "[t]hat a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation."

On the other hand, if there is no necessary relation between the inherently religious nature of a practice and an impermissible religious purpose, the question remains: How can we tell when religious considerations predominate?

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125. 449 U.S. 39 (1980) (per curiam) (holding unconstitutional the display of Ten Commandments on school room wall for lack of sufficiently secular purpose).

126. The display contained the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 40 n.1. The Court made no inquiry into whether historical evidence substantiated this claim.

127. *Id.* at 41 (footnote omitted). The majority in *Stone* went beyond *Schempp* by presuming a religious purpose from the religious character of the display contrary to both the findings of the trial court and the legislature's articulated purpose. *But see* Board of Educ. *v. Allen*, 392 U.S. 236, 243 (1968) (legislature's express motivation is crucial to purpose determination). The Court was so certain about the impermissible religious purpose that it took the extraordinary step of reversing the Kentucky Supreme Court's decision below without holding oral argument or accepting briefs on the merits. *See Stone*, 449 U.S. at 47 (Rehnquist, J., dissenting). Even if the Court had found a sufficiently secular purpose for the display, it likely would have struck it down anyway for impermissibly benefiting religion. The Court observed that "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school-children to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* at 42.


129. *Id.* at 685.
The Supreme Court took a different view of the secular purpose requirement in *Lynch* when it held that a city's use of a nativity scene in its Christmas display did not violate the Establishment Clause. It rejected the district court's inference from the religious nature of the nativity scene that the city had no secular purpose for the display. Chief Justice Burger wrote for the majority that to "[f]ocus exclusively on the religious component of any activity [will] inevitably lead to its invalidation under the Establishment Clause."\(^{130}\) Considering the display in the larger context of the Christmas holiday season, he concluded that it served a secular purpose, namely, "to celebrate the Holiday" and "[to] depict[] the . . . origins" of a "significant historical religious event long celebrated in the Western World."\(^{131}\) The dissenters still presumed a necessary connection between the religious character of the display and an impermissible religious purpose. In their view, to find a secular purpose meant that the nativity scene's religious message had to be obscured.\(^{132}\) The Chief Justice, of course, insisted that the majority's assessment of the display's secular purpose in no way diminished its religious significance.\(^{133}\) Given this conclusion, however, it is impossible to reconcile *Lynch* with *Stone*. The nativity scene and the Ten Commandments are distinctively religious symbols and both depict significant historical events in Christian and Jewish theology.

Chief Justice Burger also declared that the secular purpose requirement, as elaborated in *Schempp* and *Stone*, was met so long as the activity was not "motivated wholly by religious considerations."\(^{134}\) This means that religious considerations may predominate so long as there is some plausible secular purpose, no matter how minor.\(^{135}\) By

130. *Id.* at 680.

131. *Id.* at 680-81.

132. Justice Blackmun complained that the majority had "relegated [the crèche] to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part." *Id.* at 727 (Blackmun, J., dissenting). Similarly, Justice Brennan suggested that "by focusing on the holiday 'context' in which the nativity scene appear[s]," the majority "seeks to explain away the clear religious import of the crèche," therefore making it "no different from Santa's house or reindeer." *Id.* at 705, 712 (Brennan, J., dissenting).

133. *Id.* at 685 n.12.

134. *Id.* at 680 (emphasis added). *But see* Stone v. Graham, 449 U.S. 39, 41 (1980) ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.") (emphasis added); *Schempp*, 374 U.S. at 224 ("[E]ven if its purpose is not strictly religious . . . the pervading religious character of the ceremony is evident . . . .") (emphasis added).

135. *See* Lynch, 465 U.S. at 681 n.6 ("We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon v. Kurtzman* requires. Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.") (citation omitted).
contrast, Justice O'Connor, also citing Schempp and Stone, maintained in her concurrence that the secular purpose requirement "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." Since the Lynch decision was five-to-four, and Justice O'Connor differed with the rest of the majority on this point, we are left with no authoritative determination of what "secular purpose" means. Does it mean that government cannot be motivated wholly by religious purposes? Or, does it also forbid actions dominated by religious aims?

The secular purpose test also is indeterminate where religious means are used to achieve a secular objective. The impetus for many traditional government practices using religious language or symbols was the perception of a strong connection between the flourishing of religion and the public good. These practices were intended to encourage religion, not just for religion's sake, but also for some derivative public benefit. When Thomas Jefferson asked those listening to his Second Inaugural Address to "join in supplications with me that [God] will . . . enlighten the minds of your servants, guide their councils, and prosper their measures," his appeal obviously was for the people to engage in a religious activity, but he intended they do so for the common good. The national government, as we shall see in Part III of this Article, issued many official proclamations during the revolutionary and founding periods calling on citizens to pray for the fledgling nation. Careful examination of those proclamations reveals that they were not merely formal or commemorative, nor did they exploit the practice for purely political ends. The founders plainly believed in the efficacy of public prayer. As the people and their leaders sought the guidance and protection of divine Providence, the nation would prosper politically, economically, and spiritually. Other official pronouncements emphasized the importance of religion to the maintenance of a republican regime. Apart from its truth value, religion was widely perceived as providing social stability and cohesion. Again, the purpose behind such messages was at the same time both religious and secular—to advance both religion and republic—for it was widely understood that to encourage religion was to safeguard the republic. It is anyone's guess how the secular purpose requirement would apply to these practices.

136. Id. at 690-91 (O'Connor, J., concurring).
137. Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in 1 A Compilation of the Messages and Papers of the Presidents 1789-1897, at 382 (James D. Richardson ed., 1899) [hereinafter Richardson].
138. Besides Schempp and Stone, the Court invalidated teaching creation science in public
The effects test suffers from similar ambiguities. It forbids government action that has a "primary effect" of advancing religion. If "primary" is used comparatively to mean "principal," then the test would only require that the predominant consequences of the activity be secular, and thus would permit a considerable religious side effect. This would conflict, however, with the "no-aid" dictum in Everson v. Board of Education, as well as the Court's refusal to tolerate certain Establishment Clause violations as de minimis. On the other hand, if "primary" is used substantively to mean an effect that is immediate, direct, and consequential, then many forms of official religious expression will likely withstand constitutional challenge because they only incidentally benefit religion. It is worth noting that the Court did not find the prayers or Bible reading in either Engle or Schempp to have had any substantial effect of advancing or inculcating religious belief. The twenty-two word Regents' Prayer has been described as a "pathetically vacuous assertion of piety" that was "more doctrinally flavorless than grace before a community chest schools because it lacked a secular purpose in Edwards v. Aguillard, 482 U.S. 578, 585-89 (1987). Laws have been struck down for lack of a secular purpose in only two other Establishment Clause cases. See Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (statute requiring moment of silence in public schools "was not motivated by any clearly secular purpose"); Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968) (state prohibition on teaching evolution in public schools is clearly religious in purpose). A post hoc secular rationale is all that should be required for any government action to satisfy the Establishment Clause. See Sullivan, supra note 32, at 197 n.9 (favoring requirement of secular rationale over secular motivation because "a requirement of secular motivation trenches too far on the freedoms of conscience and expression of citizens and legislators").

139. See Giannella, supra note 64, at 533.
140. 330 U.S. 1, 15 (1947) (The Establishment Clause forbids government from "pass[ing] laws which aid one religion or aid all religions.").
141. The Court rejected de minimis arguments in Engle and Schempp by reference to Madison's Memorial and Remonstrance. See Engle v. Vitale, 370 U.S. 421, 436 (1962) ("To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment . . . it may be appropriate to say in the words of James Madison . . . '[I]t is proper to take alarm at the first experiment on our liberties . . . .'); School Dist. v. Schempp, 374 U.S. 203, 225 (1963) ("The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties."). In Lee v. Weisman the Court refused to characterize the brief graduation prayers as de minimis because it "would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority." 112 S. Ct. 2649, 2659 (1992); see id. at 2670 n.3, 2678 (Souter, J., concurring) (distinguishing presidential religious proclamations as "at worst trivial breaches of the Establishment Clause" and "inhabit[ing] a pallid zone worlds apart" from graduation prayers).
142. Giannella, supra note 64, at 533.
When Government Speaks Religiously

Is religion substantially advanced when a brief portion of the Bible is read without comment to school children, but only incidentally advanced when those same children only moments later sing from national anthem, "[M]ay the heav’n rescued land Praise the Pow’r that hath made and preserved us as a nation. . . . And this be our motto ‘In God is our Trust’? I doubt the meaning of the Establishment Clause is found in such obscure distinctions. Conversely, if distinctively religious exercises conducted by the government advance religion per se, then it is impossible to distinguish between prayer in public schools and prayer in Congress. Both are religious exercises, both primarily aid or advance religion, but are both unconstitutional? Not according to Marsh v. Chambers, which upheld legislative prayers and chaplains. Of course, the Marsh Court did not arrive at that result by applying the primary effect test, nor could it. To sustain the longstanding tradition of legislative prayer, the Court had to abandon the effects test and justify the practice on historical grounds. So long as the challenged message or symbol retains its distinctively religious character, it will advance religion to some degree. In those cases where the message or symbol also confers a significant secular benefit, distinguishing between primary and secondary effects largely will be left up to a judge’s own predilections. For instance, how does one determine the primary effect of a county’s display of a large Latin cross atop a hill which serves both as an occasional gathering place for religious services and a navigational aid for pilots?

In Lynch the Court used a comparative approach to determine whether the nativity display impermissibly advanced religion. It concluded that the display was "[no] more beneficial to and [no] more an endorsement of religion" than other practices previously held not to violate the Establishment Clause or other presumably permissible acknowledgments of religion in public life, such as official recognition of the origins of the Christmas holiday or the exhibition of religious paintings in government museums. William Van Alstyne calls this the "any more than" test: governmental advancement of religion is not objectionable if it does not go beyond what has been commonly

144. Arthur E. Sutherland, Jr., Establishment According to Engle, 76 Harv. L. Rev. 25, 45 (1962).
145. This line is from The Star-Spangled Banner, quoted in Engle, 370 U.S. at 449 (Stewart, J., dissenting) (internal quotation omitted).
147. See Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993).
149. Id. at 681-83.
acceptable in the past.\textsuperscript{150} In other words, there is no substantive baseline that reflects constitutional values; rather, everything is relative to what government has traditionally done. Without some baseline, however, how does a judge go about comparing such dissimilar practices as Sunday closing laws, tax exemptions, and nativity scenes? How can the display of religious paintings in government museums provide a meaningful baseline if the constitutionality of that practice has never been explained? Like the purpose prong of the \textit{Lemon} test, the effects inquiry is an invitation to the selection of outcomes based on judicial preferences. Neither requirement ultimately is able to supply judicially manageable standards for making sensitive judgments regarding official religious observances or references, or for justifying those widely accepted practices that likely will withstand any constitutional challenge.

\section*{B. The Historical Approach}

In its first case involving official religious speech outside the public school setting, the Supreme Court in \textit{Marsh v. Chambers}\textsuperscript{151} upheld the opening of each session of Nebraska's legislature with a prayer by a chaplain paid with public funds. The purpose and effect tests were ignored in favor of a historical inquiry into whether the founders intended to forbid legislative chaplains and prayers when they enacted the Establishment Clause.\textsuperscript{152} Chief Justice Burger, writing for the majority, marshaled persuasive evidence to show that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."\textsuperscript{153} Conceding that the longevity of a practice alone does not make it constitutional, Burger was unwilling to lightly cast aside a national practice that had survived two centuries. Moreover, he maintained that "[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable."\textsuperscript{154}

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\textsuperscript{151} 463 U.S. 783 (1983).
\textsuperscript{152} See id. at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause. . . . [I]f the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.").
\textsuperscript{153} Id. at 786.
\textsuperscript{154} Id. at 790.
\end{flushleft}
What is missing from this approach is a more principled explanation for why the founders did not think that legislative chaplains and prayers offend the Establishment Clause. To be sure, Burger did suggest that the First Continental Congress' decision to open its sessions with prayer despite objections from two of its members shows that the delegates "did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view." But he offered no clue as to what features about the prayers ensured that they would not be viewed as proselytization or an endorsement of a particular religious position, or why the founders defined an establishment of religion in those terms. Consequently, Marsh sheds virtually no light on the meaning of the Establishment Clause beyond the particular practice of legislative chaplains and prayer. Little in the opinion is useful for analyzing the constitutionality of other forms of official religious expression that do not possess a historical pedigree that reaches back to the practices of the founders.

C. "Ceremonial Deism" and the Almost Secular State

In his Lynch v. Donnelly dissent, Justice Brennan stated that "the Court has never comprehensively addressed the extent to which government may acknowledge religion by, for example, incorporating religious references into public ceremonies and proclamations, and I do not presume to offer a comprehensive approach." Nevertheless, he proposed three principles for "tracing the narrow channels" which must be followed if government religious speech is to satisfy the Establishment Clause. First, under Zorach v. Clauson, he would permit the government to accommodate individual religious exercises. In his view, that would justify a decision to declare December 25th a public holiday. Second, it would be constitutional for government to continue solely for secular reasons a practice that had religious origins and may retain certain religious connotations, such as Sunday closing laws upheld in McGowan v. Maryland and official observance of

155. For this reason, Professor McConnell views Marsh as an example of "originalism gone awry." See Michael W. McConnell, On Reading the Constitution, 73 CORNELL L. REV. 359, 361-63 (1988).

156. 463 U.S. at 792 (internal quotations omitted). The objections raised by John Jay and John Rutledge and the response offered by Samuel Adams are discussed infra in text accompanying notes 256-57.


158. Id. at 715-17.

159. 343 U.S. 306 (1952) (upholding an off-campus "released time" program of private religious instruction for public school children).

Thanksgiving Day. Third, Justice Brennan would allow (with some uncertainty) government to recognize publicly those religious beliefs and practices that survive as a form of "ceremonial deism," that is, practices that are "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." In this category he included references to God in the Pledge of Allegiance and national motto "In God we trust," the invocation "God save the United States and this Honorable Court," religious works on display at the National Gallery, and religious allusions in presidential inaugural addresses. Such references, he explained, serve to "solemniz[e] public occasions, or inspir[e] commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases." This function, combined with their long history, gives these practices an "essentially" or "dominantly" secular message. For example, Brennan suggested that "[t]he reference to divinity in the revised pledge of allegiance...may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln’s Gettysburg Address, which contains an allusion to the same historical fact." The "ceremonial deism" approach was adopted by the majority in County of Allegheny v. ACLU.


162. 465 U.S. at 717.

163. Schempp, 374 U.S. at 304. Contrary to Justice Brennan's characterization, the House Report notes that "[t]he inclusion of God in our pledge...acknowledge[s] the dependence of our people and our Government upon the moral directions of the Creator." H.R. Rep. No. 1693, 83d Cong., 2d Sess. (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340. Similarly, Lincoln's use of the phrase "under God" in the Gettysburg Address was hardly a reference to the founding period. When he concluded his Address by urging that "we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth," Lincoln was speaking of the nation as it was in his time, not at the time of the founders. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in VII THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

164. 492 U.S. 573, 602-03 (1989) ("Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of 'ceremonial deism,' because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.") (citations omitted). See also id. at 595 n.46 (opinion of Blackmun, J., joined by Stevens, J.); id. at 630-31 (O'Connor, J., concurring in part and concurring in judgment, joined by Brennan and Stevens, J.J.).
To his credit, Justice Brennan did not follow Justice Blackmun who strained in Allegheny to diminish the perceived religious message of the challenged displays by emphasizing their secular dimensions. In both Allegheny and Lynch, Brennan recognized the distinctively religious character of the symbols. Nevertheless, his designation of certain practices as "ceremonial deism" is subject to strong empirical challenge. While phrases such as "In God we trust" and "under God" may have no religious significance to some (including, apparently, Justice Brennan), it does not follow that the same holds true for everyone. My guess is that most people probably do not even think about these phrases very often. But when they do, can we say with assurance that such words fail to inspire religious thoughts at least for some, especially when polls consistently show that an overwhelming majority of Americans say they believe in God? Out of the millions of school children who recite the Pledge of Allegiance each day, surely there are many whose thoughts are lifted to God, even if just for a few seconds. Indeed, I suspect they are far more likely to turn their thoughts toward God than to contemplate the religious origins of our nation.

Justice Brennan's "ceremonial deism" is especially troubling for at least two other reasons. First, it reflects a subtle bias against religion. As Judge Manion recently pointed out, this approach selects only religious phrases as losing their meaning through rote repetition. Do not other equally repeated secular phrases in the Pledge, such as "indivisible" and "liberty and justice for all," also become meaningless under Brennan's logic? Second, it requires judicial scrutiny into the religious potency of the message. To say that such messages are in effect meaningless comes perilously close to saying that they are untrue, and that is something beyond the competency of courts to decide.

D. The Endorsement Test

A variation on the purpose and effect elements of the Lemon test is the endorsement test, first proposed by Justice O'Connor in her con-

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165. See id. at 613-21 (Blackmun, J.).
166. See, e.g., Lynch, 465 U.S. at 717 (Brennan, J., dissenting) ("[T]he message of the crèche begins and ends with reverence for a particular image of the divine.").
curring opinion in *Lynch v. Donnelly*,\(^{170}\) and increasingly embraced by the Court in subsequent cases.\(^{171}\) In her view, the Establishment Clause prohibits government from "mak[ing] adherence to religion relevant, in reality or in public perception, to [a person's] standing in the political community."\(^{172}\) The most direct infringement of this prohibition is "government endorsement or disapproval of religion."\(^{173}\) Justice O'Connor's fundamental concern is that our religiously diverse society remain politically inclusive: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."\(^{174}\)

The principal difference between the endorsement concept and Justice Brennan's "ceremonial deism" approach is that Justice O'Connor would permit the state to display a religious symbol if its larger setting negates any endorsement of the religious content of that symbol, even though the symbol retains its distinctively religious meaning within the setting.\(^{175}\) In other words, the religious message of the display would be mitigated in favor of a predominantly pluralistic message of official respect for all beliefs.\(^{176}\) Justice O'Connor's emphasis on religious pluralism, as opposed to secularism, and on a political community that is broadly inclusive is a welcome refinement of the *Lemon* test. She quite properly recognizes that in some circumstances government action may advance religion without endorsing it.\(^{177}\) Several commentators,

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\(^{170}\) 465 U.S. at 692 (O'Connor, J., concurring).


\(^{172}\) *Lynch*, 465 U.S. at 692.

\(^{173}\) *Id.* at 688.

\(^{174}\) *Id.* The test also has been formulated as precluding the government "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). See *Allegheny*, 492 U.S. at 593-94 (Blackmun, J.) (claiming that the concepts of "endorsement," "favoritism," and "promotion" are the same).

\(^{175}\) *Allegheny*, 492 U.S. at 633-35 (O'Connor, J., concurring in part and concurring in judgment).

\(^{176}\) See *id.* at 634 ("[T]he relevant question for Establishment Clause purposes is whether the [challenged government action] sends a message of government endorsement . . . or whether it sends a message of pluralism and freedom to choose one's own beliefs.").

\(^{177}\) *Lynch*, 465 U.S. at 691-92 ("Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the Lemon test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion.").
however, have criticized the endorsement test as being fundamentally flawed.\textsuperscript{178}

One criticism is the difficulty of defining "endorsement." The term itself can mean anything from acknowledgment to approval to sanction. Nevertheless, in the context of government speech, Justice O'Connor has distinguished official "acknowledgment" of religion from "endorsement." In her \textit{Lynch} concurrence, she classified as permissible acknowledgments such practices as legislative prayer and chaplains, official declaration of Thanksgiving as a public holiday, placing "In God we trust" on our coins, and opening court sessions with "God save the United States and this Honorable Court."\textsuperscript{179} These practices, however, look more like official endorsements of religion. Consider the various ways government can recognize religion in its speech. First, the state can acknowledge the \textit{existence} or \textit{role} of religious belief in society without expressing any judgment about the value or veracity of that belief. The study of comparative religion, religious history, or the literary and historical dimensions of the Bible falls into this category. Second, the state also can acknowledge the \textit{value} of religious belief to society without expressing any judgment about the veracity of that belief. One well-known example is the Northwest Ordinance's assertion that "[r]eligion, morality, and knowledge [are] necessary to good government and the happiness of mankind."\textsuperscript{180} Such statements are normative in a utilitarian sense, but agnostic as to the validity of religious claims. Finally, the state can acknowledge the \textit{truthfulness} (or in a weak sense, the \textit{plausibility}) of religious belief.\textsuperscript{181} This occurs whenever the government treats religion as if its claims are true, factual, or legitimate. The last two forms of acknowledgment obviously would qualify as endorsements of religion. Only those practices that acknowledge religion in an objective or descriptive sense can be said not to endorse religion. Yet many, if not most, of the widely accepted usages Justice O'Connor mentioned in \textit{Lynch} are more than merely descriptive of religion. Legislative and courtroom invocations, for example, assume the truthfulness of a fundamental premise of religious belief—the existence of a Supreme Being—unless, of course, we deem them meaningless incantations.\textsuperscript{182}

\textsuperscript{178} For the most persuasive arguments against the endorsement test, see McConnell, \textit{supra} note 51, at 147-57, and Smith, \textit{supra} note 56.

\textsuperscript{179} 465 U.S. at 692-93 (O'Connor, J., concurring).

\textsuperscript{180} \textsc{Northwest Ordinance} (July 13, 1787), \textit{reprinted in 1 The Founders' Constitution} 27, 28 (Philip B. Kurland & Ralph Learner eds., 1987).

\textsuperscript{181} See Smith, \textit{supra} note 56, at 282-83 (distinguishing between endorsements of "value" and endorsements of "truthfulness").

\textsuperscript{182} In \textit{County of Allegheny v. ACLU} Justice O'Connor embraced Justice Brennan's "cere-
The ambiguity of the endorsement concept makes it susceptible to observer bias. If the Establishment Clause forbids official practices that create the perception that government has endorsed religion, the question is, Whose perception counts? The concept depends ultimately on the eye of the beholder. For this reason, "endorsement" cannot be defined in a way that is both generally acceptable and useful. When government acts favorably toward a particular religion, those who are sympathetic toward that religious perspective will almost never perceive an endorsement, while those who do not share the perspective almost always will. Justice O'Connor's attempt to remedy this problem by calling for judicial application of a fictitious "objective" or "reasonable" observer is not entirely satisfying. This falsely assumes that there is a single impartial perspective from which to judge whether government has "endorsed" religion. It is simply impossible to define an objective or reasonable observer without imputing to that observer certain characteristics that ultimately will affect his or her perceptions of endorsement. Thus, William Marshall asks, "Is the objective observer (or average person) a religious person, an agnostic, a separationist, a person sharing the predominant religious sensibility of the community, or one holding a minority view?"

If the principal concern of the endorsement test is that government is making some feel excluded, perhaps the relevant perspective should be that of the religious outsider. However, as Professor Karst points out, that approach presents two difficulties of its own. First, in a nation as religiously diverse as our own, there is no single uniform outsider's perspective. Second, it would be difficult for judges to assume the view of a religious outsider because by-and-large "[j]udges are themselves acculturated to a set of perspectives that are emphatically monistic deism" principle with respect to Thanksgiving holidays. 492 U.S. 573, 630-31 (1984) (O'Connor, J., concurring in part and concurring in judgment). Nevertheless, she has been careful in other instances not to minimize the religious content of the challenged symbol in order to preserve its constitutionality. Id. at 633-36.

183. Smith, supra note 56, at 291.


not the perspectives of outsiders.'"\(^{188}\) In the end, of course, most would agree that it is the judge's own perception that counts. Judge Easterbrook reminds us that "'[w]hen everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.'"\(^{189}\) That is why the endorsement test can be essentially reduced to the exercise of a judge's own intuitions and biases.\(^{190}\) And the extent to which judicial impressions can differ over what constitutes an endorsement of religion is no better illustrated than in *County of Allegheny v. ACLU*.\(^{191}\)

A second and related criticism is that the endorsement test permits constitutional claims to be raised against governmental action solely on the ground that such action is offensive or makes people feel excluded or stigmatized.\(^{192}\) Since the purpose of the endorsement inquiry is to protect the sensibilities of nonadherents, establishment is formulated as a function of personal perceptions or feelings rather than as an abuse of government power.\(^{193}\) By contrast, religious believers who maintain that government action has exposed them to ideas contrary to their faith have no claim under the Establishment or Free Exercise clauses.\(^{194}\) Cases involving compelled allegiance to an official political

\(^{188}\) *Id.* at 517. Mark Tushnet similarly maintains that "'judges will always be broadly representative of the general population, and will be susceptible to all the distortions of interpretation that membership in the majority entails.'" Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711 (1986). In many instances, however, judges may more closely represent society's secularized intellectual elite than the general population. If that is true, they would more likely assume the view of the nonreligious or antireligious outsider rather than the view of one who belongs to a religious minority.

\(^{189}\) *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

\(^{190}\) See Michael S. Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 816 (1993) ("'The 'objective observer' canard is merely a cloak for a judge's personal preference made by reference to the judge's own personal perspective.'"); McConnell, *supra* note 51, at 151 ("A finding of 'endorsement' serves only to mask reliance on untutored intuition.").

\(^{191}\) Compare *492 U.S. 573, 637-46 (1989)* (Brennan, J., concurring in part and dissenting in part) with *id.* at 613-21 (Blackmun, J.) (display of menorah does not convey message of endorsement of religion) and *id.* at 632-37 (O'Connor, J., concurring in part and concurring in judgment) (same).


\(^{193}\) *See Allegheny*, 492 U.S. at 650-51 (Stevens, J., concurring in part and dissenting in part) ("There is always a risk that [the display of religious] symbols will offend nonmembers of the faith being advertised . . . . ").

viewpoint have not held that the governmental speech itself was unconstitutional, even though it was offensive to dissenters. Under current equal protection doctrine, racial minorities who claim that they feel stigmatized by government action but who have suffered no harm in addition to the psychological affront have no constitutional claim. Indeed, outside of Justice O'Connor's endorsement concept, the government's use of controversial speech does not give rise to an assertable constitutional violation for those who are merely listeners or observers, no matter how irritating or insulting the messages may be. In the colonial and founding periods, state establishments created real political disabilities for disfavored groups through such devices as religious test oaths. The endorsement test errs by leaping from real disabilities to felt disabilities. When government speaks religiously, "no one loses the right to vote, the freedom to speak, or any other state or federal right."

The indeterminacy of the endorsement test is especially evident when analyzing official practices that have continued over a long period of time. For over fifty years, the University of Virginia School of Law displayed a plaque containing a "Prayer Before the Study of Law" written by Samuel Johnson in 1765. The plaque was a gift from a former student and hung on a wall in the school's main hallway where classrooms are located. Other pictures, plaques, and commemorative memorabilia are displayed in the school's hallways. The plaque was removed after a student complaint because school officials thought it might be an endorsement of religion since it contained references to "Almighty God" and "Jesus Christ." Over 235 students

195. Objecting students in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) were permitted to opt out of the flag salute, but the Court did not require that the flag salute itself be terminated. In Wooley v. Maynard, 430 U.S. 705 (1977), the Court held that the state could not force a Jehovah's Witness to be "mobile billboard" for its "Live Free or Die" motto, but it did not prevent the state from displaying that or other disagreeable messages in a noncoercive fashion.


197. See Valley Forge College v. Americans United for Separation of Church & State, 454 U.S. 464, 483 (1982) (plaintiffs who "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees" have no standing to sue).

198. Curry, supra note 42, at 80-81.

199. Smith, supra note 56, at 307. See Tushnet, supra note 188, at 712 ("[I]t is not clear why symbolic exclusion should matter so long as 'nonadherents' are in fact actually included in the political community."); see also Carter, supra note 74, at 94 ("The question should not be whether members of 'minority' religions . . . are offended or not. The Establishment Clause does not regulate psychology.").
subsequently signed a petition requesting that the plaque be returned to the wall, while a second petition bearing more than 100 signatures supported the plaque's removal. 200 Under the endorsement concept, the school was faced with a dilemma. Displaying the plaque would send a message to those who object to the prayer that they are outsiders, but removing the plaque would send a message to those who favor the prayer that they are outsiders. Unfortunately, neither group could have its way, and there was no "neutral" reason for choosing one over the other. If the school were deciding whether to hang the plaque for the first time, the endorsement test might be more appealing. But here, as with most other instances of government religious speech, the school was not writing on a clean slate. 201

E. The Coercion Test

The most recently formulated alternative for analyzing Establishment Clause cases is the coercion test proposed by Justices Kennedy, White, Scalia, and Chief Justice Rehnquist in County of Allegheny v. ACLU, 202 and embraced by Justice Thomas in Lee v. Weisman. 203 As explained by Justice Kennedy, the Establishment Clause contains "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to a religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" 204

The idea of coercion, Professor McConnell points out, is grounded largely in the distinction between persuasion and force. 205 While speech usually is part of the coercive process, speech with no accompanying threat of harm is never coercive. As John Locke observed, "it is one thing to persuade, another to command; one thing to press

201. The plaque eventually was exhibited even more prominently in a less-traveled area on the second floor of the school's library, being placed along with letters and photographs relating to its donation in a display case normally reserved for the school's historical memorabilia. While the controversy has subsided, the question of whether its continued display constitutes an endorsement of religion remains.
204. Allegheny, 492 U.S. at 659 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). See Weisman, 112 S. Ct. at 2655 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.") (quoting Lynch, 465 U.S. at 678).
205. McConnell, supra note 51, at 159.
with arguments, another with penalties." Justice Kennedy rejects this conception of coercion. Instead, he maintains that "[s]peech may coerce in some circumstances," thus "[s]ymbolic recognition . . . of religious faith may violate the [Establishment] Clause in an extreme case." One example of such coercive speech, Kennedy explained in Allegheny, is a permanent display of a large Latin cross atop city hall. "[S]uch an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." Professor McConnell suggests, however, that "[t]his conclusion may be correct, but it has no logical connection to the coercion test." The failure to show a principled link between coercion and proselytization underscores a major flaw in the coercion test. It cannot explain why a large cross atop city hall is necessarily coercive if its passive display does not obligate anyone to participate in religious exercise. Neither would it forbid Congress from declaring Christianity to be the official religion of the United States, so long as no one was required to affirm Christian beliefs, provide financial support, or attend church. It is highly doubtful the founders would consider either permissible under the Establishment Clause, and no one presently on the Supreme Court appears to hold such a view. That is why the concept of coercion cannot sum up everything there is to say about the Establishment Clause.

Justice Kennedy departs from traditional legal conceptions of coercion in another, more significant way. By coercion he means not only "direct coercion in the classic sense of an establishment of religion

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207. Allegheny, 492 U.S. at 661.
208. Id.
209. McConnell, supra note 51, at 162.
210. See Foley, supra note 78, at 968.
211. Even the dissenting Justices in Weisman were unwilling to make coercion the exclusive Establishment Clause inquiry. They recognized that our constitutional tradition also forbids "government-sponsored endorsement of religion . . . where the endorsement is sectarian." 112 S. Ct. 2649, 2684-85 (1992).
212. The coercion standard has been criticized for rendering the Establishment Clause redundant of the Free Exercise Clause. See Weisman, 112 S. Ct. at 2673 (Souter, J., concurring) ("[A] literal application of the coercion test would render the Establishment Clause a virtual nullity. . . ."); Allegheny, 492 U.S. at 628 (O'Connor, J., concurring in part and concurring in judgment) ("To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy."). See also Sullivan, supra note 32, at 205 ("[A] 'coercion' test for establishment would reduce the Establishment Clause to a redundancy. If the Establishment Clause is to have independent meaning, it must bar something other than coercion of private citizens into confessions of official faith."). For a persuasive refutation of the redundancy argument, see Paulsen, supra note 190, at 843 n.171.
that the Framers knew," but also indirect forms of coercion such as peer pressure on schoolchildren to participate in state-led classroom prayers. This distinction is the principal point of disagreement between Justice Kennedy on the one hand, and Justices Scalia, Thomas, and Chief Justice Rehnquist on the other. In Weisman Justice Kennedy, writing for the majority, concluded that psychological pressures on students to stand and bow their heads during the invocation and benediction offered at their graduation ceremony rendered the prayers indirectly coercive and therefore unconstitutional. The latter group of Justices dissented on the ground that "the coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." "I see no warrant," Justice Scalia wrote, "for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud." Justice Kennedy's position has been criticized for confusing state action and private action by allowing an Establishment Clause claim based on social pressure to engage in religious practice.

When applied to official religious speech or symbols, none of the above tests has either the coherence or normative appeal that is desira-
ble in Religion Clause jurisprudence. A new approach is needed. We can begin constructing that approach by examining how the founding generation perceived government religious speech and religious establishments.

III. GOVERNMENT RELIGIOUS SPEECH IN THE FOUNDING PERIOD

Questions raised by government religious speech must be resolved in accord with a historical understanding of what the Establishment Clause was intended to forbid. The Clause states a sweeping principle. The founders could have listed specific rules with detailed exceptions, but chose not to do so. Instead, they forbade the government from making any law "respecting an establishment of religion." The text itself gives us some clues to its meaning. The Clause does not prohibit laws "advancing religion" or even "respecting religion," but rather laws "respecting an establishment of religion." Neither does the Clause specifically forbid official expression of religious ideas or sentiments, unless that expression constitutes an establishment of religion. The text, however, does not tell us what an establishment of religion is. That depends, at least in part, on what the founders themselves understood it to mean. After all, words take their meaning from historical and social as well as textual contexts.

219. U.S. CONST. amend. I.
220. Id. (emphasis added). Some think that the Establishment Clause expressly forbids any governmental action that concerns religion. Justice Stevens, for example, made this point in County of Allegheny v. ACLU:

It is also significant that the final draft contains the word "respecting." Like "touching," "respecting" means concerning, or with reference to. But it also means with respect—that is, "reverence," "good will," "regard"—to. Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion.

492 U.S. 573, 649 (1989) (Stevens, J., concurring in part and dissenting in part) (emphasis added) (footnote omitted). But that is not what the clause says. It forbids only laws "respecting an establishment of religion." During the debates over the wording of the Establishment Clause, the House initially approved a sweeping amendment offered by Samuel Livermore that would have prohibited Congress from making laws "touching religion." That wording later was rejected in favor of the version sent to the Senate which read "Congress shall make no law establishing religion." 1 ANNALS OF CONG. 766 (Joseph Gales ed., 1834) (Aug. 20, 1789). See 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 159, 166 (House Journal) (L. de Pauw ed., 1972); 1 id. at 136 (Senate Journal).

222. That is why "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.). The importance of the founders' understanding of the Religion Clauses has been widely recognized. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (proposing that the goal is to frame a principle "that is not only grounded in the history and language of the first amendment, but one that is also capable
We must resist the recurring urge to reduce the meaning of the Establishment Clause to a single formulaic abstraction that can nicely be applied in every circumstance. The Supreme Court's own efforts in this regard reveal that no single unifying test for identifying an establishment of religion will yield consistent and coherent results when applied to the myriad ways religion and government intersect in the modern welfare-regulatory state. Vague metaphors and mechanical tests are poor substitutes for reasoned analysis of the text, history, and purposes of the Establishment Clause. That is not to say, of course, that it is impossible to define broad principles that will aid in identifying what the Establishment Clause prohibits. These principles derive from the underlying values, justifications, and symmetry of the Religion Clauses, as well as what the founders considered as paradigmatic establishments of religion. Instead of bending the principles into metaphors or tests, we must use them to build flexible and nuanced approaches applicable to specific relevant categories of government action involving religion—religious speech, funding, regulation, and accommodation.

A. The Rise of an Expansive View of Religious Liberty

While this is not the place to recount in detail the development of religious liberty in preconstitutional America, a summary of what that history teaches is nonetheless useful. The original design behind religious establishments in the colonies was to utilize civil power to protect...
the purity of the church from heretics and schismatics who threatened to unravel the fabric of true religion and civilized society.\textsuperscript{224} The means for providing such protection was through civil enforcement of uniformity in religious doctrine and practice.\textsuperscript{225} By the late seventeenth and early eighteenth centuries, however, the original intention to perpetuate state-imposed religious uniformity had been widely frustrated by the efforts of such advocates for religious freedom as Roger Williams and William Penn, as well as by various circumstances in colonial America that made it impractical to continue religious persecution.\textsuperscript{226} Colonies with religious establishments became increasingly tolerant of dissenting sects. The road from religious uniformity to toleration to full religious freedom began with the recognition of individual rights of conscience; that is, dissenters could practice their own religion freely so long as they did not breach the peace or interfere with the religious exercises of others. By the mid-eighteenth century, it was commonly believed that the free exercise of religion could coexist with religious establishments, and those establishments more frequently were justified on the ground that religion produced effects beneficial to state and society.\textsuperscript{227}

Despite increased toleration, states with established churches continued efforts to protect against theological error and the decline of religious fervor through such coercive measures as religious qualifications for officeholders, mandatory public worship, and tax support for the clergy.\textsuperscript{228} These laws were widely assailed as being both ineffective and contrary to the spirit of true religion. Thomas Jefferson wrote in his \textit{Notes on the State of Virginia} that the state will only make matters worse by compelling a person professing error to confess the correct belief: "Constraint may make him worse by making him a hypocrite, but it will never make him a truer man. It may fix


\textsuperscript{225} It was generally believed that the church's power to expel or otherwise sanction a dissenting or wayward member was inadequate to ensure religious faithfulness. Calvin wrote that "the Church has no power of the sword to punish or to coerce, no authority to compel, no prisons, fines, or other punishments, like those inflicted by the civil magistrate." \textit{2 John Calvin, Institutes of the Christian Religion} 398 (Fifth American ed. 1819) (1536). It was precisely because the civil magistrate had the power to compel that Calvin advocated an alliance between church and state.

\textsuperscript{226} These circumstances are described in Curry, \textit{supra} note 42, at 19-28, 78-104, and Mead, \textit{supra} note 224, at 71-78.

\textsuperscript{227} See Curry, \textit{supra} note 42, at 165.

\textsuperscript{228} The principal features of religious establishments during the founding period were coercive in nature. See Michael W. McConnell, \textit{Coercion: The Lost Element of Establishment}, 27 \textit{Wm. & Mary L. Rev.} 933, 937 (1986).
him obstinately in his errors, but will not cure them." The preamble to Jefferson's Bill for Establishing Religious Freedom declares that attempts to influence religious conscience "by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness," and are contrary to the plan of God who "chose not to propagate [religion] by coercions" but rather "to extend it by its influence on reason alone." James Madison urged that "[w]hilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." The abuse of this freedom, Madison warned, "is an offence against God, not against man." Baptist minister John Leland maintained that religious establishments "hold[] forth a tempting bait to men to embrace that religion which is pampered by the law, without searching after truth conscientiously."

Objections to religious establishments went beyond their coercive effects, however. Proponents of religious liberty argued that civil government invaded divine prerogative when it treated one religious group's doctrines or modes of worship as superior to the rest, thus "mak[ing] the majority of the people the test of orthodoxy." In their view, the nature of religious belief rendered civil government incompetent to direct the religious choices of its citizens not only by

229. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, QUERY 17, 159 (1784), reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 180, at 80.

230. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (June 12, 1779), reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 180, at 77 (original spelling). A modified version was enacted into law in 1785. Id. at 84. Similarly, the Virginia Declaration of Rights protected free exercise of religion on the ground "[t]hat religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." VIRGINIA DECLARATION OF RIGHTS § 16 (June 12, 1776), reprinted in id. at 70.

231. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 4 (June 20, 1785), reprinted in 5 THE FOUNDERS' CONSTITUTION, supra note 180, at 82. The Court has relied on the Memorial and Remonstrance for insight into the founders' intent for the Religion Clauses. See, e.g., Everson v. Board of Educ., 330 U.S. 1, 37 (1947). Justice Rutledge called it Madison's "complete, though not his only, interpretation of religious liberty." Id. (Rutledge, J., dissenting).

232. MADISON, supra note 231, ¶ 4 (original spelling).


234. ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY (1773), reprinted in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at 329, 343 (Ellis Sandoz ed., 1991) [hereinafter POLITICAL SERMONS]; see id. at 339 ("God always claimed it as his sole prerogative to determine by his own laws, what his worship shall be, who shall minister in it, and how they shall be supported").
coercing participation in religious exercise, but also by determining the content of true religion.\textsuperscript{235} "[I]f religion is, at all times and places, a matter between God and individuals, and also, that religious opinions are not objects of civil government, nor under its control," Leland argued, "it then follows that government has no right to describe the god which the people are to worship."\textsuperscript{236} Jefferson believed that religious liberty was necessary because "legislators and rulers, . . . being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking, as the only true and infallible, and as such, [have] endeavor[ed] to impose them on others."\textsuperscript{237} By the end of the eighteenth century, a broad consensus about church and state had emerged that went beyond mere toleration of dissenting beliefs. Thomas Curry, author of one of the leading histories of church-state relations in colonial and revolutionary America, says that "Americans could not achieve unity on any one religious belief, but they agreed that the government could have no authority in defining or imposing a belief on the populace, and that each person was entitled to the free exercise of his or her religion of choice."\textsuperscript{238} This consensus was reflected in the protections for religious liberty enacted at both the federal and state level.

If any metaphor captures the quintessence and symmetry of the Religion Clauses, it is not Jefferson's misunderstood "wall of separa-

\textsuperscript{235} John Locke greatly influenced American conceptions of religious liberty, especially Jefferson's. Locke emphasized that civil magistrates were not given power over individual religious decisions. In his \textit{Letter Concerning Toleration}, Locke wrote: 

[T]he care of souls is not committed to the civil magistrate . . . because it appears not that God has ever given any such authority to one man over another, as to compel any one to his religion. Nor can any such power be vested in the magistrate by the consent of the people, because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another.

\textit{Locke, supra} note 206, at 52. Madison argued that since religion is beyond the jurisdiction of the state, the civil magistrate is not competent to judge religious truth. See \textit{Madison, supra} note 231, ¶¶ 1, 2, 5.

\textsuperscript{236} Leland, \textit{supra} note 233, at 249. \textit{See John Leland, The Rights of Conscience Inalienable, and therefore, Religious Opinions Not Cognizable by Law; or, The High-Flying Churchman, Stripped of His Legal Robe, Appears a Yahoo (1791), reprinted in The Writings of the Late Elder John Leland, supra note 233, at 184 ("The duty of magistrates is not to judge the divinity or tendency of doctrines . . .").

\textsuperscript{237} Jeffereson, \textit{supra} note 230, at 77. \textit{See} Leland, \textit{supra} note 233, at 251 (mixing religious laws and test oaths with civil laws "makes the opinions of fallible men, the test of orthodoxy for all the people . . . and shall the judgment of one man in a thousand, be the rule for the faith and worship of the whole thousand?").

tion," but rather Roger Williams’ imaginary “ship at sea,” which he called “a picture of a commonwealth . . . or society”:

It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the papists, protestants, Jews, or Turks, be forced to come to the ship’s prayers of worship, nor compelled from their own particular prayers or worship, if they practice any.239

Thus, in Williams’ view, the state interferes with religious freedom in two ways: first, when it compels people to adopt its religious practices; and second, when it compels people to abandon their own religious practices. The enacting clause in Jefferson’s Bill for Establishing Religious Freedom is similar. On one hand, it prohibits anyone from “be[ing] compelled to frequent or support any relig[i]ous Worship place or Ministry whatsoever”; on the other, it provides that no one “shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.”240 The Establishment and Free Exercise clauses also reflect this complement. The former forbids the state from imposing its preferred religion, while the latter forbids the state from interfering with an individual’s preferred religion.241 The Establishment Clause protects all, the religious and nonreligious alike, from the state’s efforts to conform them to officially-approved religious belief or practice. The Free Exercise Clause protects religious believers from undue interference by the state with their own spiritual obligations or decisions. Both clauses are thus necessary to fully protect individual conscience in religious matters.

B. The Founders’ Views on Government Religious Speech

The enactment of federal and state prohibitions on religious establishments had little effect on the frequency with which government

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239. Letter from Roger Williams to the Town of Providence (Jan. 1655), in 5 THE FOUN-
DERS’ CONSTITUTION, supra note 180, at 50.

240. JEFFERSON, supra note 230, at 77.

conveyed religious ideas or sentiments in its constitutions, laws, pro-
clamations, ceremonies, and symbols during the colonial and found-
ning periods.242 Both Congress and state legislatures regularly
proclaimed official days of public fasting and prayer, provided for
chaplains to open their sessions with prayer, and encouraged the prac-
tice of religion in other official pronouncements or enactments.
Speeches by Presidents and other public officials often contained re-
ligious appeals. Official documents such as the Declaration of Inde-
pendence and most state constitutions were replete with references to
God and religion. While Americans agreed that government should
not coerce or otherwise impose religious beliefs or practices, most also
agreed that there should be official recognition of the providential
hand of God in national affairs and encouragement of religious values
they shared in common. The question, then, is whether the founders,
by engaging in or approving of such practices, acted inconsistently
with their intent regarding disestablishment, or whether such actions
reflected that intent.

To answer that question we must get beyond the existence of these
practices and identify, to the extent possible, those principles the
founding generation used to distinguish impermissible religious ex-
pressions from otherwise permissible recognition of religion by gov-
ernment. On one hand, since the founders cannot be expected to have
come to grips with every implication of their commitment to disestab-
ishment, these principles are best identified in the resolution of con-
troversial matters, when the founders had to think through the
establishment issue.243 Indeed, as Chief Justice Burger wrote in *Marsh
v. Chambers*,244 “evidence of opposition . . . infuses [the historical ar-

242. Compilation of various forms of official religious expression during the founding pe-
riod can be found in CHESTER J. ANTEAU, ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT 76-
91, 182-83 (1964), EDWARD FRANK HUMPHREY, NATIONALISM AND RELIGION IN AMERICA 1774-
INSTITUTIONS OF THE UNITED STATES 206-331, 525-612 (1864), and I ANSON P. STOKES, CHURCH
AND STATE IN THE UNITED STATES 447-517 (1950). Several judicial opinions also have recited
many of these practices. See, e.g., Lee v. Weisman, 112 S. Ct. 2649, 2679-80 (1992) (Scalia, J.,
dissenting); County of Allegheny v. ACLU, 492 U.S. 573, 671-72 (1989) (Kennedy, J., concur-
rning in judgment in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 100-03 (1985)
(Rehquist, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 674-78 (1984); Marsh v. Cham-
berrs, 463 U.S. 783, 786-92 (1983); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437,
445-46 (7th Cir. 1992) (Easterbrook, J.); American Jewish Congress v. City of Chicago, 827
F.2d 120, 132-37 (7th Cir. 1987) (Easterbrook, J., dissenting).

243. This point is developed in two thoughtful articles by Professor Douglas Laycock on
original intent and the Religion Clauses. See Douglas Laycock, Original Intent and the Constitu-
tion Today, in THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS 87, 89-90 (JAMES E.
Wood, Jr. ed., 1990) [hereinafter Laycock, Original Intent]; Douglas Laycock, Text, Intent, and

244. 463 U.S. 783 (1983).
When Government Speaks Religiously

Argument with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society.\textsuperscript{245} Unexamined practices, by contrast, may have continued simply because of precedent, oversight, or failure of anyone to object. On the other hand, we must not treat the founders as unable to comprehend what they meant by the Establishment Clause or, worse, as deliberately ignoring it in their own proceedings. It is entirely possible that certain practices continued because of widespread agreement that those practices posed no establishment problems.\textsuperscript{246}

I. Was the Matter Considered?

Colonial charters and constitutions in the seventeenth and early eighteenth century frequently contained explicitly religious language.\textsuperscript{247} While such expressions often were manifestations of formal or de facto religious establishments, almost no one thought religion was established merely by official documents or pronouncements containing religious content. Consider, for example, the position taken by Elisha Williams, a Congregationalist minister and former president of Yale, in the most principled and persuasive defense of religious liberty in the first half of the eighteenth century. Williams maintained that the civil magistrate has "no power to establish any religion (i.e. any professions of faith, modes of worship, or church government) of a human form and composition, as a [binding] rule."\textsuperscript{248} It was not an establishment of religion, however, for government to speak favorably of religion.

\textsuperscript{245} Id. at 791.

\textsuperscript{246} See Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring) ("The existence from the beginning of the Nation's life of a practice, . . . [while] not conclusive of its constitutionality . . . is a fact of considerable import in the interpretation [of the Establishment Clause].").

\textsuperscript{247} The Fundamental Orders of Connecticut, for example, adopted in 1638-39, attributed the presence of the first settlers in Connecticut to "Almighty God," and acknowledged that "the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent Gouerment established according to God." Fundamental Orders of Connecticut (1638-39), reprinted in 1 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 519 (Francis N. Thorpe ed., 1909) (original spelling). The preface to Pennsylvania's Frame of Government of 1682 begins with the description of man's creation, fall, and the institution of the rule of law, and then quotes several verses from the writings of the Apostle Paul that illuminate the purpose of law and human government. Frame of Government of Pennsylvania (1682), reprinted in 5 Id. at 3052-53 (the quotations are from Galatians 3:19, 1 Timothy 1:9-10, and Romans 13:1-5).

\textsuperscript{248} Elisha Williams, The Essential Rights and Liberties of Protestants (1744), reprinted in Political Sermons, supra note 234, at 72.
If by the word establish be meant only an approbation of certain articles of faith and modes of worship, of government, or recommendation of them to their subjects; I am not arguing against it. But to carry the notion of a religious establishment so far as to make it a rule binding to the subjects, or on any penalties whatsoever, seems... to break in upon the sacred rights of conscience... 249

The progress from religious tolerance to full religious liberty by the end of the eighteenth century had little effect on religious references in official speech. To some commentators, the content and frequency of these allusions seem out of step with heightened efforts during the founding period to undo the remaining state establishments. "[W]hile adhering to the principle that government had no power in religion," writes Thomas Curry, "[Americans] seemed to be saying that in practice and for the good of society, government needed to promote religious symbols and values." 250 Curry's explanation for what he sees as a contradiction between the founders' theory and practice is that the American view of church-state relations emerged largely in response to controversy rather than to clear thinking; that is, Americans developed strong ideas about religious liberty, but only applied them when the diversity of religious groups made it necessary or when dissenters could persuade them to do so. 251 Where Americans disagreed about the meaning of religious freedom, such as over whether government should provide financial support for the clergy, they decided that government should have no power over religious matters. 252 However, because Protestant Christianity and American culture were so intertwined, Curry argues, few objected to government speaking out in support of common religious symbols and values, and hardly anyone stopped to think how this might impose a particular religious viewpoint. 253 Disputes over practices such as chaplains and designation of days of prayer arose only later with a more religiously diverse society. 254 Professor Laycock similarly maintains that "the founders saw no problem with government sponsorship and endorsement of generic Protestantism... because in their society, no one complained... [i]t

249. Id. at 73.
250. Curry, supra note 239, at 263.
251. Id. at 263, 272.
252. Id. at 272.
253. Curry, supra note 42, at 2181.
254. Id. at 219.
did no apparent harm, no one raised the issue, and they had no occasion to seriously think about it.\(^{255}\)

To be sure, practices such as chaplains and days of prayer did not arouse controversy comparable to that generated by tax support for churches. Nevertheless, contemporary opposition to these practices did arise, which forced the founders to ponder whether such forms of official expression were permissible. The Continental Congress' first act during its first session in 1774 was to arrange for its daily proceedings to begin with prayer. John Adams described what transpired in a letter to his wife:

> When the Congress first met, Mr. Cushing made a motion that it should be opened with prayer. It was opposed by Mr. Jay of New York, and Mr. Rutledge of South Carolina, because we were so divided in religious sentiments; some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that we could not join in the same act of worship. Mr. Samuel Adams arose and said, "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country. He was a stranger in Philadelphia, but had heard that Mr. Duché (Dushay they pronounce it,) deserved that character, and therefore he moved that Mr. Duché, an episcopal clergyman, might be desired to read prayers to the Congress, tomorrow morning." The motion was seconded and passed in the affirmative.\(^{256}\)

The objection raised by Jay and Rutledge was that the divergent religious beliefs of the delegates would make it impossible for all to participate in the prayers. Given the extent of religious diversity in America today, the rather narrow range of religious differences in the late eighteenth century seems fairly insignificant. Having fewer religious traditions, however, did not make the differences that did exist any less real or intensely felt. This exchange suggests the delegates did not consider nonparticipatory opening prayers to be injurious to anyone's religious sensibilities or beyond the prerogative of government. Even if they were unable to "join" in prayer, they could, as Samuel Adams

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255. Laycock, *Original Intent*, *supra* note 243, at 103. See Laycock, *Nonpreferential Aid*, *supra* note 42, at 917-18 (concluding that widespread objections forced the founders to conclude that any form of tax support for churches violated religious liberty, but that "other government supports of Protestantism never aroused enough controversy to trigger similar examination").

pointed out, "hear" a prayer offered on their behalf and on behalf of the nation.257

The Constitutional Convention of 1787 had no chaplains or opening prayers and made no official religious pronouncements. There were few references to religion in convention proceedings until June 28, 1787, when Benjamin Franklin suggested members of the Convention turn to prayer as a means of resolving their political differences. Franklin reminded the delegates that when the Revolutionary War first broke out, they undertook "daily prayer in this room for the divine protection" and "[t]o that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity."258 He then warned:

[H]ave we now forgotten that powerful friend? or do we imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth, that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? . . . .

. . . I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.259

After the motion was seconded, some delegates observed that while such a resolution would have been proper at the beginning of the convention, it might now provoke public criticism by suggesting there was

257. Duché continued as chaplain of Congress until his resignation on October 17, 1776, at which time he was paid a stipend of $150. HUMPHREY, supra note 242, at 412-13. Other chaplains were appointed and served until the termination of the Continental Congress. Their duties generally consisted of opening sessions with prayers, conducting services for the dead, delivering sermons on days of fasting, prayer, and thanksgiving, assisting in patriotic celebrations, and supervising the preparation and publication of an American Bible. Id. at 415. Several state legislatures and conventions regularly used chaplains to open their sessions with prayer, including two states that were most instrumental in defining religious liberty. See Antieau, supra note 242, at 76-77. Virginia followed the practice of opening legislative sessions with prayer, even after disestablishment. See J. OF THE HOUSE OF BURGESSSES 34 (NOV. 20, 1712); DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA OF JUNE 2, 1788 at 13 (1805) (ratification convention); J. OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA OF JUNE 24, 1788 at 3 (1828) (state legislature). The sessions of Rhode Island's ratification convention, like Virginia's, began with prayer. William R. Staples, Rhode Island in the Continental Congress, 1765-1790, 668 (Reuben A. Guild ed., 1971) (reprinting the May 26, 1790 convention minutes).


259. Id. at 451-52 (footnote omitted).
dissension and disagreement within the convention. Franklin and others responded that "the past omission of a duty could not justify a further omission," that rejection of the motion would mean more criticism than its adoption, and that any alarm to the country likely would be as helpful as harmful. One delegate surmised that the real reason there was no chaplain was because "[t]he Convention had no funds." No vote was taken on the motion. Franklin noted on the manuscript containing his remarks that "[t]he Convention, except three or four persons, thought Prayers unnecessary." Thus, it appears Franklin's motion failed for political or pragmatic reasons rather than out of concern that the prayers would constitute an establishment of religion.

Objections to opening prayers were raised at the 1787 Pennsylvania convention debating the ratification of the Federal Constitution. The practice was opposed on grounds that it was unnecessary, that it "might be inconsistent with the religious sentiments of some of the members, as it was impossible to fix upon a clergyman to suit every man's tenets," and that there was no precedent for it in prior proceedings of the state's General Assembly or constitutional convention. Benjamin Rush, who had offered the proposal, pointed to the practice of opening prayers in the Continental Congress as precedent, and expressed hope that "there was liberality sufficient in the meeting to unite in prayers for the blessings of heaven upon their proceedings, without considering the sect or persuasion of the minister who officiated." Action on Rush's motion was postponed, and the issue was never revisited.

When the United States House of Representatives resolved on September 25, 1789 to call for a day of prayer and thanksgiving, it did so in the face of objections that Congress possessed no power over matters of religion and that the proclamation might impose upon the people something they were not inclined to do—both establishment-type arguments. The day before, the House had given final approval to the language of the Religion Clauses. Three days prior to that, the First
Congress had authorized payment of an annual salary to its chaplains.\textsuperscript{267} The resolution introduced by Elias Boudinot requested that the President "would recommend to the People of the United States a day of thanksgiving and prayer . . . [for] the many signal favours of Almighty God, especially by affording them an opportunity peacefully to establish a Constitution of government for their safety and happiness."\textsuperscript{268} Thomas Tucker objected on both pragmatic and principled grounds. He thought the people might not want to give thanks for the Constitution until they saw that it worked, and he urged that issuing such a proclamation "is a business with which Congress have nothing to do; it is a religion matter, and, as such, is proscribed to us."\textsuperscript{269} Boudinot reminded the delegates of similar practices of the Continental Congress. The resolution was approved. Although deliberations on the matter apparently were brief, the nature of Tucker's objections, while the debates over the Religion Clauses were still fresh in the minds of all, gave Congress ample pause to consider whether the proclamation was an impermissible establishment of religion. Yet no such concerns were voiced.\textsuperscript{270}

These were not the only instances of opposition to various forms of official religious expression. John Leland opposed state payment of chaplains as unnecessary and inconsistent with religious liberty, but he did not object to chaplains per se.\textsuperscript{271} When Connecticut enacted a law in 1791 imposing a fine on all who failed to observe public fast and thanksgiving days, it prompted objections from Episcopalians whose liturgical calendar sometimes conflicted such observances.\textsuperscript{272} No one apparently was prosecuted under the law. Maryland appointed a form of public prayer for its new government, and clergy of the Church of England were faced with the choice of using the form, paying a

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\item \textsuperscript{267} Id. at 2180 (Sept. 22, 1789); 1 Stat. 71. On April 25, 1789, the Senate had elected its first chaplain, J. of the Senate 20, and the House followed suit on May 1, 1789, J. of the H.R. 26.
\item \textsuperscript{268} 1 Annals of Cong. 914 (Sept. 25, 1789).
\item \textsuperscript{269} Id. at 915. Tucker believed that any power to issue such proclamations rested with the states rather than the national government. See id. ("If a day of thanksgiving must take place, let it be done by the authority of the several States; they know best what reason their constituents have to be pleased with the establishment of this Constitution.").
\item \textsuperscript{270} See generally Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888) ("[An act] passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of its true meaning."). Curry dismisses Tucker's objections to the thanksgiving proclamation as receiving "scant attention." Curry, supra note 238, at 269.
\item \textsuperscript{271} John Leland, The Virginia Chronicle (1790), reprinted in The Writings of the Late Elder John Leland, supra note 233, at 119.
\item \textsuperscript{272} Antieau, supra note 242, at 183.
\end{itemize}
“treble tax” if they refused, or leaving the state. Most of them decided to leave, and their church buildings were closed or used by other religious groups. The practices in Connecticut and Maryland of course were coercive; it is not clear whether they were opposed on other grounds.

These episodes show that objections were raised and thoughtfully considered. It is plainly false, then, to suggest that practices such as appointment of chaplains and designation of days of prayer were “non-disputed” and “caused no conflict at either the state or federal level,” or were the product of “unreflective bigotry.” The practices of the founding generation therefore can provide a useful guide to formulating a more sensitive and workable Establishment Clause jurisprudence.

2. Rationales Supporting Government Religious Speech

Despite the religious diversity in America during the founding period, certain theological ideas were accepted by nearly everyone as true. This shared frame of reference, or “public theology,” was derived mostly from the Bible and was reinforced through widely-published sermons. It included faith in an all-knowing and all-powerful God who created the universe and governs it by his providence, and who will reward and punish human beings according to whether they have carried out his will, as well as belief that the human mind can perceive divine realities, that human beings are at the same time both noble and brutish, and that the human spirit is immortal. These beliefs had profound implications for the new political regime. To eighteenth century Americans, life was a unity—they had not yet learned to separate completely the spiritual from the civil as we are so accustomed to doing in postmodern America. Their daily lives, as well as world events, were understood within the framework of their religious beliefs. As one scholar notes: “In eighteenth-century America—in city, village, and countryside—the idiom of religion penetrated all dis-

273. Cobb, supra note 224, at 504.
274. Curry, supra note 42, at 218-19.
275. Laycock, Nonpreferential Aid, supra note 42, at 919.
course, underlay all thought, marked all observances, gave meaning to every public and private crisis.'" 278 The Bible taught them that God was sovereign over the state as well as the church; as "God's servant," the civil magistrate was obliged to dispense justice and punish wrongdoers. 279 It was commonly accepted that the nation should seek divine support and guidance for its political order. The notion of a thoroughly secular state, completely removed from God's sovereign authority, was never seriously contemplated. 280

Perhaps the most striking recognition of God's sovereignty over the political order came from James Madison, whose argument for religious liberty rested primarily on the ground that religion represents irresistible obligations to a higher Being who is beyond the jurisdiction of the state. In his *Memorial and Remonstrance Against Religious Assessments*, he explained:

> [The right of religious conscience] is unalienable . . . because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. 281

To Madison, the citizen's prepolitical duty to God, as perceived within the individual conscience, is superior to political, legal, or social obligations. Similar recognition of God's sovereignty over political society appears in the Declaration of Independence, which asserts that the "Laws of nature and of Nature's God" stand above the laws of men. Only because "all Men are created equal" and have been "endowed by their Creator with certain unalienable Rights," do people have the right to alter or abolish human government that disregards those rights. 282

278. *Bonomi*, supra note 276, at 3.
282. The language of the Declaration is subject to both deistic and evangelical interpretations. Adams and Emmerich, however, suggest the Declaration was of necessity a consensus
Official religious speech in the late eighteenth century repeatedly stressed one dimension of God's sovereignty, namely, his providence.\textsuperscript{283} The belief that God is concerned about and guides the affairs of both people and nations was shared even by the rationalists of the day. Consider, for example, the sentiments expressed by Benjamin Franklin when he called for prayer at the Constitutional Convention. They reveal that his proposal was not made as a symbolic gesture or political ploy, but because he really believed that "God governs in the affairs of men." Other acknowledgments of God's providence are found in the numerous proclamations issued first by the Continental Congress and later by both the President and Congress designating days of public fasting, prayer, and thanksgiving. The first such resolution, issued June 12, 1775, explains that it is "our indispensable duty devoutly to acknowledge [the] superintending providence" of the "great Governor of the World," especially "in times of impending danger and public calamity."\textsuperscript{284} In 1776, John Witherspoon, the president of Princeton, was appointed to chair a committee of Congress to make recommendations to the states for a day of fasting and prayer.\textsuperscript{285} He wrote that "it becomes all public bodies, as well as private persons, to reverence the Providence of God, and look up to him as the supreme disposer of all events, and the arbiter of the fate of nations."\textsuperscript{286} Similarly, the preamble to what has been called the first national Thanksgiving Day proclamation,\textsuperscript{287} dated November 1, 1777, states that "it is the indispensable Duty of all men to adore the superintending Providence of Almighty God; to acknowledge with Grati-

\textsuperscript{283} For insight into how Americans in the late eighteenth century understood God's providence over human government, see JACOB CUSHING, DIVINE JUDGMENTS UPON TYRANTS; AND COMPASSION TO THE OPPRESSED, reprinted in POLITICAL SERMONS, supra note 234, at 607, 611-12 (sermon on Apr. 20, 1778 commemorating the British attack at Lexington in April 1775).

\textsuperscript{284} 2 J. OF CONTINENTAL CONG. 81 (June 17, 1775).

\textsuperscript{285} 1 STOKES, supra note 242, at 300.

\textsuperscript{286} Id.

\textsuperscript{287} Id. at 453.
tude their Obligation to him for Benefits received, and to implore such farther Blessings as they stand in Need of." \(^\text{288}\)

Between 1775 and 1787, the Continental Congress issued at least seventeen such proclamations.\(^\text{289}\) Their language is advisory and their appeal limited. No penalties were imposed for not observing the designated day in the manner described, and the proclamations were directed to those who were inclined to pray. The closing words of the first proclamation are typical: "And it is recommended to Christians, of all denominations, to assemble for public worship, and to abstain from servile labor and recreation on said day."\(^\text{290}\) Their form remained much the same throughout the period. The preamble would give the reasons for the proclamation, a specific date would be set for the day of prayer and fasting, and various requests to be offered up to God would follow. The people would be encouraged to acknowledge God's overruling providence, confess and turn from their sins and seek forgiveness, pray for Divine favor and success in their struggles against England, and seek God's blessing on their leaders, institutions, and community. Allusions to the Bible are frequent, and the language sometimes is distinctively Trinitarian with references to "Jesus Christ" and "the Holy Ghost." Most references to the Deity, however, are more general, such as "Divine Providence," "our great Creator," "Supreme Disposer," "Great Governor of the universe," "sovereign Lord of heaven and earth," "righteous Governor of the world," "gracious Benefactor," "Supreme Being," "Divine Redeemer," "the Giver of all good," "Supreme Ruler of all human events," "Almighty Being," and "all-bountiful Creator."

The practice of officially recognizing God's providence over the affairs of the nation continued after the Constitution was ratified. Even though the Constitution itself is mostly silent about religion,\(^\text{291}\) John

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288. Id. at 452.
289. The proclamations are collected in Morris, supra note 242, at 528-43.
290. 2 J. of Continental Cong. 82 (June 12, 1775) (emphasis added).
291. Besides the No Religious Test Oath Clause, there are only incidental references to religion in the Constitution— the exception of Sundays from days on which the President may exercise his right to veto legislation and the dating of the document as "in the Year of our Lord one thousand seven hundred and eighty seven." U.S. Const. art. 1, § 7, art. VII. Benjamin Rush later complained in a letter to John Adams that "[m]any pious people wish the name of the Supreme Being had been introduced somewhere in the new Constitution" and hoped that some "acknowledgment may be made of his goodness or of his providence" in the proposed amendments before Congress that eventually became the Bill of Rights. Letter from Benjamin Rush to John Adams (June 15, 1789), in 1 Letters of Benjamin Rush 516-17 (L.H. Butterfield ed., 1951). Rush nevertheless pronounced himself "perfectly satisfied that the Union of the States, in its form and adoption, is as much the work of a Divine Providence as any of the miracles recorded in the Old and New Testament were the effects of a divine power." Letter from Benja-
Mansfield reminds us that it "embodies a particular view of human nature, human destiny and the meaning of life. It is not neutral in regard to these matters." 292 Nowhere does the Constitution repudiate the cognizance of God’s sovereignty and providence already explicit in the Declaration of Independence, prayer resolutions, or other forms of official acknowledgment of religious belief, nor could it. For the founders to have asserted the supremacy of the state in all matters would have necessarily denied the existence of a Supreme Being and, as a consequence, undermined the very assumptions about human nature and human rights upon which the Constitution is based. 293 Official recognition of God’s position above the state served as a reminder that the power of civil government is restrained by higher law. Indeed, Jefferson worried over how the liberties of the nation would be secure if removed from "their only firm basis, a conviction in the minds of people that these liberties are the gift of God." 294 This is why the liberal constitutional regime that emerged in 1789 did not equate recognition of God’s sovereignty and providence in government speech with an impermissible establishment of religion. Rather, as Robert Bellah points out, "the reference to a suprapolitical sovereignty, to a God

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292. John H. Mansfield, The Religion Clauses of the First Amendment and the Philosophy of the Constitution, 72 Cal. L. Rev. 847, 856 (1984). See School Dist. v. Schempp, 374 U.S. 203, 213 (1963) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.").

293. Professor McConnell has proposed a political version of Pascal’s wager:

[While unable to establish a national religion, the liberal state also cannot reject in principle the possibility that a religion may be true; and if true, religious claims are of a higher order than anything in statecraft. . . .] Religious claims, if true, are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by "God." For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist.


who stands above the nation and whose ends are standards by which to judge the nation and indeed only in terms of which the nation’s existence is justified becomes a permanent part of American political life ever after.”

Consider also that the very constitutional provisions now thought to forbid government from expressing religious sentiments were themselves premised, at least in part, on religious considerations. The prevailing justifications for religious liberty during the founding period were essentially religious. Believing that “Almighty God hath created the mind free,” Jefferson resisted state-imposed religion as “a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do.” Madison’s principal argument for religious freedom in his Memorial and Remonstrance, as we have seen, was based on the theological proposition that God is sovereign over both the individual and civil society, and that man’s duty to God is prior in both time and importance to man’s duty to the state. To the extent these and other religious defenses for religious liberty supply the definitive rationales for the Religion Clauses, the First Amendment itself has religious content. Moreover, the foun-

295. Bellah, supra note 282, at 19. References to God’s superintending providence frequently appear in subsequent official pronouncements. In 1789 President Washington issued a proclamation for a National Thanksgiving, urging that all nations have a duty “to acknowledge the providence of Almighty God, to obey his will, to be grateful for His benefits, and humbly to implore his protection and favor.” George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), in 1 Richardson, supra note 137, at 64. In his First Inaugural Address, Washington remarked that “it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect.” George Washington, First Inaugural Address (Apr. 30, 1789), in 1 id. at 52. Prompted by an outbreak of yellow fever, John Adams issued a proclamation in March 1799, which urged that “a deep sense and a due acknowledgment of the governing providence of a Supreme Being, and of the accountableness of men to Him as the searcher of hearts and righteous distributor of rewards and punishments.”

296. JEFFERSON, supra note 230, at 77.

297. See supra text accompanying note 281.

298. See David C. Williams & Susan H. Williams, Volitionism and Religious Liberty, 76
ders did not underestimate the importance of religion in shaping and sustaining the values, habits, and institutions they believed necessary to support a regime of rights. In their view, religion was special because it provides citizens with a sense of moral guidance and legitimacy not supplied by other institutions, it holds families and communities together in difficult times, and it teaches people about the dignity and value of the individual. Disestablishment meant the federal government could not meddle with private religious decisions, but it did not prevent official recognition of religion's unique contribution to public life. That is why the Religion Clauses themselves are a statement about the value of religion to the republic. The First Amendment is no more indifferent to the flourishing of religion in civil society than it is to the flourishing of free speech or a free press.

CORNELL L. REV. 769, 870-71 (1991) (the Religion Clauses may have metaphysical rationales but endorse no particular religious perspective). I do not mean to suggest that all the framers and ratifiers of the First Amendment believed in God and his sovereignty over the state as a matter of personal religious faith, although, at the very least, most would have intellectually accepted this proposition as true.

299. Thus, John Adams warned that "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 THE WORKS OF JOHN ADAMS, supra note 256, at 228, 229. Madison thought "belief in a God All Powerful wise & good, is so essential to the moral order of the World & to the happiness of man, that arguments which enforce it cannot be drawn from too many sources." Letter from James Madison to Frederick Beasley (Nov. 20, 1825), in 9 THE WRITINGS OF JAMES MADISON 229, 230 (Gaillard Hunt ed., 1910).

300. See Michael M. Maddigan, The Establishment Clause, Civil Religion, and the Public Church, 81 CAL. L. REV. 293, 316 (1993) ("Religious associations teach people about the infinite worth of the individual, the obligation to tell the truth, the importance of mutual respect, and the value of mutual care—all of the values that make other associations and, indeed, democratic government possible."). Some commentators have suggested that religion undermines liberal democracy. See, e.g., Stephen G. Gey, Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. PITT. L. REV. 75, 172-80 (1990). However incompatible religion may be with some modern versions of democratic theory, it certainly was not perceived as inconsistent with the constitutional republic established by the founders. See McConnell, supra note 241, at 738-41.

301. Mark Tushnet and Michael McConnell each have suggested that the Religion Clauses originated at least in part out of a regard for religion's role in creating and sustaining a community where citizens would act for the common good and where morality and self-restraint might flourish. See Mark Tushnet, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 274 (1988); Tushnet, supra note 188, at 735-38; McConnell, Accommodation, supra note 293, at 17-18. See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2151 (1993) (Scalia, J., concurring in the judgment) ("[T]hose who adopted our Constitution . . . believed that the public virtues inculcated by religion are a public good."). See generally Timothy L. Hall, Religion and Civic Virtue: A Justification for Free Exercise, 67 Tul. L. Rev. 87 (1992).

302. See Lamb's Chapel, 113 S. Ct. at 2151 (Scalia, J., concurring in judgment) ("[The] Constitution . . . itself gives 'religion in general' preferential treatment . . . ").
Remarkably, the founders for the most part do not seem to have used religious speech solely to legitimate or sanctify a particular political order. There is a difference between using religion for supremely political ends and the political community recognizing its need for divine guidance and protection. The former is characterized by insincerity; the latter, by humility. The official prayer proclamations, especially those issued in times of national crisis, urge repentance, supplication, and gratitude—hardly the kind of language that energizes the pretensions of power. When the founders spoke religiously, then, it was not to impose religious orthodoxy or to offer some polite “tip of the hat” to an irrelevant Deity, nor were they merely “employ[ing] religion as an engine of Civil policy.” They simply were spelling out what they and the people really believed about the natural order of things. Recognition of a Supreme Being, although official, was both general in the abstraction of its terminology, and marginal in that no one was required to believe in the religious ideas expressed. If disestablishment reflected the founding generation’s commitment to separating church and state, government religious speech reflected its belief in the impossibility of separating faith from life. Controversy over such expression did not arise, as Curry suggests, with the advent of a more religiously diverse society. Rather, it coincided with the arrival of a postmodern culture which has rejected traditional notions of any transcendent authority that is independent of, prior to, and more powerful than human experience.

3. The Views of Jefferson and Madison

Judging by their writings, Thomas Jefferson and James Madison both appear to have thought more about the constitutionality of official religious expression than most in their generation. They, of course, have had a unique influence on our understanding of what the Establishment Clause means.

(a) Thomas Jefferson. The two most important public documents Thomas Jefferson penned contain distinctively religious language. The Declaration of Independence contains no less than four references to

303. Madison, supra note 231, at 83.
304. Professor Steven Smith maintains that it is “anachronistic” to think the founders’ public religiosity was a contradiction between their theory and their practice which became evident only later, because “it fails to make a distinction that the framers would probably have taken for granted—the distinction between an institutional separation of church and state and a cultural separation of government and religion.” Smith, supra note 57, at 973 n.99.
305. Curry, supra note 42, at 218-19.
WHEN GOVERNMENT SPEAKS RELIGIOUSLY

the Deity. "Nature's God" and "Creator" appear in the first two paragraphs and "Supreme Judge of the world" and "Divine Providence" appear in the concluding paragraph. His *Bill for Establishing Religious Freedom*, as previously discussed, rested on explicitly religious premises. As Judge Easterbrook has observed, "The preamble to the bill is itself an exercise in religious persuasion." These writings clearly show that Jefferson was not averse per se to religious references in government speech.

Jefferson also proposed a religious symbol for our national seal. The same day the Declaration of Independence was adopted, the Continental Congress appointed Jefferson, Benjamin Franklin, and John Adams as a committee to prepare a seal for the United States. Franklin suggested a picture of Moses dividing the Red Sea while Pharaoh was consumed by the waters, with the motto "Rebellion to tyrants is obedience to God." Jefferson wanted Israel in the wilderness "led by a cloud by day and a pillar of fire by night." Ironically, Adams, the most serious Protestant of the three, proposed Hercules ascending the mountain of Virtue. The committee recommended Jefferson's idea for one side and an elaborate design for the other showing, among other things, the eye of Providence in a radiant triangle and the motto *E Pluribus Unum*. These were the only two features from the initial proposal that were preserved in the final design adopted by Congress in 1782. The report of the secretary, also approved by Congress, noted: "Reverse. The pyramid signifies Strength and Duration: The Eye over it & the Motto allude to the many signal interpositions of providence in favour of the American cause." Stokes suggests that "[t]he story of the seal is interesting as corroborating the manifold evidence that the founders of the nation were believers in the guidance of God and wished to give expression to this faith."


309. See 1 Stokes, supra note 242, at 467-68 (citing Galliard Hunt, *History of the Seal of the United States* 8-12 (1909)).

310. See id. at 468 for a description of the proposed seal. Stokes observes that the motto has no particular significance (although it was used by Augustine in his *Confessions*), "but it is extraordinarily appropriate as applying not only to the national unity of the different states, but to the similar spiritual unity of their inhabitants—partly achieved and partly sought—in spite of differences of race, status, and religion." Id.

311. Id. (internal quotations omitted).

312. Id. (emphasis added).
Jefferson participated in issuing at least two proclamations for days of public prayer while holding office in Virginia and apparently endorsed an attempt to have the practice written into law. The first was a proclamation appointing a “day of fasting, humiliation, and prayer” issued by the colonial legislature in May 1744. Jefferson, as a member of the House of Burgesses, helped draft and enact the resolution. He later described his role in the effort to include consulting old Puritan documents as a guide for the wording of the resolution.

Later, as governor of Virginia, Jefferson issued a proclamation appointing a day “of publick and solemn thanksgiving and prayer to Almighty God.” In October 1785, James Madison introduced a Bill for Appointing Days of Public Fasting and Thanksgiving (Bill No. 85) in the Virginia Assembly, but it failed to be enacted into law. The bill apparently was endorsed and perhaps even drafted by Jefferson. Not only did the bill authorize the appointment of days of thanksgiving and fasting and notification of the public by proclamation, but it required the clergy to hold services and preach sermons suited to the occasion or pay a fine of fifty pounds.

When he became President, Jefferson refused to issue Thanksgiving proclamations, in part because he believed they violated the Establishment Clause. In a letter to Reverend Samuel Miller in January 1808, Jefferson explained why he chose to depart from the practice of his predecessors. First, he considered such proclamations as inherently coercive.

But it is only proposed that I should recommend, not prescribe a day of fasting & prayer. . . . It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and

315. 3 THE PAPERS OF THOMAS JEFFERSON, supra note 313, at 177-79 (the proclamation is dated November 11, 1779, which is after Jefferson had written the Bill for Establishing Religious Freedom).
316. REPORT OF THE COMMITTEE OF REVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA IN MDCCLXXVI 59-60 (Richmond 1784). The bill is reprinted in 2 THE PAPERS OF THOMAS JEFFERSON, supra note 313, at 556. See CORD, supra note 42, at 219-20; Dreisbach, supra note 308, at 193-99.
317. Julian P. Boyd, a leading authority on the general revision of the laws of Virginia during this period, reports that a surviving manuscript copy of Bill No. 85 contains a notation in the “clerk’s hand” that the bill was “endorsed by T.J.” 2 THE PAPERS OF THOMAS JEFFERSON, supra note 313, at 556. Several commentators identify Jefferson as the drafter of this bill. See CORD, supra note 42, at 220-21; ROBERT M. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 135 (1962); Dreisbach, supra note 308, at 193.
imprisonment, but of some degree of proscription perhaps in public opinion. And does the change in the nature of the penalty make the recommendation the less a law of conduct for those to whom it is directed?  

Second, Jefferson believed that he had no authority to tell people when and how they must perform religious exercises. The federal government was "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises" both under the Establishment Clause and the Tenth Amendment. It would not be beneficial to religion for the federal government to "direct" or "effect[] any uniformity of time or matter" among religious groups regarding acts of religious discipline such as fasting and prayer. "Every religious society has a right to determine for itself the times for these exercises, [and] the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it." Jefferson did not rule out the possibility that such proclama-
tions could properly issue from state executives, but "what might be a right in a state government, was a violation of that right when assumed by [the federal government]."

Jefferson did express religious sentiments and supplications in other public pronouncements, however. In his First Inaugural Address in 1801, he observed that religion inculcated "honesty, truth, temper-
ance, gratitude, and the love of man; acknowledging and adoring an  

319. Id. at 98.  
320. Id. at 99.  
321. Id.  
322. Id. Jefferson recognized that "power to prescribe any religious exercise, or to assume authority in religious discipline . . . rest[s] with the states, as far as it can be in any human authority." Id. at 98. In his Second Inaugural Address in 1805, Jefferson remarked:  
In matters of religion I have considered that its free exercise is placed by the Constitution independent of the power of the General [federal] Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the state or church authorities acknowledged by the several religious societies.  

Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, supra note 314, at 341. Jefferson's letter to the Danbury Baptist Association in 1802, which contains the well-known "wall of separation" metaphor, also was written at least in part to explain why he did not proclaim fastings and thanksgivings. See Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, supra note 314, at 332; Letter of Thomas Jefferson to Attorney General Levi Lincoln (Jan. 1, 1802), in 10 THE WRITINGS OF THOMAS JEFFERSON 305 (Monticello ed.).
overuling Providence” and called upon the “Infinite Power which rules the destinies of the universe [to] lead our councils to what is best, and give them a favorable issue for your peace and prosperity.” He invoked the familiar imagery of Israel’s journey to Canaan from the Old Testament in his Second Inaugural Address and asked the people “to join with me, in supplications that [God] will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.” This, of course, seems puzzling in light of his refusal to make similar requests in proclamations for days of prayer and thanksgiving.

Jefferson’s concern for federalism only partly explains why he felt constrained as President to issue religious proclamations even though he had engaged in the practice when he held office in Virginia. His letter to Reverend Miller indicates that he had come to view such proclamations as coercive in nature due to social pressures to conform to the recommended practice. This led him to conclude that their issuance was tantamount to the government “directing” religious exercises. It is conceivable that Jefferson may have found certain forms of government religious speech nonobjectionable, so long as that speech did not coerce anyone, directly or indirectly, to participate in religious activities. Perhaps this explains why his Second Inaugural

324. Id. at 375, 383.
325. Justice Souter rejects this characterization in his Lee v. Weisman concurrence. 112 S. Ct. 2649, 2674-75 (1992) (Souter, J., concurring). He suggests Jefferson’s remarks to Reverend Miller show that Jefferson understood the Establishment Clause to forbid state endorsement, not just coercion, of religious observance. The proclamations were noncoercive, Souter maintains, because they merely recommended a religious observance and the “proscription” to which Jefferson referred came from private pressures to conform rather than from state action. Id. at 2674 n.5. Nevertheless, he concludes that because such proclamations “demean[ed] religious dissenters ‘in public opinion,’ Jefferson necessarily condemned what, in modern terms, we call official endorsement of religion.” Id. at 2674. This analysis is flawed, however. Jefferson was responding to the suggestion that the recommendatory nature of the proclamations precluded any direct exercise of governmental power over religious exercises. His point was that such proclamations were indeed coercive, if only indirectly due to the social pressures to conform. Whether Jefferson was right, of course, is besides the point; what matters is that he believed the proclamations were coercive, and that is one reason why he opposed them. Even if Justice Souter’s reading of Jefferson is correct, it may prove too much. Jefferson’s reasoning is remarkably similar to the majority’s in Weisman, who concluded that peer pressure to participate in graduation prayer made the exercise coercive. See id. at 2659 (“[G]overnment may no more use social pressure to enforce orthodoxy than it may use more direct means”).
326. See David Little, Religion and Civil Virtue in America: Jefferson’s Statute Reconsidered, in The Virginia Statute for Religious Freedom: Its Evolution and Consequences for
Address was replete with religious imagery and even contained a request that his listeners join him in praying for the nation.

(b) James Madison. James Madison, principal author of the Bill of Rights, served on the chaplaincy committee in the First Congress and voted for the bill authorizing remuneration for chaplains, but changed his mind toward the end of his life about the constitutionality of chaplaincies. In his Detached Memoranda, Madison expressed the view that chaplaincies were "a palpable violation of equal rights, as well as of Constitutional principles." He explained that the beliefs of chaplains elected by the majority "shut the door of worship" to those in Congress who are members of minority sects such as Catholics and Quakers. Since religion is a voluntary activity, he argued, public officials should discharge their religious duties just like their constituents—at their own expense. He also thought the practice was ineffectual, since "the daily devotions conducted by these legal Ecclesiastics, [are] already degenerating into a scanty attendance, and a tiresome formality." Later, in a letter to Edward Livingston dated July 10, 1822, Madison insisted that "it was not with my approbation, that the deviation from [the immunity of religion to civil jurisdiction] took place in Cong[ress], when they appointed Chaplains, to be paid from the Nat[ional] Treasury." He acknowledged, however, that "[a]s the precedent is not likely to be rescinded, the best that can now
be done, may be to apply to the Const[itution] the maxim of the law, de minimis non curat."

Unlike Jefferson, Madison issued several proclamations as President for days of fasting and thanksgiving, taking care to see that they were merely recommendatory and did not favor the doctrines of one sect over another. The first proclamation recommended August 20, 1813, as a "convenient day" for those religious groups "so disposed" to gather for "the devout purpose of rendering the Sovereign of the Universe and the Benefactor of mankind the public homage due to his holy attributes," and to pray, among other things, that God would "guide their public councils, animate their patriotism, and bestow his blessing on their arms." On July 23, 1813, Madison appointed a national day of public humiliation and prayer addressed "to all, who shall be piously disposed to unite their hearts and voices in addressing, at one and the same time, their vows and adorations to the great Parent and Sovereign of the Universe." Other proclamations were issued in 1814 and 1815.

Madison later had misgivings about this practice. "Alth[ough] recommendations only," he wrote in his Detached Memoranda, "they imply a religious agency, making no part of the trust delegated to political rulers." While he apparently had greater misgivings about congressional chaplaincies, he nevertheless described executive religious proclamations as "shoots from the same root." He believed that government should interpose itself only in matters where it has authority to speak with effect—"[a]n advisory [Government] is a contradiction in terms"—and that there is no reason to suppose that government officials have been authorized by their constituents to advise them on religious matters. Presidential proclamations also "seem[ed] to imply and certainly nourish the erroneous idea of a national religion." Finally, Madison thought it difficult to frame a re-

331. Letter to Livingston, supra note 330, at 105.
332. Madison also had introduced into the Virginia legislature a Bill for Appointing Days of Public Fasting and Thanksgiving. See supra text accompanying notes 316-17.
333. Morris, supra note 242, at 549.
334. 27 ANNALS OF CONG. 2673 (July 23, 1813). Perry Miller notes that the Federalists denounced Madison's proclamation as a trick designed to inspire public (and perhaps divine) support for his foreign policy. PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 38 (1965).
335. See James Madison, Proclamations (Nov. 16, 1814 and Mar. 4, 1815), in 2 Richardson, supra note 137, at 543, 545-46.
336. Madison, supra note 327, at 93.
337. Id.
338. Id.
339. Id. (original spelling).
igious proclamation without favoring the predominant sect or expressing some position regarding the political circumstances which created the need for the proclamation in the first place. Madison noted at the conclusion of his Detached Memoranda that it was understood that he was "disinclined" to issue such proclamations and that some individuals "supposed . . . that [the proclamations] might originate with more propriety with the Legislative Body." He explained that he issued religious proclamations because he thought it "not proper" to refuse a congressional request, but he made sure that a form [and] language were employed . . . to deaden as much as possible any claim of political right to enjoin religious observances by resting these expressly on the voluntary compliance of individuals, and even by limiting the recommendation to such as wished simultaneous as well as voluntary performance of a religious act on the occasion.

In his 1822 letter to Edward Livingston, Madison suggested that executive proclamations of religious fasts and festivals "deviat[ed] from the strict principle" that religion is immune from civil jurisdiction insofar as they "[speak] the language of injunction, or [lose] sight of the equality of all religious sects in the eye of the Constitution." He claimed he "found it necessary on more than one occasion to follow the example of predecessors" and issue such proclamations, suggesting that he might have felt constrained by political pressure to continue the practice. Of course, Madison could have followed Jefferson's precedent, and he twice took the initiative to veto congressional legislation that he believed violated the Establishment Clause. He nevertheless explained that he was "always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms." Only in this sense would he "reserve to the Gov[ernment] a right to appoint particular days for religious worship throughout the State, without any penal sanction enforcing the worship."
Like Jefferson, Madison was most concerned about the preferential and coercive effect of these proclamations. While Madison did find fault with recommended days of fasting and prayer in his *Detached Memoranda*, this was only after he was far removed from the controversy. In both the Livingston letter and the *Detached Memoranda*, when looking back on his issuance of four such proclamations as President, Madison believed their recommendatory nature and general language preserved the voluntary and egalitarian features essential to his conception of religious liberty.

C. Summary of the Evidence

The historical record unfortunately does not provide the definitive answers we might like. Evidence suggests the founders *did* consider whether certain forms of government religious speech were inconsistent with Establishment Clause values and concluded that they were not. The founders did not believe that disestablishment foreclosed the government from recognizing the providence of God in national affairs or from acknowledging the value of religion to the republic. If there was any principled distinction in the minds of the founding generation between permissible expression of religious sentiments and forbidden establishments of religion, it was that official religious speech generally did not entail the imposition of religion by the state so long as it was nonpreferential and noncoercive. This goes to the heart of Madison’s and Jefferson’s objections and is generally reflected in the form such expressions commonly took during the period. Madison and those in the Continental Congress understood how official prayers or other forms of religious expression could be offensive to individual religious sensibilities. That did not deter the founders, however, from approving such practices so long as no one was obligated to believe a certain way or to participate in religious exercises.

IV. A Proposed Establishment Clause Analysis for Government Religious Speech

A proper constitutional jurisprudence for government religious speech must begin with the central value of the Religion Clauses,
namely, that the right of conscience in religious matters be kept inviolate. This means that government should refrain as much as possible from distorting the individual process of reaching and practicing religious beliefs.\textsuperscript{348} Properly understood, the Establishment Clause does not require us to ask whether government religious speech is somehow advancing or endorsing religion, but whether it is a means of \textit{imposing} officially-preferred religious beliefs or practices. This occurs when government attempts to direct the religious choices of its citizens through its rhetoric or symbols. Personal decision making in religious matters must be respected by insisting that official speech not unduly thrust a particular religious sensibility or broadly acceptable "civil religion" on anyone. On the other hand, we do not want government assuming ultimate authority in defining reality, ordering experience, and making moral judgments—in short, to behave as if \textit{it} were God. Our political tradition emphasizes pluralism over sectarianism and secularism; we are neither a theocracy nor a godless state. That is why government, as Michael McConnell suggests, "should eschew both religious favoritism and secular bias in its own participation in the formation of public culture."\textsuperscript{349}

It is not always good for religion when government engages in religious speech. One danger is that religious language or symbols will be used insincerely to further a particular political agenda or administration, something Madison called "an unhallowed perversion of the means of salvation."\textsuperscript{350} Even when its efforts are genuine, government cannot always be counted upon to avoid corrupting the underlying religious message. The most subtle and perhaps greatest harm comes from the tendency of government religious speech to trivialize religious faith. Stephen Carter reminds us that "having lots of public religion is not the same as taking religion seriously."\textsuperscript{351} Religious symbols are diminished when they cannot be displayed as part of an official holiday celebration unless they are sufficiently "secularized" by surrounding objects such as a Santa Claus, reindeer, a Christmas tree, or even a talking wishing well.\textsuperscript{352} Efforts to use all-inclusive religious terminology may produce a watered-down religious message that is offensive to the religious and nonreligious alike. Of course, general references to God do not have to be theologically feeble, as illustrated by Abraham Lincoln’s Gettysburg and second inaugural addresses.

\begin{itemize}
\item \textsuperscript{348} McConnell, \textit{supra} note 51, at 175.
\item \textsuperscript{349} Id. at 194.
\item \textsuperscript{350} Madison, \textit{supra} note 231, § 5.
\item \textsuperscript{351} Carter, \textit{supra} note 74, at 44-45.
\end{itemize}
These messages are remarkably profound but accessible to nearly everyone. The problem lies not so much with the use of nondenominational language, but with the tendency of government speakers to lack the sincerity of their private counterparts as well as the perception that such official messages are trite or meaningless. For these reasons, religious believers should not look to the state as a surrogate for their own efforts to get religious messages into public life. School prayer and nativity scenes are not the answer to the moral and spiritual problems that beset our society.

Yet some forms of official religious speech may be desirable, if for no other reason than to avoid fostering an inordinate faith in government or embracing the ideal of the secular state with its tendencies toward indifference or hostility to religion. The history of the Religion Clauses dispels any notion that government must act as if God does not exist, or is forbidden from affirming the special status of religion in public life. In this way, government may assert the limits of its own power and prerogative, recognize a transcendent source for human rights and human dignity, and encourage those institutions and associations which provide stability and moral guidance for the political community. Instead of devaluing religious feeling or constraining religious conscience, government is best served when it encourages a wide range of individual choices, both religious and secular. This allows each religion to "flourish according to the zeal of its adherents and the appeal of its dogma." Official religious expression does spark political controversy at times. But it is a mistake to assume that permitting government speech that is sometimes indifferent, sometimes hostile, but never favorable toward religion will significantly reduce the potential for divisiveness along religious lines. We cannot expect to derive a constitutional standard that will eliminate religious strife in our political life. The law did not create it, and the law cannot solve it. The best we can hope for is that the law will avoid aggravating religious conflict, while at the same time ensuring that, in the political sphere, no "side" ultimately wins.

Finding the middle ground constitutionally between sectarianism and secularism in the context of government speech is not an easy task. As I have suggested, the approaches the Supreme Court has favored in recent cases have been less than satisfying. The endorsement test, straightforwardly applied, forbids too much, while the coercion test does not reach far enough. Considering the historic ideals of the Religion Clauses, as well as the unique difficulties posed by govern-

ment speech, I offer two limiting principles: coercion and orthodoxy.

A. The Coercion Principle

The coercion principle takes aim at the traditional evil of religious establishments, namely, the imposition of religion through the coercive power of the state. To apply this principle, we must define what exactly is meant by "coercion." No one would dispute that the Establishment Clause forbids the state from compelling persons by direct legal sanction to conform to the religious sentiments it expresses. But government has many different avenues for enforcing its way short of direct coercion. With government's ever-growing presence in almost every aspect of our culture and personal lives, its influence may be felt in more subtle ways. Government may indirectly oblige conformity to its religious messages by making nonconformity more difficult or costly, aside from any threat of legal penalty. Expanding the concept of coercion beyond direct or legal means is a reasonable and necessary check on the power of the modern regulatory state.

Two elements must be satisfied for governmental action to be considered directly or indirectly coercive. The first requirement is a threat

354. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (The Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.").


[in its simplest form, the doctrine of unconstitutional conditions holds that if an individual possesses a right as against the government, the government may not require waiver of that right as a condition to the receipt of a benefit—even though the person may have no inherent constitutional right to the benefit.

McConnell, supra note 24, at 443.

356. In Engle v. Vitale Justice Black rejected the idea that the Establishment Clause is violated only when the government engages in direct legal coercion:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

370 U.S. 421, 430-31 (1962) (emphasis added). See Zorach v. Clauson, 343 U.S. 306, 311 (1952) ("If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.")
of harm, and is based on the premise that mere suggestion cannot coerce. The threat of harm is what makes compliance in a real sense obligatory; it is the means of coercion. Of course, the threat must be real, not imagined. In the context of government religious speech, this occurs when the state conveys a religious message and penalizes non-conformity to that message by direct legal sanction or threat thereof, or by requiring the forfeiture of some other right, benefit, or privilege. The difficult question is determining what properly constitutes the indirect coercive threat. In Lee v. Weisman the student could have avoided participating in prayers offered at her graduation ceremony by choosing not to attend. This is a classic example of indirect coercion. The student was placed on the horns of a dilemma: she either must do something that will violate her religious conscience or miss her graduation.

The approach embraced by the majority in Weisman also suggests that social pressure to engage in religious activity may give rise to an Establishment Clause violation if government has created and retains sufficient control over the setting in which that pressure occurs. Justice Kennedy wrote that it is “undeniable . . . that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction.” This pressure, he continued, “though subtle and indirect, can be as real as any overt compulsion.” It follows then that “government may no more use social pressure to enforce orthodoxy than it may use more direct means.”

Although agreeing with the result in Weisman, Michael Paulsen has criticized this approach for confusing private with state action. Professor Paulson writes, “[T]his analytic error is unqualifiedly dangerous in its implication . . . that speech by private parties that occurs on public property or in a state-created forum may be imputed to the government and, on that basis, regulated or banned.”

Justice Kennedy’s position in Weisman is supported by at least two early advocates of religious freedom. Thomas Jefferson refused to issue recommendatory Thanksgiving proclamations as President, largely because he perceived they were “to carry some authority, and

358. Id. at 2658; see id. at 2659 (“Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”).
359. Id. at 2658.
360. Id. at 2659.
361. Paulsen, supra note 190, at 798.
to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion.\textsuperscript{362} John Leland maintained that one of the evils of religious establishments was that "the minds of men are biased to embrace that religion which is favored and pampered by law . . . while those who cannot stretch their consciences to believe anything and everything in the established creed, are treated with contempt and opprobrious names."\textsuperscript{363} The school prayer and Bible reading cases contain similar views. Justice Brennan, for example, recognized that peer pressure may have prevented children who did not want to participate in such activities from exercising their right to be excused:

[B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.\textsuperscript{364}

Justice Douglas, who did not consider the challenged exercises compulsory, remarked that "some may think they have that indirect effect because the nonconformist student may be induced to participate for fear of being called an 'oddball'."\textsuperscript{365}

Professor Paulsen maintains that a schoolchild's peers are not subject to the Establishment Clause; whatever pressure they may exert is private rather than state action. This is an astute observation. Nothing indicates that Justice Kennedy in \textit{Lee v. Weisman}, Justice Brennan, or even Jefferson considered it. Nevertheless, Paulsen's fear that the rationale of \textit{Weisman} will undermine the Supreme Court's cases protecting student religious speech within fora created for student expression on public university or high school campuses seems largely un-

\begin{itemize}
\item \textsuperscript{362} Letter to Rev. Miller, \textit{supra} note 318, at 99.
\item \textsuperscript{363} \textit{Leland}, \textit{supra} note 236, at 182.
\item \textsuperscript{365} \textit{Id.} at 228 (Douglas, J., concurring).
\end{itemize}
founded. Weisman involved government speech in a setting where the government’s presence was pervasive. The Court’s ruling forbade official prayer, not the audience’s private expressions of disapproval. Equal access cases typically involve a state-created forum where there may be private pressure to conform to private religious messages. But when the state creates the occasion, controls the program, and is the sole or principal religious speaker, it is easier to attribute to the state’s coercive process any pressures to conform to that message which occur in that environment. Outside such a context, social pressure should not give rise to an Establishment Clause violation.


367. Social pressure, as Professor Paulsen points out, usually (if not entirely) consists of speech in the form of disapproving glances or other symbolic expressions as well as actual words. See Paulsen, supra note 190, at 843.

368. Justice Kennedy devoted the first half of his analysis in Weisman to emphasizing the extent of government involvement in sponsoring and directing the content of the challenged prayers. See Lee v. Weisman, 112 S. Ct. 2649, 2655-57. The school principal, a state official, had decided that the prayers should be given and had selected the clergyman who would offer them. The principal also advised the clergyman that his prayers should be nonsectarian and provided him with written guidelines for their composition. “Through these means,” Justice Kennedy concluded, “the principal directed and controlled the content of the prayer.” Id. at 2656. The official’s actions, in Kennedy’s view, violated a “cornerstone principle” of the Establishment Clause, namely, that “it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.” Id. (quoting Engel v. Vitale, 370 U.S. 421, 425 (1962)). The state’s involvement in controlling the content of the clergyman’s prayers is, of course, what makes Weisman a case of government rather than private religious speech.

Was the state’s involvement a separate ground for invalidating the prayers or only a prerequisite to finding coercion? Certain language in the majority opinion suggests that government may not conduct prayers or other formal religious exercises even if they are not coercive. In other places, however, Justice Kennedy was careful to link the state-directed prayer to its coercive context. He found the school principal’s instructions to the clergyman regarding the appropriate content of his prayers inherently coercive because “[e]ven if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State’s displeasure in this regard.” Id. At issue was “an overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.” Id. Thus, the question was not whether the state could compose a nonsectarian prayer for public use, but rather “the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.” Id. If the Establishment Clause forbids government from conducting religious exercises regardless of their context, there was no need for Justice Kennedy to address the problem of coercion once he had concluded that content of the challenged prayers was attributable to the state. It also would render superfluous Justice Kennedy’s efforts to dis-
This does not mean that a graduation prayer is permissible just because the prayer is ordered by a majority of the student body rather than by school officials, as the Fifth Circuit Court of Appeals held in *Jones v. Clear Creek Independent School District*. In *Jones* the school district had adopted a policy of allowing students to decide whether to include an invocation in graduation ceremonies and which student volunteer would deliver it. The Fifth Circuit reasoned that the graduation prayers permitted by the policy place less psychological pressure on students than the prayers at issue in *Lee v. Weisman* because all students, after having participated in the decision of whether prayers will be given, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.

The result was that "a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." I disagree. So long as graduation prayers confront dissenters with the choice of participating in a religious activity, openly dissenting, or electing to miss their graduation exercise, it makes little difference whether the prayers are given by student volunteers or school officials. Participation in such prayers can hardly be considered voluntary. Rather than reducing the effects of peer pressure, the school's policy actually sanctions it by allowing a majority of students to use the machinery of the state to impose their approved religious exercise on nonadherents.
The second requirement of the coercive process is an act of compliance, and is based on the premise that belief—especially religious belief—cannot be coerced.\footnote{374} The object of the coercive threat must be to force performance of an act that signifies affirmation of religious belief or participation in religious exercise on one hand, or renunciation of religious belief on the other. This reflects the harm that occurs when a person is forced to say or do what his religious conscience will not allow. It is distinct from such "psychic" harm as feeling offended or alienated. The coercion principle is violated when government forces individuals to choose between participating in or protesting a religious exercise, or forfeiting some right, benefit, or privilege. It is concerned with actions that signify espousal of religious ideas or practices rather than with avoiding mere exposure to offensive religious messages. From the standpoint of protecting individual conscience in religious matters, this distinction is crucial.\footnote{375}

Consider two examples. The first involves a public school graduation ceremony that begins each year with an invocation during which the audience is asked to stand, bow their heads, and join the speaker in prayer ("Let us pray."). A student who objects to the prayer has

\footnote{374. Locke maintained that "[l]ight is only light and evidence that can work a change in men's opinions; and that light can in no manner proceed from corporal sufferings, or any other outward penalties." \textit{Locke}, supra note 206, at 53. Jefferson similarly recognized that since the human mind was "insusceptible of restraint," any efforts to coerce it "tend only to beget habits of hypocrisy and meanness." \textit{Jefferson}, supra note 230 at 77. Madison also believed "the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men." \textit{Madison}, supra note 231, ¶1.}

\footnote{375. This differentiates the coercion analysis from the endorsement test which emphasizes the offense or stigma created by official religious words or symbols. \textit{See supra} notes 192-99 and accompanying text.}
one of three alternatives. She can bow her head while the speaker prays, but that would make her feel "that she is being forced by the State to pray in a manner her conscience will not allow." She can decline to participate by refusing to stand or bow her head, which will openly signal her dissent. Or, finally, she can decide to skip her commencement altogether, since attendance is not mandatory. The participatory nature of the prayer in this setting forces the dissenting student to choose between doing something her conscience will not permit (publicly affirming or disavowing religion) or foregoing her graduation ceremony as the price of nonconformity.

The second example is identical to the first, except instead of asking those in attendance to stand, bow their heads, or engage in some other responsive act, the speaker simply prays for the audience and the occasion. The same student now has two alternatives. She can remain silent during the prayer and listen or she can refuse to attend the event. Suppose she listens to the prayer. Will that force her to do something against her conscience? Probably not. Mere exposure to someone else's religious activity does not create a "conflict of conscience" in the usual sense. Suppose she is asked to stand during the prayer. While standing ordinarily shows respect, it is not a religious act and does not necessarily signify either participation or dissent in this context. People generally are not constrained by conscience from showing respect for the religious beliefs of others. Unless the student is asked to participate in the prayer, her real complaint is that the prayer is being said, not that she is being forced to violate her conscience.

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376. Weisman, 112 S. Ct. at 2658.
377. Id. at 2660.
378. See John H. Garvey, Cover Your Ears, 43 CASE W. RES. L. REV. 761, 768 (suggesting that hearing a prayer does not force a person to do something against her will or cause scandal to others of her faith "because hearing is not an act that communicates meaning to others").
379. Id. at 767 ("[T]he act of standing has an uncertain social meaning. It can signify participation; but it can mean something else."). My principal disagreement with the holding in Weisman turns on this point. The majority concluded that "the act of standing or remaining silent was an expression of participation in the Rabbi's prayer . . . given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it." Weisman, 112 S. Ct. at 2658. But the Court acknowledged that "in our culture standing . . . can signify adherence to a view or simple respect for the views of others." Id. As Justice Scalia observed, if it is permissible to infer that one who is standing is doing so out of respect for the beliefs of others, rather than participating in the exercise, why is the "reasonable dissenter" tied to the latter and not the former? See id. at 2682 (Scalia, J., dissenting). Justice Scalia goes on to suggest that the government's interest in fostering respect for religion generally trumps any interest the dissenter might have in avoiding even the false appearance of participation. Id. To the contrary, if the false appearance of participation creates a legitimate conflict of religious conscience, the respect for religion mandated by the First Amendment requires that government cease its coercive activity.
My point is that without being compelled to do something that affirms or denies religious belief, conscience is not coerced. This means that mere exposure to official religious messages or attendance at secular public events where nonparticipatory prayers are said, even as a captive audience, should not suffice as coercion under the Establishment Clause. Forced attendance would be unconstitutional, however, if attendance itself signifies religious worship, expression, affirmation, or participation. That is why the state cannot compel persons to frequent worship services at a Baptist church or Jewish synagogue. Attending church is a religious activity. It ordinarily signifies commitment to a particular religious group's doctrines and involves participation in religious worship. By contrast, merely hearing a prayer or viewing a religious display is not an inherently religious act. Some people may respond in a religious manner as a result, but that is not required in order to listen or observe.  

The analysis I have described would allow prayers to be said at public events so long as the form of those prayers is similar to that adopted by the Continental Congress, where onlookers heard the prayers, as Samuel Adams suggested, rather than participated in them. The distinction between "Let me pray for you" and "Let us pray" is a fine but workable one and is consistent with the values reflected in the Religion Clauses. Since the principal concern would be to ensure that the prayer is nonparticipatory rather than theologically nonoffensive, this approach would permit more authentic spiritual expression as people from a wide variety of religious backgrounds offer prayers in accord with their religious traditions. Of course, nonparticipatory prayers could still be constitutionally objectionable under the orthodoxy principle, as discussed below, if they disproportionately feature the beliefs or representatives of a particular religion or denomination in a way that suggests that group is superior to others. Within these limitations, prayers offered at official events could foster a sense

380. Thus, I cannot agree with Professor Paulsen's rejection of participation in prayer as a necessary element of coercion and his defense of the result in Weisman by describing it as a case of compelled attendance at a religious worship service. See Paulsen, supra note 190, at 828-31. As Professor Richard Myers points out, Paulsen's entire argument depends on his characterization of the graduation exercises in Weisman as a worship service. Richard S. Myers, A Comment on the Death of Lemon, 43 CASE W. RES. L. REV. 903, 905 (1993). Myers lists several factors which argue convincingly against the analogy Paulsen attempts to draw between Weisman and laws requiring compulsory church attendance: "the students were not in a church or other place of worship, and there was no identifiable congregation in the sense of a worship community; the purpose of the event was to celebrate the graduation, not to worship; and no institutional relationship existed between the school and any religious denomination." Id. at 905-06 (parenthetical omitted). Attending church signifies religious activity or commitment. Merely listening to a prayer at an otherwise secular event carries no inherent religious significance.
of openness, diversity, and common respect for the beliefs of others, as Cole Durham discovered while listening to a prayer offered at his son's graduation ceremony:

[The prayer] started out in English, but the student offering it was a Chicano, and most of his prayer was in Spanish. . . . [A]s the prayer went on and the force of what was happening sank in, most of us in that audience felt something much more profound. While few could literally understand what was being said, we understood that the young Chicano was engaging in an exercise of deep personal meaning at a particularly important moment in his life. We heard, or better, felt the call of his conscience, emanating from another culture in another language and another voice, and in that moment of encounter, something was translated into our own modes of responding to the experience of conscience, thereby opening a channel to the highest within each of us. The experience confirmed us at once in our unity and in our diversity, providing us with a glimpse of the way that even distinctive assertions of conscience can have an integrating influence that bridges cultural distance.  

To be sure, the coercion principle will not forbid situations where adults or children are forced to hear unwelcome religious messages from the government. If the standard is that mere exposure to religious ideas, symbols, or activities is forbidden under the Establishment Clause, then our public schools must be swept clean of anything that refers to the existence of a Supreme Being or is supportive of religion, including the Pledge of Allegiance, National Anthem, and Declaration of Independence." Courtroom supplications must be halted because jurors, parties, and attorneys are obligated to be present at the proceedings. The national motto "In God we trust" must be removed from our money because people cannot handle it without the risk of being exposed to its message. Religious symbols cannot be exhibited in public parks or buildings because people who use those facilities must view the displays. Serious application of a "no forced exposure" rule would require secularization of virtually all government speech. Rather than opting for an absolute approach, the potential for harm


382. If this is what the Establishment Clause requires, then Professor Dent is correct when he asserts that the same standard should apply under the Free Exercise Clause when religious parents and children object to forced exposure to public school instruction that slights their religious beliefs. See Dent, supra note 73.
from official religious messages that require no affirmation or participation is better handled under the orthodoxy principle.\textsuperscript{383}

**B. The Orthodoxy Principle**

James Madison put it best when he said any notion that "the Civil Magistrate is a competent Judge of Religious Truth" is an "arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world."\textsuperscript{384} John Leland echoed these sentiments when he condemned religious establishments because "[u]ninspired fallible men make their own opinions tests of orthodoxy, and use their own systems, as Procrustes used his iron bedstead, to stretch and measure the consciences of all others by."\textsuperscript{385} Thomas Jefferson likewise maintained that
to suffer the civil Magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty; because he . . . will make his own opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with, or differ from his own.\textsuperscript{386}

Indeed, the Supreme Court long ago recognized that "[t]he law knows no heresy, and is committed to the support of no dogma."\textsuperscript{387} It follows then that "government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."\textsuperscript{388}

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\textsuperscript{383} Professor Garvey identifies four types of harm government religious speech might cause to the individual: (1) forced assent to or renunciation of religious belief; (2) scandal to others of the individual's religious faith; (3) false belief (religious heresy or simple error); and (4) false religious practice (idolatry). Garvey, supra note 378, at 762-66. The first two harms ordinarily occur in settings where a dissenter is forced to participate in religious affirmation or exercise. The latter two result when an individual is exposed to a religious message and persuaded to believe or act on it.

\textsuperscript{384} Madison, supra note 231, \S\ 5.

\textsuperscript{385} Leland, supra note 236, at 182.

\textsuperscript{386} Jefferson, supra note 230, at 77.

\textsuperscript{387} Watson v. Jones, 80 U.S. 679, 728 (1871).

\textsuperscript{388} Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted). See Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (noting that "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses" and that "it is not within the judicial function and judicial competence" to determine whether one person or another "more correctly perceived the commands of their common faith," since "[c]ourts are not arbiters of scriptural interpretation"); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (noting the danger that "the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs"); United States v.
These considerations translate into a prohibition on government speech that conveys a message of religious orthodoxy.

The term "orthodoxy" means right belief, as opposed to heresy or heterodoxy. It expresses the idea that certain theology, worship, or ritual accurately embodies the content of true religion and is therefore normative for all. Since religions differ in their beliefs, practices, and claims to divine authority, not all of them can be correct. This means that government cannot suggest, directly or indirectly, that a particular group's doctrines are less true than others, nor can it declare one religion or group of religions superior to the rest or suggest that some beliefs are more true than others. The state may not declare what is theologically correct, that is, it may not direct people's choices in religious matters by defining what is acceptable religious belief or behavior. To do so would impose the state's religious views on the listener in violation of the Establishment Clause.

Forbidding messages of religious orthodoxy solves the problem of indoctrination or proselytization that falls short of coercion. Indoctrination occurs when the government tells people what they must believe or practice in religious matters. Proselytization is the persuasive attempt to convert someone to a particular religious belief which is held out above all others as being worthy of one's commitment. Both present certain religious views as more true or acceptable than others. The orthodoxy principle recognizes that many people obey the directives of government "for the sake of civility, harmony, and consideration of others," rather than out of fear of penalty or anticipation of reward. It thus forbids the state from engaging in religious imperative or persuasion, regardless of whether there are attendant pressures to

Ballard, 322 U.S. 78, 86-87 (1944) (finding that the trier of fact cannot judge whether religious beliefs are true or false). See also Weisman, 112 S. Ct. at 2683-84 (Scalia, J., dissenting) (arguing that our constitutional tradition forbids "government-sponsored endorsement of religion—even when no legal coercion is present . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ").

389. See Richard Cavendish, The Great Religions 8 (1980) ("[T]he attitudes of the major religions to salvation and the purpose of life are quite different."); J.N.D. Anderson, Christianity and Comparative Religion 11 (1970) ("[E]ven the most elementary study of the different religions reveals fundamental contradictions."). This is true not only between religions, but also within religions. See, e.g., Sidney E. Ahlstrom, A Religious History of the American People 571-82 (1972) (describing the characteristically American features of sect formation).

390. See supra notes 234-38 and accompanying text.

conform. By contrast, the orthodoxy principle would not bar government from merely recommending that people engage in a certain religious practice if they are so disposed. In this way, no one is asked to do anything that would violate religious conscience, nor is the state suggesting that it is better to engage in religious exercise than not. Official pronouncements that follow the recommendatory form Madison used in his prayer proclamations should be permitted, so long as no particular religious position is given such prominence that the message becomes one of orthodoxy rather than pluralism.

This analysis refines the endorsement concept in several respects. Orthodoxy is a narrower standard than endorsement, but still retains the essential idea that government should not favor one religious belief or practice over another. Like the endorsement test, it is context sensitive. Instead of asking whether government speech sends a message to nonadherents that they are outsiders, the relevant question is whether the message promotes a particular religious view in a way that conveys a clear expectation to the nonadherent that he or she accept that view. Since the orthodoxy principle is aimed at official pronouncements or symbols that impose religion, the inquiry redirects attention to the content and context of the message, and away from mere perceptions. If government religious speech violates the Establishment Clause, it is not because such expression merely is an affront to individual feelings; rather, it is because the state has invaded the process of private religious decision making. Real harm occurs when the purpose or effect of government speech is to distort or otherwise influence that process, independent of any offense it causes to the listener. Deciding whether official messages or symbols present one religious position as more true or acceptable than others involves determinations that are less prone to subjective manipulation than deciding whether such expression endorses or only acknowledges religion. This considerably reduces the potential for observer bias inherent in the endorsement test.

The orthodoxy principle explains why the Establishment Clause allows printing “In God we trust” on our money, but not “In Jesus Christ we trust” or “Allah be praised.” Generalized references in our national motto and the Pledge of Allegiance to God’s position over the state and the religious nature of our people are consistent with a host of different religious traditions rather than expressions of a particular orthodoxy. Although they recognize the existence of a Supreme Being, these statements are not couched in imperative terms. In other

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392. Of course, no legal principle, including those proposed here, is immune from judicial manipulation.
words, they do not tell people to believe in God or to embrace a particular religious doctrine or practice. Daily Bible reading or recitation of the Lord's Prayer in public schools would not survive application of the orthodoxy principle because they present exclusively the beliefs of one religion. However, if a school began its day by reading to students brief meditations from various literary or political sources such as Ralph Waldo Emerson, Shakespeare, the Federalist Papers, or Martin Luther King, Jr., it would be permissible to include readings from religious sources such as the Koran or the Bible, so long as those readings are not disproportionately featured, present one religion as superior to the rest, or urge students to accept particular religious beliefs. While teachers could not use their official positions to direct students in what to believe or practice in religious matters, religious perspectives on controversial issues could be included in public school curricula or other official programs, so long as they are presented as part of a variety of viewpoints rather than as the correct view.

The orthodoxy principle provides a more reliable standard for analyzing displays of religious symbols on government property, which usually are both passive and sectarian. The concern here is to ensure that the symbols of one religion, or group of religions, are not so preferred or prominently featured as to suggest that the government considers the beliefs those symbols represent to be more true or superior to the rest. This would explain why the permanent display of a large Latin cross atop city hall would violate the Establishment Clause, even though it is not directly or indirectly coercive. The religious makeup of the relevant political community would provide a sufficient baseline for determining whether some religious symbols are disproportionately displayed. If government officials feature the symbols of certain religious groups while refusing requests for fair treatment of alternative symbols within the community, it could be inferred that those officials are promoting religious orthodoxy. The better solution, in my view, would be for government itself to refrain from displaying sectarian religious symbols but vigorously enforce equal access for private religious speakers to public property that is a traditional or

393. For a helpful discussion of issues related to distinguishing teacher-as-individual from teacher-as-government in the public school context, see Paulsen, supra note 190, at 849-52.

394. Under the orthodoxy analysis, the inclusion of two books titled The Bible in Pictures and The Life of Jesus in a fifth-grade teacher's classroom library of over two hundred books would not have been unconstitutional, since the library also contained works on American Indian religions and Greek mythology. The Tenth Circuit took a contrary view in Roberts v.Madigan, 921 F.2d 1047, 1055, 1057-58 (10th Cir. 1990).

designated forum for public expression. In any event, the orthodoxy principle would permit official policies toward the display of religious symbols that promote a sense of diversity and pluralism, while at the same time protecting against religious indoctrination or proselytization.

There are times when the coercion and orthodoxy principles will overlap. For example, if a school principal tells everyone at a graduation ceremony to stand and pray, her religious imperative directs an "orthodoxy of practice" and the participatory features of the prayer render it coercive. Nevertheless, because the orthodoxy principle is more susceptible to intuitive application, the proper starting point is coercion. When government speaks religiously, we must ask first, "Is it coercive?" We should then inquire, "Does it convey a message of orthodoxy?" These limits are both sensible and faithful to the historic ideals of the Religion Clauses.

V. CONCLUSION

The Establishment Clause protects against government-imposed religion. It does not require a secular public sphere completely devoid of all reference to God or religion, nor does it permit a religious majority or minority to use the means of government to impose its religious views on the rest. Government may speak religiously, but it must avoid both the rhetoric of orthodoxy and coercing compliance with its messages. Beyond these fundamental protections, the frequency and content of official religious speech must be left to the political process and mutual forbearance.396

396. On the importance of mutual forbearance and toleration, see Tushnet, supra note 188, at 735-38.