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SYMPOSIUM

HOW MUCH GOD IN THE SCHOOLS?*

SQUEEZING RELIGION OUT OF THE PUBLIC SQUARE—THE SUPREME COURT, *LEMON*, AND THE MYTH OF THE SECULAR SOCIETY

M.G. "Pat" Robertson"

I. INTRODUCTION

In an angry note he wrote to the Danbury Baptist Association in 1802, Thomas Jefferson mentioned in passing that the First Amendment Establishment Clause had built "a wall of separation between church and State."¹ Inconceivable as it may be, the United States Supreme Court, starting in 1947,² has built much of its present Establishment Clause jurisprudence on this off-hand phrase uttered by a man, however distinguished, who was not even present in the country when the Bill of Rights was drafted and ratified. That judicial distortion of United States history by the Court has accomplished the amazing feat of drawing criticism from "people who disagree about nearly everything else in the law."³

* The following three articles were written in conjunction with a symposium held on February 23, 1995 at the Marshall-Wythe School of Law, College of William & Mary, sponsored by the Student Division of the Institute of Bill of Rights Law.

" B.A., Washington and Lee University; J.D., Yale University; M. Div., New York Theological Seminary. Founder and Chairman, Christian Broadcasting Network. Founder and Chancellor, Regent University. Founder and President, American Center for Law and Justice.

¹ Jefferson stated:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach action only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

SAUL K. PADOVER, *THE COMPLETE JEFFERSON* 518-19 (1943) (quoting letter from Thomas Jefferson to the members of the Danbury (Connecticut) Baptist Association, Jan. 1, 1802).

² See *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (using for the first time the "wall of separation" metaphor in an Establishment Clause case).

³ Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablish-*

Before joining this chorus of criticism, I must state at the outset something that may surprise (if not shock) many people. I agree that the church and state should be separate because the separation of *church* and *state* is good for religion, religious institutions, and the religious liberty of believers. However, as the emphasis of the terms *church* and *state* imply, my agreement depends upon a proper understanding of "separation of church and state." I submit that properly understood, "separation of church and state" means separation between ecclesiastical institutions and the apparatus of government. It means that government should not set up an official sect or denomination on which it bestows its special blessing. It means that governments should not control or intervene in the internal affairs of religious institutions. And it means churches, as is the case of the Anglican Church in the United Kingdom, should not have *official* representation in government. It should never mean, however, that religious ideals and ideas are to be excluded from the political and lawmaking processes. Nor should it mean that government is (or should be) disabled from generally endorsing, promoting, or encouraging religious belief and practice, from acknowledging God, or even from giving certain forms of aid (including financial) that advance the cause of religion. In the history of the American experiment, "separation of church and state" has never meant that American citizens would be forced to live by judicial fiat in a completely secular state.⁴

Why do I say that separating ecclesiastical and governmental institutions is good for religion and religious belief? Simply put, government should not be in the business of running churches or telling people when or how to practice religion. Likewise, organized religious institutions should not be controlling the levers of political power. History demonstrates that such intermingling of ecclesiastical and political power tends to corrupt the church, often with untoward results to the faith of believers. "The worldliness and corruption of the pre-Reformation papacy, . . . the decline of the German Hohenstaufen dynasty, the religious wars of the sixteenth century, and, more recently, the English civil war of the seventeenth century were all problems resulting, to some extent, from an overly close relationship between church and state."⁵ Conversely, history is also replete with tragic examples of secular tyrants who were more than willing to manipulate and even plunder ec-

ment Decision, 67 TEX. L. REV. 955, 956 (1989) [hereinafter Smith, *Separation and the "Secular"*]; see also *id.* at 956 n.1 (citing comments denigrating the Supreme Court's present Establishment Clause jurisprudence made by Leonard Levy, who generally favors an interpretation of the Establishment Clause requiring strict separation of Church and State, by Critical Legal Studies Scholar Mark V. Tushnet, and by former Reagan administration Solicitor General Rex Lee).

⁴ Professor Smith provides an extended and well-reasoned discussion and defense of the proposition that disestablishment—"separation of church and state"—means institutional separation, not secularization. See generally *id.*

⁵ *Id.* at 964 n.45.

clesiastical institutions to further their selfish political ends.

Unfortunately, the past half-century has seen a determined effort to radically alter the historical understanding of separation. During the past several decades, both the popular and the legal mind have tended to redefine "separation of church and state" as the establishment of a completely secular state in which religion on one hand and government and politics on the other are to be completely (or as completely as possible) sealed off from each other. Religion is seen as having only private value, as being good only for the individual believer, and as conferring no public benefit. Beyond this, religion is seen as a divisive force that must be kept in its place for the peace and good order of society.

For example, in defending a law that prohibited the use of public school facilities after school hours by religious speakers (while opening those facilities to practically any other speakers), the Attorney General of New York stated that "[r]eligious advocacy . . . serves the community only in the eyes of its adherents and yields a benefit only to those who already believe."⁶ In a similar vein, one legal scholar has written that religion has no place in a democratic government because it does not fit with the intellectual cornerstone of modern democracy.⁷

Supreme Court justices often have joined the chorus. Professor Michael McConnell has noted in the Religion Clauses decisions of the Warren and Burger Courts a "tendency to press relentlessly in the direction of a more secular society. The Court's opinions seemed to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere."⁸ McConnell cites several examples of language

⁶ *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2151 (1993) (Scalia, J., concurring) (quoting oral argument transcript); see also Jay Alan Sekulow et al., *Lamb's Chapel v. Center Moriches Union Free School District: An End to Religious Apartheid*, 14 MISS. C. L. REV. 27, 28 & n.6 (1993). In *Lamb's Chapel*, the Court appears, fortunately, to have rejected the Attorney General's argument. The Court held that a local school district which had excluded a religious speaker from access to school facilities to address a subject addressed by other speakers violated the religious speaker's right to free speech by discriminating against the religious speaker based on the viewpoint of the speech. *Lamb's Chapel*, 113 S. Ct. at 2143. I will discuss *Lamb's Chapel* further in Part III.

⁷ Steven 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, 79 (1990). Other scholars have expressed similar sentiments. See, e.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992) (calling for "establishment of the secular public moral order"); Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174 (1986) (arguing that allowing religious student groups to meet at public schools on the same terms as other student groups violates the Establishment Clause).

⁸ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV.

from Supreme Court opinions to support his thesis. I will cite but one. In the case of *Grand Rapids District v. Ball*,⁹ the Court struck down a law allowing public school employees to provide remedial learning assistance to parochial school children on parochial school grounds.¹⁰ Justice Brennan explained for the Court that "teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution; thus reinforcing the indoctrinating effect."¹¹

This was a remarkable assertion in light of the fact that there was no evidence in *Grand Rapids* of any religious "proselytizing" (much less "indoctrination") by any public school teachers, who were teaching courses such as "Math Topics," "Spanish," and "Gymnastics."¹² The remedial learning programs involved in *Grand Rapids* and its companion case, *Aguilar v. Felton*,¹³ offered no real threat to anybody's religious liberty or threat to "establish" the Catholic Church as the official religion of Michigan and New York. Yet, the Court's fear of the seemingly mystical power of religion to overcome professional teachers' sense of duty and responsibility (a power that could overcome those teachers merely by allowing the teachers to set foot on parochial school premises!) led the Court to strike down remedial learning programs that "helped thousands of impoverished parochial school children to overcome educational disadvantages."¹⁴

The lack of any evidence of any real threat of religious establishment in *Grand Rapids* and *Aguilar* highlights the message inherent in the passage

115, 120 (1992) [hereinafter McConnell, *Religious Freedom*]; see also Mark Fischer, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on the Religious World View*, 54 U. PITT. L. REV. 325, 340 (1992) ("Underlying many of the theories used in Establishment Clause jurisprudence is an implicit disdain for the religious world view.").

⁹ 473 U.S. 373 (1985).

¹⁰ *Id.* at 388.

¹¹ *Id.*

¹² *Id.* at 399 (O'Connor, J., concurring in part and dissenting in part); *id.* at 401 (Rehnquist, J., dissenting); see also *Aguilar v. Felton*, 473 U.S. 402, 424 (1985) (O'Connor, J., dissenting) (noting in a case striking down a remedial learning program similar to that struck down in *Ball* that "in 19 years there has never been a single incident in which [an] . . . instructor 'subtly or overtly' attempted to 'indoctrinate the students in particular religious tenets at public expense'" (quoting *Grand Rapids*, 473 U.S. at 397)).

¹³ 473 U.S. 402 (1985).

¹⁴ *Id.* at 431 (O'Connor, J., dissenting); see also *id.* at 419-20 (Burger, C.J., concurring) ("[I]n the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are . . . vital to the Nation's school children.").

cited from *Grand Rapids*. As Professor McConnell noted:

The evocative words in [the *Grand Rapids*] passage—"conform," "dominantly religious," "indoctrination,"—suggest that the Justices who joined the opinion believe that religious convictions are reached not through thoughtful consideration and experience, but through conformity and indoctrination. This view of religion justifies discriminating against religious schools, because indoctrination is the antithesis of democratic education. Moreover, the Justices seemed to view religion as not only unreasoned but insidious. The "atmosphere" of a Catholic school has such power to influence the unsuspecting mind that it may move even public school remedial English and math specialists to "conform"—though their only contact with the school is to walk down its halls.¹⁵

One observer has given the name "religious cleansing" to the tendency to discount and privatize religious belief.¹⁶

Just as ethnic cleansing attempts to rid certain ethnic groups and their influence from public life, so religious cleansing attempts to do the same with religious groups, their beliefs, and their values. How? Not by physical extermination—at least not in the United States—but by political and legal containment. If as Christians all of our views on contemporary major issues are seen as religious; if "religious" views are to be kept in church buildings or behind the front door of our homes lest we violate certain contemporary notions of the separation of church and state; and if taking positions on the critical ideas—such as liberty, life, and family—that shape culture is somehow deemed "improper" for a religious person, then what are we left with? No voice in the marketplace of ideas. Sure, we can sit around in our homes and churches and discuss political, moral, and social issues. Yes, we can vote our conscience. But if we move beyond these borders and step into city hall or the courts or the public schools or federal offices or virtually any other public arena, then we become trespassers—violators who need to be pushed back

¹⁵ McConnell, *Religious Freedom*, *supra* note 8, at 122.

¹⁶ KEITH A. FOURNIER, A HOUSE UNITED? EVANGELICALS AND CATHOLICS TOGETHER—A WINNING ALLIANCE FOR THE 21ST CENTURY 152 (1994).

to the private sphere where our ideas cannot impact, or even threaten to impact, anyone but ourselves.¹⁷

Present Supreme Court First Amendment jurisprudence is embodied in the most part in the tripartite test established in *Lemon v. Kurtzman*.¹⁸ Under that test, a government policy touching on religion will pass constitutional muster if it has a secular legislative purpose, has a principal or primary effect that neither advances nor inhibits religion, and does not foster excessive entanglement between government and religion.¹⁹

I say that *Lemon* embodies present Supreme Court Establishment Clause jurisprudence "for the most part" because *Lemon* has come under a great deal of criticism by both Court members and scholars. Scholars have lamented the doctrinal confusion the Court has engendered in applying *Lemon*.²⁰ Justice Scalia has called present Supreme Court Establishment Clause jurisprudence "embarrassing";²¹ Chief Justice Rehnquist has criticized the test for not being accurately grounded in history.²² In its most recent Establishment Clause case, four of the Court's present members called for abandoning the *Lemon* test.²³ The Court itself has ignored *Lemon* in recent cases,²⁴ and in other cases relegated the test's three prongs to the status of "helpful signposts."²⁵

Despite this criticism, *Lemon* survives. In *Lee v. Weisman*,²⁶ the Court specifically refused to reconsider *Lemon*.²⁷ The Court in fact applied the *Lemon* test in its recent decision in *Lamb's Chapel v. Center Moriches Un-*

¹⁷ *Id.*

¹⁸ 403 U.S. 602 (1971).

¹⁹ *Id.* at 612-13.

²⁰ See, e.g., Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-86 (1980); Keith A. Fournier, *In the Wake of Weisman: The Lemon Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 REGENT U. L. REV. 1 (1992); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 20-28 (1986) [hereinafter Laycock, *Equal Access*]; Smith, *Separation and the "Secular,"* *supra* note 3, at 956-57 & n.1; John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 129-44 (1986).

²¹ *Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

²² *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

²³ See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2498-99 (1994) (O'Connor, J., concurring); *id.* at 2515 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.).

²⁴ See *id.* at 2515 (mentioning *Lemon* in passing in two citations); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Marsh v. Chambers*, 463 U.S. 783 (1983).

²⁵ See *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

²⁶ 112 S. Ct. 2649 (1992).

²⁷ *Id.* at 2650, 2655.

ion Free School District.²⁸ The Supreme Court has not overruled *Lemon*, and lower courts are bound to—and do—apply it. Thus, for better or worse, when considering the state of Establishment Clause jurisprudence in this country, one must consider *Lemon*.

Considering *Lemon* is what this Article generally proposes to do. However, I do not intend to attempt to reconcile the various Supreme Court cases applying (and ignoring) *Lemon* to propose any grand doctrinal synthesis or discover the underlying principle (if any) tying the cases together.²⁹ Rather, my goals are more modest. First, I will explain briefly how the religious world view is beneficial—indeed crucial—to representative government and human liberty, and why that world view should be included in the political process and public debate. Next, I will examine several cases to show how *Lemon* and certain “twists” on the reasoning underlying *Lemon* could, if rigorously applied, lead to the removal of the religious world view from the political process, in effect disenfranchising religious believers. Although a series of recent Supreme Court and lower federal court cases have at least recognized that the Establishment Clause provides no excuse for censoring religious speech in public fora, I will explain that even in those cases the Court has reserved the means to keep religion in check. Finally, I will discuss how the Establishment Clause does not compel the notion that religion and politics are to be kept separate, or that government may provide no encouragement or aid to religion.³⁰

Professor Gerard V. Bradley of Notre Dame Law School has written a passage that concisely sums up this Article’s thesis. Bradley states:

Reason discloses that religion is truly a good for everyone,
and society rightly promotes it. . . . Religion, or the good of

²⁸ 113 S. Ct. 2141, 2148 (1993) (holding, under *Lemon*, that the Establishment Clause does not justify discriminating against religious speakers based on the religious viewpoint of their speech).

²⁹ Such an effort to uncover the Court’s underlying rationale in its Religion Clauses jurisprudence has been offered by one scholar who concludes that since *Everson*, the Court has made a conscious effort to “privatize” religion—that is to remove religion from the public realm by reducing religion to a subjective preference rather than “a reality . . . the believer experiences as compelling . . . , as objective truth, as an undeniable fact.” Gerard V. Bradley, *Dogmatomachy—A “Privatization” Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 277 (1986) [hereinafter Bradley, *Dogmatomachy*]. According to Bradley, the Court has sought this privatization as a solution to what the Court has perceived as the potential divisiveness of conflicts along religious lines. *Id.* I will return to the “divisiveness” issue in Part III.

³⁰ In doing so, I do not propose to state conclusively exactly what the Establishment Clause does mean. I am content to show that if anything, the Clause does not require the establishment of a completely secular state or the prohibition of all government encouragement or aid to religion.

it for human persons, is intrinsically voluntary because it involves adherence to certain propositions as *true*, as really disclosing a transcendent reality which is a fit object of worship and prayer. Religion is, and should be acknowledged as, a basic human good. Government ought to promote it. The religion clauses, construed faithfully on an originalist basis, work no barrier to that proposal. The *Lemon* test does. Thus, we should get rid of the *Lemon* test.³¹

II. THE POSITIVE ROLE OF RELIGION IN THE CULTURE AND POLITICS.

To the believer, of course, religion is important—indeed, the most important element in human existence—because it provides the framework within which man relates to God, the Supreme Being. And to the Christian, man gains eternal life through faith in Jesus Christ.

At least one hundred million Americans claim membership in one or more Christian denominations. American Christians not only believe that God exists to bring eternal life, but that God has established moral laws which form the only objective standard by which the personal or collective actions of human beings living on earth can be judged. Today's Christians are the spiritual heirs of the founders of America, whose profoundly religious beliefs have shaped our institutions.

The constitution of every single state in the United States contains some reference to God. Our pledge of allegiance to the flag of the United States, our coinage, and our patriotic songs all acknowledge a supreme being. This fact was recognized in the well known case decided by a previous Supreme Court, *Zorach v. Clauson*,³² in which Mr. Justice Douglas wrote: "[W]e are a religious people whose institutions presuppose a Supreme Being."³³ This nation's founding document, the Declaration of Independence, recognized the reality that human rights come not from government, but from God: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."³⁴

The concepts of "self-evident truth" and "unalienable rights" both have a long pedigree in Christian thought. "Seventeenth century Enlightenment rationalists did not coin the term 'self-evident.' Medieval theologians used the term centuries earlier, tracing their views of 'self-evident' to the teachings

³¹ Gerard V. Bradley, *Protecting Religious Liberty: Judicial and Legislative Responsibilities*, 42 DEPAUL L. REV. 253, 260-61 (1992).

³² 323 U.S. 306 (1952).

³³ *Id.* at 313.

³⁴ DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of St. John of Damascus."³⁵ Medieval Christian thinkers such as Thomas Aquinas regarded "self-evident" knowledge as "first principles" naturally implanted in men by God.³⁶ Aquinas' thought was built on a biblical understanding of knowledge. John Locke, who had an undeniable influence on the drafting of the Declaration, built upon this same biblical understanding in formulating and setting forth his own view of self-evident truth.³⁷

Likewise, the concept of "unalienable rights"—including rights to life, property, liberty, and the pursuit of happiness—is traceable back to medieval Christian theological and legal thought, and ultimately to Scripture.³⁸ As one commentator has noted:

The doctrine of individual rights was not a late medieval aberration from an earlier tradition of objective right or of natural moral law. Still less was it a seventeenth-century invention of Suarez or Hobbes or Locke. Rather, it was a characteristic product of the great age of creative jurisprudence that, in the twelfth and thirteenth centuries, established the foundations of the Western legal tradition.³⁹

Some would argue that even though human rights might have had religious roots, those rights are now secured by their inclusion in the Bill of Rights and can continue to be secured by a consensus of the American people.⁴⁰ But consensus, absent any objective basis of morality, provides no

³⁵ GARY T. AMOS, *DEFENDING THE DECLARATION* 77 (1989).

³⁶ THOMAS AQUINAS, *SUMMA THEOLOGICA* Pts. I-II, Q. 100, Art. 3 (Dominican trans., Christian Classics 1981); see AMOS, *supra* note 35, at 76, 78.

³⁷ See generally AMOS, *supra* note 35, at 75-101. Amos concludes that Locke's views were not of the Enlightenment. Rather, his use of the term "self-evident" was religious. Thus, the founders used a Christian idea when they used the term "self-evident" in the Declaration of Independence. *Id.*

³⁸ See *id.* at 103-11, 115-21.

³⁹ Brian Tierney, *Villey, Ockham and the Origin of Individual Rights*, in *THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION* (John Witte, Jr. & Frank S. Alexander eds., 1988), quoted in AMOS, *supra* note 35, at 124.

⁴⁰ For example, at a panel discussion held on September 30, 1994, in conjunction with the dedication of Robertson Hall (Regent University's Law and Government Building), Barry Lynn stated:

I get my rights from the Bill of Rights and from our Constitution, but I exercise my responsibilities because I am a Christian. And I think we can revere, respect, and celebrate the protections of our Bill of Rights and still not only exercise responsibilities ourselves, but indeed urge other people to do the same.

Defining American Culture: A Panel Discussion, 2 LIBERTY, LIFE, AND FAMILY 93 (forthcoming 1995) (remarks of Barry Lynn, Executive Director of Americans United for Separation of Church and State). In his summary remarks at the discussion, Robert Peck of the ACLU stated that there tended to be much agreement among the panel

secure basis for human rights. As noted by one commentator, principles such as liberty "are like cut flowers: they come from certain roots, and those roots are religious roots. When the cut flowers are severed from their roots they maintain their beauty for a while But in time, without the nourishment of the soil, those values will wither and die" ⁴¹

How can "consensus" secure rights? For instance, suppose our society forms a consensus that this country is overpopulated and that a good solution to that problem would be to force pregnant women to abort if they already have two children? What would prevent us from enacting such a law? Some might answer: "the Due Process Clause." But the Constitution itself is a legal document, subject to amendment.⁴² Although amending the Constitution is a more cumbersome process than enacting statutes, if sufficient "consensus" exists, nothing in the positive legal order prevents the people from amending the Constitution, for better or worse.

Moral relativism, which denies both transcendent truth and objective morality, can lead in the legal order to a crude legal positivism in which law is essentially just an assertion of the lawmaker's will. According to Hans Kelsen, the twentieth century's foremost positivist jurist, "legal norms . . . are not valid by virtue of their content. *Any* content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm."⁴³ As two commentators have noted:

When Kelsen wrote that "[a]ny content whatsoever can be legal," he meant it. Witness Kelsen's response to Nazi law that authorized concentration camps, forced labor, and murder: "Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order" Thus, to the positivist, "the law . . . under the Nazi-government was law" ⁴⁴

members regarding rights "[n]ot because of any religious-based agreement, but because we all believe in those principles of liberty and justice for all." *Id.* (remarks of Robert Peck, Legislative Counsel for the ACLU).

⁴¹ *Id.* at 114 (remarks of Mona Charen, syndicated columnist).

⁴² See U.S. CONST. art. V.

⁴³ Hans Kelsen, *The Pure Theory of Law*, 51 LAW Q. REV. 517, 517-18 (1934) (emphasis added).

⁴⁴ Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists*, 5 REGENT U. L. REV. (forthcoming 1995) (citing HANS KELSEN, *PURE THEORY OF LAW* 40 (Mat Knight trans., 1967); HANS KELSEN, *DAS NATURRECHT IN DER POLITISCHEN THEORIE* 148 (F.M. Schmoetzel ed., 1963), *quoted in* F.A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY (THE MIRAGE OF SOCIAL JUSTICE) 56 (1976)). Regarding deadly force against abortionists, Rice and Tuskey conclude that intentionally killing or injuring abortionists is neither legally nor morally justifiable, *id.*, a conclusion with which I fully agree.

This is not to say that America is sliding into Nazism. But it is to say that outside of a framework of a transcendent, objective morality (that is, a religious framework), the human being can have no intrinsic value. This is true of law as it is of philosophy. As Oliver Wendell Holmes noted, for the lawmaker who does not anchor his will to an objective moral order, there is "no reason for attributing to man a significance different in kind from that which belongs to a baboon or grain of sand."⁴⁵ Without a transcendent truth, human worth becomes a question of utility or aesthetics. Without an objective standard of right and wrong we cannot protect human rights—indeed human life itself—because it is "right" to do so. We can only protect human rights because doing so serves the "utility" decreed by the majority consensus of the moment. We thus act at our own peril when we exclude the religious voice from the political and legal process because the exclusion of that voice removes from the political arena the only world view on which human rights and dignity find any secure footing.

This country's Founders understood well the connection between a transcendent moral order and human rights. This understanding was reflected in the Declaration of Independence, which spoke of a "Creator" who endowed his creatures with "unalienable rights," thereby using terms with a long religious pedigree.⁴⁶

The generation that founded this country also understood that religion was essential to the experiment in liberty and self-government this nation represented. For those Founders, "liberty depended on faith."⁴⁷ This is clearly stated in one of the core founding documents of the nation, the Northwest Ordinance. Originally passed in 1787, this act expressly stated that "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁴⁸ This understanding was also reflected in the statements of individual Founders. Perhaps the most striking example is George Washington's farewell address in 1796:

Of all the dispositions and habits which lead to political

⁴⁵ Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43-44 (1918).

⁴⁶ See *supra* text accompanying notes 33-41.

⁴⁷ Gerard V. Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827, 835 (1986) [hereinafter Bradley, *Imagining the Past*]; see also HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 210 (1993) (stating that it "was undoubtedly the view of the men who framed the Constitution" that "the very existence of constitutional law in the United States, and therefore of freedom of belief or disbelief, rests ultimately on the religious faith of the American people"); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 123-24 (1987) [hereinafter BRADLEY, CHURCH-STATE RELATIONSHIPS].

⁴⁸ NORTHWEST ORDINANCE ch. 8, 1 stat. 52 (1789).

prosperity, Religion and morality are indispensable supports And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.⁴⁹

John Adams, a key draftsman of the United States Constitution and our second President, believed that "religion and virtue are the only foundations, not only of republicanism . . . but of social felicity under all governments and in all combinations of human society."⁵⁰ In Adams' view, "our [C]onstitution was made only for a moral and religious people [and was] wholly inadequate for the government of any other."⁵¹ Even Jefferson, who has been erroneously viewed as the patron saint of the modern secular state, stated in his first message as President that "the liberties of a nation [cannot] be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God."⁵²

What was true in the eighteenth century remains true today: Religion is indispensable to liberty and self-government. As the founding generation realized, it is incongruent to believe that a people can govern themselves as a nation if they cannot govern themselves as individuals. Religion provides a transcendent, objective moral standard by which people may govern their conduct, a standard "that determines how people treat other individuals and how they define their social duties."⁵³ It is only possible to determine "right" or "virtuous" behavior if one knows what is "right" or "virtuous." Moreover, there can be no freedom among a self-governing people unless they are controlled by individual virtue and self restraint enforced by a belief in eternal rewards and eternal punishment.

The transcendent moral standard provided by religion also allows the governed to judge the actions of their governors against something other

⁴⁹ 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799, at 229 (John C. Fitzpatrick ed., 1940).

⁵⁰ Letter from John Adams to Benjamin Rush (Aug. 28, 1811), in 9 THE WORKS OF JOHN ADAMS 635, 636 (C. Adams ed., 1854).

⁵¹ RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 95 (2d ed. 1988).

⁵² PADOVER, *supra* note 1, at 677; *see also* Bradley, *Imagining the Past*, *supra* note 47, at 835 n.43 ("Jefferson feared a future American shorn of Christian morality."); Fischer, *supra* note 8, at 327 ("Even Thomas Jefferson, not known as one with orthodox religious beliefs, questioned whether America's liberties could remain secure if their only firm basis—a belief that they are a gift from God—is removed.").

⁵³ Bradley, *Imagining the Past*, *supra* note 47, at 826.

than their own often transitory (and sometimes harmful) self-interest. "[T]he only sure guide to enacting 'just' laws is a jurisprudence that recognizes that there is such a thing as 'justice.'"⁵⁴ It is only against a philosophical backdrop that recognizes "right" from "wrong" that a citizen can have standing to tell a government that what it is doing is "wrong." Throughout our history, religiously motivated people have stood up to tell their government that what it was doing was "wrong." During the civil rights movement, for example, a Protestant minister, Dr. Martin Luther King, Jr., challenged the "consensus" that tolerated government sponsored discrimination by asserting a religious belief in the inherent dignity of every human being as a child of God.⁵⁵ Dr. King's work, therefore, was explicitly and self-consciously religious.⁵⁶

Those who argue that religion, morality, and law do not mix should bear in mind Dr. King's legacy—a legacy consistent with the American political tradition. "[A]n interpretation of the establishment clause that sees in the disestablishment decision a public commitment to the exclusion of religious influence and rhetoric from politics and government puts the decision at odds with much of the American political tradition."⁵⁷

III. LEMON—SQUEEZING RELIGION FROM THE PUBLIC SQUARE

The religious world view should, indeed must, have a place in our cul-

⁵⁴ Charles E. Rice, *Natural Law, the Constitution, and the Family*, 1 LIBERTY, LIFE & FAM. 77, 78 (1994).

⁵⁵ This belief is reflected in a speech Dr. King made on August 28, 1963, before over 200,000 people in Washington, D.C., in which he stated:

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all God's children—black men and white men, Jews and Gentiles, Protestants and Catholics—will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God almighty, we are free at last."

Martin Luther King, Speech of Aug. 28, 1963, *quoted in* WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* 576 (1993).

⁵⁶ Dr. King was also "frustrated by a media establishment which ignored the religious and philosophic basis of his life's work." Fischer, *supra* note 8, at 325. Reflecting on the media, Dr. King noted that "[t]hey aren't interested in the *why* of what we're doing, only in the *what* of what we're doing, and because they don't understand the *why* they cannot really understand the *what*." NEUHAUS, *supra* note 51, at 98. "To Dr. King, the *why* not only counted, it was the core of his ideas. Take out the *why*, and the *what* lacked coherency." Fischer, *supra* note 8, at 325.

⁵⁷ Smith, *Separation and the "Secular," supra* note 3, at 989; *see also* McConnell, *Religious Freedom, supra* note 8, at 144 ("From the War for Independence to the abolition movement, women's suffrage, labor reform, civil rights, nuclear disarmament, and opposition to pornography, a major source of support for political change has come from explicitly religious voices.").

ture and politics. Moreover, the law cannot be divorced from morality. Rigorous application of the three-prong *Lemon* test, which governs most Establishment Clause analysis, however, could lead to the removal of the religious world view from the political process. In this section, I will examine that proposition by examining several issues that may arise under *Lemon*.

For a law touching upon religion to meet constitutional muster, *Lemon* requires that: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [third,] the statute must not foster an excessive government entanglement with religion."⁵⁸ *Lemon* did not actually create a new test; rather, it is a synthesis of tests derived from previous precedent.⁵⁹ To understand the problems inherent in *Lemon*, one must understand from whence it came.

Lemon's "purpose" and "effects" prongs are taken from *Abington School District v. Schempp*.⁶⁰ The "entanglement" prong is taken from *Walz v. Tax Commission*,⁶¹ which in turn relied on *Board of Education v. Allen*.⁶² The granddaddy of all these cases is *Everson v. Board of Education*,⁶³ in which the Court first used the "wall of separation"⁶⁴ metaphor in Establishment Clause jurisprudence, holding that the Establishment Clause forbade, among other things, "aid [to] one religion, aid [to] all religions, or [government preference for] one religion over another."⁶⁵ To Justice Rutledge and three other Justices, the "wall of separation" meant "a complete and permanent separation of the spheres of religious activity and civil authority by compre-

⁵⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted).

⁵⁹ See FOURNIER, *supra* note 16, at 4-5; Valauri, *supra* note 20, at 129-30.

⁶⁰ 374 U.S. 203, 222 (1963) ("[T]o withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion."); see FOURNIER, *supra* note 16, at 5; Valauri, *supra* note 20, at 129-30.

⁶¹ 397 U.S. 664, 674 (1970) ("We must also be sure that the end result—the effect—is not an excessive entanglement with religion."); see FOURNIER, *supra* note 16, at 5; Valauri, *supra* note 20, at 130.

⁶² 392 U.S. 236 (1968) (supplying texts to private school is not establishment of religion); see Valauri, *supra* note 20, at 130.

⁶³ 330 U.S. 1 (1946).

⁶⁴ *Id.* at 16.

⁶⁵ *Id.* at 15; see Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 675 (1987) [hereinafter Bradley, *No Religious Test*] ("Arguably, the entire nonestablishment opus is little more than an excruciatingly belabored footnote to this part of *Everson*."); FOURNIER, *supra* note 16, at 5 (stating that post-*Everson* Establishment Clause cases "proceeded to develop a test to protect" the wall of separation established in *Everson*); Valauri, *supra* note 20, at 129-30 ("[T]he seed of *Lemon* did not fall far from the tree of *Everson*.").

hensively forbidding every form of public aid or support for religion.”⁶⁶ This is the genesis of the extreme position contending that the religious must be kept strictly separate from the secular, including the political process.

Lemon’s second prong—the “effects” prong—purports to ban laws that either advance or *inhibit* religion.⁶⁷ One might suppose from this statement that *Lemon* would protect the rights of religious believers to participate fully and freely in the political process and the marketplace of ideas. After all, to do otherwise would surely “inhibit” religion by in effect punishing believers for their beliefs and not allowing them the same opportunity afforded to the nonreligious to advance their beliefs.

Despite this veneer of neutrality, the *Lemon* test in reality has “an inherent tendency to devalue religious exercise.”⁶⁸ One reason for this is that the “neutrality” the effects prong purports to advance can itself mask hostility to religion. This is in large part because what is “neutral” is an “inherently indeterminate” question,⁶⁹ the answer to which depends in great measure on a person’s perception. Neutrality assumes a baseline. A decision can be neutral only with relation to a given baseline against which to measure the decision.⁷⁰ Thus, when people speak about “neutrality” in the law, they typically mean evenhanded application of a rule of law.⁷¹ For instance, when we ask a judge to be “neutral” between a poor plaintiff and a wealthy defendant, we do not ask the judge to give special breaks to the poor plaintiff to balance the advantages the defendant might have because of his wealth. Instead, we ask the judge to “act only upon the basis of proper rules or criteria,”⁷² as those criteria are determined by the law, “rather than upon other factors the law regards as extraneous or improper So long as the judge bases her decisions upon proper considerations, she can be said to be acting neutrally.”⁷³

What is legally “neutral,” then, turns out to be “parasitic”; it does not

⁶⁶ *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting).

⁶⁷ *Lemon*, 403 U.S. at 612.

⁶⁸ McConnell, *supra* note 8, at 128.

⁶⁹ Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 315 (1987) [hereinafter Smith, “No Endorsement” Test].

⁷⁰ See *id.* at 314 (arguing that because “neutrality is a ‘coat of many colors,’ . . . virtually anyone can find a nostrum to his liking in the cabinet of neutrality”) (citations omitted). See generally Valauri, *supra* note 20, at 98-144 (providing an in-depth discussion of the problems inherent in defining what is neutral in the context of Establishment Clause jurisprudence).

⁷¹ See Smith, “No Endorsement” Test, *supra* note 69, at 327.

⁷² *Id.*

⁷³ *Id.*

generate, but instead, depends on substantive rules.⁷⁴ If it turns out that some rules would favor the poor plaintiff (for instance, a rule that allows the judge to appoint and direct public payment for counsel for poor litigants), the judge would still be acting neutrally by taking the plaintiff's poverty into account. The same is true of "neutrality" in the Establishment Clause, as *Everson* itself illustrates. Despite its absolute "no aid" language, *Everson* actually upheld a New Jersey scheme that authorized reimbursement of money spent by parents for public bus transportation to schools, including parochial schools.⁷⁵ The majority upheld this scheme because it provided a general benefit to all school children.⁷⁶ Not to allow parochial school students to take advantage of that general benefit would penalize those students and their parents because of their religion. But the dissenters would have none of that. To them the Establishment Clause meant "no aid" to religion, and the reimbursement scheme violated that principle.⁷⁷ Both sides in *Everson* claimed to be acting neutrally, but they measured neutrality from different baselines. The majority thought that because New Jersey already transported public school students, neutrality required the state to treat parochial schools similarly;⁷⁸ the dissenters thought that allowing all students to attend public school if they chose was sufficiently neutral.⁷⁹

The problem of "neutrality" and the danger *Lemon* could pose to religious practice can be seen in the tension between *Lemon*'s "secular purpose" requirement and legislative attempts to accommodate religious practice. For instance, a ban on the sale or consumption of alcoholic beverages would severely affect the religious practices of Jews, Catholics, Eastern Orthodox Christians, and many Protestants, all of whom use wine in their worship services. To alleviate this burden, the legislature could include in its general prohibition an exemption for religious use of alcoholic beverages.

It seems clear, though, that the purpose of such an exemption is precisely to accommodate believers' religious practices, which in turn can be said to "advance" those practices. While some have argued that such exemptions serve secular purposes,⁸⁰ these arguments are not wholly convincing. Thus,

⁷⁴ See *id.* at 327-29.

⁷⁵ *Everson*, 330 U.S. at 18.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 18 (Jackson, J., dissenting); *id.* at 28 (Rutledge, J., dissenting).

⁷⁸ *Id.* at 18.

⁷⁹ *Id.* at 58-60 (Rutledge, J., dissenting); see also Smith, "No Endorsement" Test, *supra* note 69, at 314-15 (suggesting that the split in *Everson* revolved around two different notions of neutrality); Valauri, *supra* note 20, at 94-106. Both sides in *Everson* derived the "separation" and "no aid" commands from what they perceived to be the history of the Establishment Clause. *Everson*, 330 U.S. at 8-14; *id.* at 33-44 (Rutledge, J., dissenting); see *infra* part IV (discussing this history).

⁸⁰ See Smith, *Separation and the "Secular," supra* note 3, at 991-92 (suggesting that these attempts "seem contrived and unpersuasive").

one could argue that the secular purpose prong should forbid legislative accommodations of religion.⁸¹ Despite the fact that accommodation is a time-honored way of preventing indifference or hostility toward religion in our society,⁸² from a secularist perspective that broadly defines "aid" as any benefit to religion, not allowing such accommodations would be considered "neutral."⁸³ In reality, this "neutral" application of a strict "no aid" principle masks hostility to religion. This is particularly so today, when the sheer size of government increases the prospects for government activity that will restrict religious practice. As one commentator has noted, "[i]n a society of expanded social services, a strict interpretation of the no aid principle relegates religion to a marginal and disadvantaged position."⁸⁴

The potential effect *Lemon* could have on religious accommodation is only a small part of the problem with the *Lemon* test. If one equates legislative *purpose* with legislators' *motives*, *Lemon* could conceivably require striking down laws because of the religious motivation of the legislators who passed them. Taken to its logical extreme, this would for instance make

⁸¹ See *id.* at 990-93; Valauri, *supra* note 20, at 131-34. For much the same reason, one could conclude that such accommodations also violate *Lemon*'s "effects" prong. See Smith, *Separation and the "Secular," supra* note 3, at 992. But see Valauri, *supra* note 20, at 132 ("[A]ccommodations and neutralizing aids . . . arguably satisfy the effect prong of the *Lemon* test because they do not advance religion, but only attempt to avoid hindering it."). The Court fortunately rejected this argument. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). The argument's logic, however, remains for use by a less accommodating Court.

⁸² In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Supreme Court upheld against an Establishment Clause challenge a "release time" program through which students were allowed to "leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises." *Id.* at 308. To hold otherwise, the majority reasoned, would display a hostility toward religion that would be inconsistent with this country's religious tradition:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

Id. at 313-14.

⁸³ See generally Valauri, *supra* note 20, at 118-23 (discussing neutrality in the context of accommodations to religion).

⁸⁴ *Id.* at 118. Thus, in an age in which government regulation becomes more intrusive, accommodations to religion become more important to prevent adverse affects on religious practice. See McConnell, *Religious Freedom, supra* note 8, at 129 ("To the extent that *Lemon*'s purpose prong requires the government to turn a blind eye to the impact of its actions on religion, on the implicit assumption that secular effects are all that matter, it is a recipe for intolerance.").

laws against murder or stealing suspect if the motivation for those laws was the religious belief that stealing and murder are violative of the Ten Commandments. "[T]he purpose prong is an invitation to mischief—a not-so-subtle suggestion that those whose understandings of justice are derived from religious sources are second-class citizens, forbidden to work for their principles in the public sphere."⁸⁵ Any disenfranchisement of religious believers "would be a sharp and unwarranted break from our political history."⁸⁶

Even though the Court has not adopted so extreme a view of the secular purpose requirement that all religiously motivated laws are suspect, the lack of historic validity or just plain common sense of the *Lemon* test continues to force the Court into mental gymnastics that rival the contortions of Houdini. Thus, a majority of the Court was able to conclude with no trouble in *Bowers v. Hardwick*⁸⁷ that "morality" provides a rational basis for proscribing homosexual sodomy: "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."⁸⁸ The notion of "morality" invoked in *Bowers* was based on religious principles, a fact that Chief Justice Burger made explicit in his concurring opinion.⁸⁹ A "morality" based on religious principles, however, was the very ground used to strike many other state statutes.⁹⁰

Bowers was not an Establishment Clause decision, but its principle that congruity with religious beliefs, mores, or dogma does not necessarily make laws suspect has been applied in First Amendment cases. In *Harris v. McRae*,⁹¹ the Court rejected an argument that the Hyde Amendment, which restricted federal funding of abortions, violated the Establishment Clause because it incorporated into law Catholic doctrine concerning abortion's sinfulness and the time at which life begins.⁹² Although it is hard to imagine

⁸⁵ McConnell, *Religious Freedom*, *supra* note 8, at 144.

⁸⁶ *Id.* See generally *supra* part II.

⁸⁷ 478 U.S. 186 (1986).

⁸⁸ *Id.* at 196.

⁸⁹ See *id.* at 196 (Burger, C.J., concurring) ("Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."); see also *id.* at 211 n.6 (Blackmun, J., dissenting) ("The theological nature of the origin of Anglo-American antisodomy statutes is patent.").

⁹⁰ See *infra* notes 106-33 and accompanying text.

⁹¹ 448 U.S. 297 (1980).

⁹² *Id.* at 318-20. Actually, the Hyde Amendment, which in its various incarnations allowed funding for abortion to save the life of the mother, to prevent physical health damage, or in cases of rape and incest, *id.* at 302-03, did not fully reflect Catholic teaching on abortion. The Catholic Church teaches that direct abortion is never justified and that civil authorities have a duty to protect the unborn by prohibiting abortion from

that at least some of the members of Congress who voted for the Hyde Amendment were not religiously motivated (at least in part) the Court sensibly held that the Amendment was not unconstitutional simply because it "happen[ed] to coincide or harmonize with the tenets of some or all religions."⁹³

Harris implies a distinction between legislative purpose and individual legislators' personal motives. The Court explicitly recognized that distinction in *Westside Community Schools v. Mergens*.⁹⁴ In *Mergens*, the Court upheld the constitutionality of the Equal Access Act.⁹⁵ The Act generally prohibits public secondary schools that provide opportunities for non-curriculum-related student groups to meet from denying such opportunities to student religious groups.⁹⁶ The school district in *Mergens* argued that the Act violated the Establishment Clause because individual legislators were motivated by a desire to protect and promote religious speech and worship in public schools.⁹⁷ The Court rebuffed this argument "because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."⁹⁸ The Court found that the Act's purpose—to grant equal access in schools to both religious and secular speech—was secular; that, the Court stated, ended the matter.⁹⁹

the moment of conception. See CATHECHISM OF THE CATHOLIC CHURCH Nos. 227-73 (St. Paul Books & Media 1994). It is, however, accurate to say that the Hyde Amendment reflects the general Christian value that the unborn child is a human life worthy of legal protection, and it seems fair to assume that religious motivation played no small role in its passage.

⁹³ *Harris*, 448 U.S. at 319 (citing *McGowan v. Maryland*, 366 U.S. 420, 422 (1961)). The Court went on to note that the Amendment reflected "traditionalist" values towards abortion as much as it did any particular religion's view of abortion. *Id.* This does not mean that the Hyde Amendment did not reflect a religious view toward abortion. After all, the traditionalist values toward abortion themselves are religiously-based.

⁹⁴ 496 U.S. 226 (1990).

⁹⁵ *Id.* at 253.

⁹⁶ Equal Access Act, 20 U.S.C. §§ 4071-74 (1988). The Act makes it unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

Id. § 4071(a). For a detailed analysis of the Act in light of *Mergens* and subsequent lower federal court cases, see Jay A. Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. (forthcoming 1995). See also Laycock, *Equal Access*, *supra* note 20; *infra* notes 147-54, 169-72 and accompanying text.

⁹⁷ *Mergens*, 496 U.S. at 249.

⁹⁸ *Id.*

⁹⁹ *Id.* Of course, the Court's conclusion that the statute's purpose is secular is open to the objection that a law that has the purpose of promoting religious speech does not

Despite cases such as *Bowers*, *Harris*, and *Mergens*, it is still by no means clear that a legislator need not check his religious beliefs at the capitol door or keep those beliefs to himself for fear of giving the courts a reason to strike down laws with which they disagree. For instance, in his dissent in *Mergens*, Justice Stevens recognized the majority's distinction between motive and purpose and conceded that if the Act "did no more than redress discrimination against religion," it would be constitutional.¹⁰⁰ But Justice Stevens noted that the Act also was meant to allow religious speech even where other partisan speech had been proscribed.¹⁰¹ In Justice Stevens's view, if a legislator voted for the statute "on the basis of a prediction that the resulting speech would be religious in character,"¹⁰² the legislator would have a religious purpose that would make the law suspect under the Establishment Clause.¹⁰³ This would be so even though the Act on its face proscribed discrimination against *any* speech based on its religious, political, or philosophical content, since the intent to promote religious speech "reflects a judgment that it would be desirable for people to be religious."¹⁰⁴ Justice Stevens's reasoning seems to boil down to this: If a legislature passes a facially neutral law because its members believe that law will be good for religion, that law may violate the Establishment Clause because it has a religious purpose. But realistically, a religious motive, usually based on religious belief, is the most likely reason a legislator would vote for a law because it is good for religion. If Justice Stevens's suggestion is followed, that view, at least in some cases, would disable legislators from acting on their religious convictions.¹⁰⁵

To any thinking person, the sophistry used by Stevens to try to delineate "purpose" from "motive" or to invalidate a state legislative act because it might be "good for religion" borders on the bizarre. Our Constitution was

have a secular purpose. See *supra* notes 58-66 and accompanying text.

¹⁰⁰ *Mergens*, 496 U.S. at 285 n.21 (citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987)).

¹⁰¹ *Id.* at 274.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ *Id.* at 286 n.21.

¹⁰⁵ To be fair, Justice Stevens did not categorically state that the Act would be unconstitutional; he only suggested it might be, but went on to state that the Act may comply with *Lemon*'s purpose requirement because the Act included political and philosophical speech. *Id.* at 271 (Stevens, J., dissenting). Justice Stevens also recognized that religious motive, as opposed to purpose, would not invalidate the Act; thus, if a legislator voted for the Act because of a religious belief that free speech is good, the Act would pass muster because his purpose (to promote free speech) as opposed to the motivation for that purpose (religious belief) is secular. See *id.* at 285 n.21. Justice Stevens's distinction is not easy to grasp, however, and for practical purposes motive is often difficult to separate from purpose. A person inclined to conflate motive and purpose to invalidate a statute could find a way to do so in Justice Stevens's approach.

framed by rational men attempting to set forth broad principles to guide the growth of an emerging nation. With the *Lemon* test, the Court radically departed from the Constitution and in so doing has created a hodge podge of illogical and inconsistent standards which are bewildering to laymen and a source of continuing embarrassment to the four-member minority led by the Chief Justice and Associate Justice Scalia.

In fact, the fruits of the kind of reasoning Justice Stevens displayed in his *Mergens* dissent can be seen in two cases in which the Court struck down laws because of a perceived legislative purpose to advance religion. In *Wallace v. Jaffree*,¹⁰⁶ an opinion authored by Justice Stevens, Alabama had enacted a statute that authorized a moment of silence in public schools at the start of each school day for "meditation or voluntary prayer."¹⁰⁷ The Court's members appear to have agreed that properly implemented moment-of-silence laws could be constitutional.¹⁰⁸ But the majority struck down the Alabama law because the justices found it had no secular purpose.¹⁰⁹ The Court cited two reasons to justify its finding of no secular purpose. First, the law replaced an earlier moment-of-silence law that had not mentioned prayer; because that earlier law already protected the right to pray (without saying so), the purpose of the later law had to be to "endorse" and "promote" prayer.¹¹⁰ The majority also relied on statements by the law's sponsor, State Senator Donald Holmes, that the law's purpose was to return voluntary prayer to the public schools.¹¹¹ Holmes' statements were made after the law was enacted, a fact the majority failed to mention.¹¹²

Similarly, in *Edwards v. Aguillard*,¹¹³ the Court struck down a Louisiana statute requiring "balanced treatment" of evolution and creation science in public schools.¹¹⁴ The Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act specifically set forth that its purpose was to "protect academic freedom."¹¹⁵ The Court, however, found this purpose a "sham."¹¹⁶ Based again in large measure on statements by the Act's sponsor, State Senator Bill Keith, the Court found that the legislature's "preeminent purpose . . . was clearly to advance the reli-

¹⁰⁶ 472 U.S. 38 (1985).

¹⁰⁷ *Id.* at 40.

¹⁰⁸ *See id.* at 59; *id.* at 62 (Powell, J., concurring); *id.* at 72-73 (O'Connor, J., concurring).

¹⁰⁹ *Id.* at 38.

¹¹⁰ *Id.* at 59.

¹¹¹ *Id.* at 57.

¹¹² *See id.* at 86 (Burger, C.J., dissenting).

¹¹³ 482 U.S. 578 (1987).

¹¹⁴ *Id.* at 597.

¹¹⁵ *Id.* at 586.

¹¹⁶ *See id.* at 587, 589.

gious viewpoint that a supernatural being created humankind.”¹¹⁷

Neither the Alabama moment-of-silence law nor the Louisiana creation-science law can reasonably be seen as even a step in the direction of creating a state-run church or infringing on anybody’s religious liberty. Surely it cannot be improper to ensure that students hear both sides of a controversial scientific issue.¹¹⁸ So long as the schools are teaching scientific data and not religious dogma (and as Justice Scalia made abundantly clear in his dissent, there was *no* evidence to support the claim that the Louisiana Act required that schools teach religious dogma),¹¹⁹ it should not matter that some students may conclude from that data that it is more likely than not that an intelligent creator exists, or that some students may even have existing religious beliefs reinforced. That is simply the result of young minds

¹¹⁷ See *id.* at 591.

¹¹⁸ Evolution can mean any number of different things, not all of them controversial. What is controversial (both biologically and theologically) is the idea, most widely associated with Charles Darwin, that all life evolved through an evolutionary process from a common ancestor or ancestors. Even on the theological plane, the idea that life evolved from a common ancestor need not necessarily be inconsistent with the idea that a creator put that process in motion, or even that the creator guided that process. But [t]he literature of Darwinism is full of anti-theistic conclusions, such as that the universe was not designed and has no purpose, and that we humans are the product of blind natural processes that care nothing about us. What is more, these statements are not presented as personal opinions but as the logical implications of evolutionary science.

PHILLIP E. JOHNSON, *DARWIN ON TRIAL* 8-9 (1991). As one eminent Darwinist has stated: “Darwin made it possible to be an intellectually fulfilled atheist.” *Id.* at 9 (quoting Richard Dawkins, Oxford zoologist). Where schools present this mechanistic approach to the question of origins in teaching evolution, they are necessarily presenting a view that is hostile to religious belief.

On a biological plane, modern evolutionary theory has been subjected to serious criticism. It is beyond the scope of this Article to present a detailed account of this criticism or of the controversy among biologists and other scientists over evolutionary theory. For a good overview of these subjects, see generally WENDELL R. BIRD, *THE ORIGIN OF THE SPECIES REVISITED* (1991); MICHAEL DENTON, *EVOLUTION: A THEORY IN CRISIS* (1986); JOHNSON, *supra*. Bird is the attorney who represented the State of Louisiana in *Edwards*.

¹¹⁹ The only evidence in the record on this subject were affidavits from two scientists, a philosopher, a theologian, and an educator supporting the assertion that creation-science “is essentially a collection of scientific data” and that “creation science is a strictly scientific concept that can be presented without religious reference.” *Edwards*, 482 U.S. at 612 (Scalia, J., dissenting). As Phillip Johnson notes:

The trial court held the Louisiana statute unconstitutional [without a trial] . . . without allowing the state an opportunity to show what kind of evidence creation-scientists would present in classrooms if given the opportunity. The Supreme Court therefore would have had no basis for a finding that the evidence would be bogus or nonexistent.

JOHNSON, *supra* note 118, at 156-57.

drawing conclusions from objective data, a process that education is supposed to be all about.

Likewise, it is difficult to see any threat to religious liberty in telling students they *may* silently pray or “meditate,” a word that carries no necessarily religious meaning.¹²⁰ To suggest that this language would somehow “pressure” or “coerce” students to pray is ludicrous. Indeed, from the Court’s stress on *purpose*, it appears that the fact that the statute actually mentioned prayer is not relevant to the Court’s holding (except that it provides evidence of the forbidden legislative purpose). Thus, under *Wallace*, it is plausible to argue that even a moment-of-silence statute that says nothing to students about how to use their time, or a statute listing an exhaustive list of alternatives (e.g., “meditate, think, pray, do nothing, become unconscious”) would be equally unconstitutional so long as the forbidden purpose to *endorse religion* is present.

As one commentator has noted, *Wallace* and *Edwards* demonstrate that “even a law that is concededly permissible in its substantive content, or that potentially serves a legitimate secular objective, can nonetheless be constitutionally infirm if the legislators who supported the measure expressed and acted on religious motives.”¹²¹ It is possible to interpret *Wallace* and *Edwards* in two ways: either the legislators’ religious statements made the statutes unconstitutional by causing the statutes to convey messages of endorsement; or, the legislators’ actual religious motives made the statutes unconstitutional.¹²² Either interpretation raises grave conflicts with the rights of religious believers to participate fully in the political process.

If the invalidating factor in *Wallace* and *Edwards* was the legislators’ statements in those cases, then those decisions “plainly penalize legislators for expressing religious convictions and aspirations.”¹²³ Legislators who express their religious beliefs run the risk of having courts invalidate their legislative work product as religious endorsements, a result that penalizes both them and their constituents.¹²⁴ Professor Smith sees this conflict between legislators’ speech rights and establishment as “inescapable” under a

¹²⁰ “Meditation” is defined as “1.a. The act or process of meditating. b. A devotional exercise of or leading to contemplation. 2. A contemplative discourse, usually on a religious or philosophical subject.” THE AMERICAN HERITAGE DICTIONARY 1121 (3d College ed. 1992). To “meditate” in turn, is “to reflect on, to contemplate” or “to plan in the mind; intend.” *Id.*

¹²¹ Smith, *Separation and the “Secular,”* *supra* note 3, at 994.

¹²² See *id.* at 994-95.

¹²³ See *id.* at 994.

¹²⁴ *Id.* (quoting Rex Lee, *The Religious Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337, 343 (“It makes no sense to permit moments of silence in all states that want to adopt them except those states unlucky enough to have legislators who said the wrong things when the statute was debated.”)).

secularist interpretation of the Establishment Clause.¹²⁵ He cites, for instance, Laurence Tribe, who believes that legislators should be able to express religious beliefs, but who also believes in a secularist interpretation of the Establishment Clause that would ban government endorsements of religion.¹²⁶ To reconcile these two positions, Tribe posits that politicians' religious expression is constitutional until at some point it becomes "governmental speech."¹²⁷ But as Smith explains, this distinction is

conceptually dubious and practically unworkable. Legislators' statements of religious support for a law express the reasons that caused the law to be adopted, and thus will inevitably be perceived as "governmental" expressions. To classify these statements as "governmental," however, and then to strike down the resulting legislation because of the religious message it conveys, would penalize the legislators for expressing their religious convictions—precisely the result that Tribe purports to eschew.¹²⁸

The second explanation of *Wallace* and *Edwards*—that the statutes in those cases were invalid solely because of the legislators' religious motives—is equally troubling. Religious believers (including even clergy members) supposedly have a right to sit in state legislatures.¹²⁹ As Justice Brennan put it: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally."¹³⁰ But invalidating statutes because of the religious motives of the legislators who vote for those laws renders the protection of which Justice Brennan spoke a nullity. Such an approach tells legislators they may have religious beliefs, but they may not act on them. It conditions holding elective office on the willingness to "suspend or ignore religious beliefs."¹³¹ This is a task that for many believers quite simply is impossible. For those people, religious beliefs permeate every aspect of their lives.¹³² Indeed religious belief, and the ability to put that belief into action for society's benefit, is the reason many become involved in politics in the first

¹²⁵ See *id.* at 993.

¹²⁶ *Id.* at 995 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 14-15 (2d ed. 1988)).

¹²⁷ TRIBE, *supra* note 126, §§ 14-15.

¹²⁸ Smith, *Separation and the "Secular," supra* note 3.

¹²⁹ See *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating Tennessee law that disqualified ministers and priests of any denomination from holding public office).

¹³⁰ *Id.* at 641 (Brennan, J., concurring).

¹³¹ See Smith, *Separation and the "Secular," supra* note 3, at 997.

¹³² See *id.* at 997 & n.234.

place. To tell these people to put aside their beliefs when they legislate is to tell them not to bother getting involved in public life.¹³³

The secularist view of the Establishment Clause has affected more than just legislators' speech and legislative activity. The Supreme Court has consistently held that private religious speech is *speech*, entitled to the same constitutional protection as any other speech.¹³⁴ Yet some have attempted to use the Establishment Clause as an excuse to squelch private citizens' religious expression on publicly owned property.¹³⁵ This has happened especially in this nation's public schools. The Senate Judiciary Committee reported in 1984 that in the name of the Establishment Clause,

many school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech. These districts have banned student-initiated extracurricular religious clubs, certain student community service organizations and activities (including dances to benefit the American Cancer Society), student newspaper articles on religious topics, and student art with religious themes. They have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal Bibles on school property. Individual students have been forbidden to say a blessing over their lunch or recite the rosary silently on the school bus.¹³⁶

The attitude that the Establishment Clause prohibits even private religious expression on public property is not confined to public school administrators. For example, several cases have been brought to challenge the

¹³³ Professor Smith notes that the type of reasoning used in *Wallace* and *Edwards* could even lead to striking down laws based on *constituents'* religious convictions. "It would seem anomalous to hold a law invalid if legislators adopted it on the basis of their own religious convictions but not if they adopted it in response to their constituents' religious convictions." *Id.* at 998. Taken to its logical extreme, this could mean invalidating elections by voters whose religious views influence their choices. *Id.* It is doubtful courts would go that far, but that is the inevitable logic of the position that the Establishment Clause completely separates government from religion.

¹³⁴ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Nietmotko v. Maryland*, 340 U.S. 268, 272 (1951).

¹³⁵ See, e.g., S. REP. NO. 357, 93d Cong., 2d Sess. 11-12, reprinted in 1984 U.S.C.C.A.N. 2357-58; *id.* at 15-18, reprinted in 1984 U.S.C.C.A.N. 2361-64; cases cited *infra* note 137.

¹³⁶ *Id.* at 11-12, reprinted in 1984 U.S.C.C.A.N. 2357-58; see also *id.* at 15-18, reprinted in 1984 U.S.C.C.A.N. 2361-64 (citing other specific examples in which student religious expression was banned, reprimanded, or ridiculed in public schools).

government's tolerance of religious holiday displays or other religious displays on public property.¹³⁷ These cases did not involve special favors for religion; rather, the displays challenged were on properties that were considered public fora for expressive activities.¹³⁸

Because the Establishment Clause limits only government action, how can it provide reason to banish *citizens'* religious speech from public property? The argument for doing so goes like this: When government allows religious speakers to use a public forum, those speakers receive a "benefit" by receiving a platform from which to speak and the use of facilities maintained by state funds. This "benefit" allows the religious speaker to advance his religious cause. Hence, the primary effect of allowing access to the religious speaker is said to be to advance religion. Moreover, by allowing religious speech on public property, the government is said to be unconstitutionally endorsing the religious speech, which also has the effect of advancing religion.

The "benefit" argument is just a straightforward, if extreme, restatement of the *Everson* "no aid" principle as interpreted by Justice Rutledge—"no aid" means no aid, even if that "aid" is a benefit generally available to all citizens—and recast in *Lemon* terms. The endorsement argument is a bit trickier. It depends on the notion that the government endorses any speech it fails to censor. In a country with a constitutional guarantee of free speech, most would (or should) dismiss that notion as absurd; government has no right to censor speech in the first place, so that its failure to censor certain speech cannot be seen as endorsing that speech.¹³⁹ To counter this objection, however, the argument is given a slight twist: government may not

¹³⁷ See, e.g., *Pinette v. Capitol Square Review and Advisory Bd.*, 30 F.3d 675 (6th Cir. 1994), *cert. granted*, 115 S. Ct. 787 (1995); *Chabbad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383 (11th Cir. 1993); *Kreisner v. City of San Diego*, 1 F.3d 775, 780-89 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994); *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992).

¹³⁸ Under current Supreme Court Free Speech Clause doctrine, whether the government may limit the use of public property depends on the type of forum that property constitutes. In "traditional public fora" (areas such as streets, sidewalks, and parks that traditionally have been devoted to free speech and assembly) and "designated public fora" (property the government has intentionally designated for speech purposes), the government generally may not exclude speech based on its content unless the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to serve that interest; in "nonpublic fora," on the other hand, government generally may not restrict access to the forum as long as the restriction is reasonable and viewpoint neutral. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2705-06 (1992). All the cases I have mentioned involved public fora. For a critique of the Court's forum analysis as overly-restrictive of free speech rights, see Sekulow et al., *supra* note 96.

¹³⁹ See Laycock, *Equal Access*, *supra* note 20, at 14; Sekulow et al., *supra* note 96.

actually be endorsing what it does not censor, but observers in the general public may not know that, or may not realize the speaker is actually a citizen rather than the government. In the school situation, the argument takes another twist: Adults may be able to understand that government does not endorse all it fails to censor, but younger students may not yet have the knowledge and maturity to understand that supposedly fine point of constitutional law.¹⁴⁰ Under either argument, government's failure to censor speech somehow is transformed magically into actual government endorsement of that speech; a citizen's speech is thus transformed into *state* action.

Ultimately, both the primary-effect and perceived-endorsement arguments must be based on an extreme secularist view of the Establishment Clause, a view that requires such a complete separation of church from state and religion from government that it allows no contacts (or almost no contacts)¹⁴¹ between even private religious action and the state.¹⁴² Such a view is pernicious. It

blurs the line between state and private action and in the process restricts religious freedom and free speech. It is one thing to say government should not be in the business of running churches or telling people how and when to practice religion; it is quite another to attempt to justify censorship of private religious speech or efforts to prevent people from bringing their religious beliefs to bear on public policy. The former position restricts government action and advances private religious freedom; the latter position restricts private action and cabins religious freedom and free speech by denying religious adherents the same rights to speak and petition the government as other people have.¹⁴³

This view of establishment has been so well ingrained that until recently lower federal courts had consistently ruled that allowing student religious groups to meet on school property on the same terms as other student groups violated the Establishment Clause.¹⁴⁴ A passage from the Second

¹⁴⁰ See Sekulow et al., *supra* note 96.

¹⁴¹ Taken to its logical extreme, such a strict view would require that a church could not receive public police or fire protection or have its sidewalks repaired. I doubt that anyone would take that view; the Supreme Court does not. See *Widmar*, 454 U.S. at 274-75.

¹⁴² See Sekulow et al., *supra* note 96.

¹⁴³ *Id.*; see also Laycock, *Equal Access*, *supra* note 20, at 25-26 (arguing that the "separation" metaphor "encourage[s] the misguided focus on the location of the speech instead of the identity of the speaker").

¹⁴⁴ See *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Nartowicz v. Clayton County Sch. Dist.*, 736

Circuit's decision in *Brandon v. Board of Education*¹⁴⁵ demonstrates the obsession courts commonly displayed in purging the schools of student religious activity so that other students would not think the school is endorsing religion:

To an impressionable student, even the *mere appearance* of secular involvement in religious activities *might indicate* that the state has placed its imprimatur on a particular religious creed. *This symbolic inference is too dangerous to permit.* An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of the school.¹⁴⁶

Note that this passage focuses entirely on student perception rather than government action. There is no hint that actual coercion, sponsorship, endorsement, or favoritism are necessary to violate the Establishment Clause. "Mere appearance," "symbolic inference"—indeed, even the "threat" that students will (heaven forbid!) follow the example of the football team's captain or the student body president—create such a "danger" that students must be kept from meeting to pray on school property. In other words, students are expected to keep their religious convictions to themselves while on school property.

Fortunately, a series of Supreme Court decisions have in large part rebuffed this treatment of religious speakers as second-class citizens. In *Widmar v. Vincent*,¹⁴⁷ the Court held that when a state university creates an open forum for student groups to meet, the Establishment Clause neither requires nor justifies excluding religious groups from the forum.¹⁴⁸ The Court in *Widmar* rejected the university's argument that providing a forum for religious groups had the primary effect of advancing religion, and held that allowing the religious groups access to the forum would not unconstitu-

F.2d 646 (11th Cir. 1984); *Lubbock Civil Liberties Union v. Lubbock Ind. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). *But see* *Mergens v. Board of Educ.*, 876 F.2d 1076, 1079-80 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990). In *Mergens*, the Eighth Circuit upheld the Equal Access Act, 20 U.S.C. §§ 4071-74 (1988 & Supp. IV 1994), which requires that schools not discriminate against student religious groups based on the content of their speech, as not in violation of the Establishment Clause. *Mergens*, 876 F.2d at 1079-80.

¹⁴⁵ 635 F.2d 971 (2d Cir. 1980).

¹⁴⁶ *Id.* at 978 (emphasis added).

¹⁴⁷ 454 U.S. 263 (1981).

¹⁴⁸ *Id.* at 277.

tionally "endorse" religion.¹⁴⁹ In the course of upholding the Equal Access Act,¹⁵⁰ the Court in *Westside Community Schools v. Mergens*¹⁵¹ extended *Widmar*'s reasoning to the context of speech in public secondary schools. The plurality in *Mergens* noted that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,"¹⁵² and held that high school students were not too immature or tender of mind to appreciate this distinction or the related concept that government does not endorse everything it fails to censor.¹⁵³ Federal courts of appeals, relying on *Mergens*, have rejected the "perceived endorsement" argument in rebuffing attempts by school administrators to discriminate against religious speakers in junior high schools.¹⁵⁴

Given *Mergens*' rejection of the perceived endorsement argument, and that argument's reliance on the alleged youth and immaturity of students in the public school context, it should not be surprising that the argument has not fared well outside the school context. In *Lamb's Chapel v. Center Moriches School District*,¹⁵⁵ the Court held that discriminating against religious speakers in granting access to public facilities (in that case, a public school after school hours) because of the religious viewpoint of their speech violates the Free Speech Clause.¹⁵⁶ The defendants in *Lamb's Chapel* cited the Establishment Clause to justify their discrimination, relying in part on

¹⁴⁹ See *id.* at 270-75. The Court also rejected an argument by the university that the state constitution's establishment clause required that it deny access to the forum, finding that the possible state establishment clause violation in that case was not a sufficiently compelling interest to override federal constitutional free speech rights. See *id.* at 276. While the Court did not decide the issue generally, the Supremacy Clause would require that federal constitutional or statutory speech rights trump a state establishment clause provision. See U.S. CONST. art. VI, cl.2. The Ninth Circuit in *Garnett v. Renton School District No. 403*, 987 F.2d 641 (9th Cir. 1993), and the Third Circuit in *Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1254 (3d Cir. 1993), each recognized this principle. See generally *Sekulow et al.*, *supra* note 96.

¹⁵⁰ See *supra* notes 93-95 and accompanying text.

¹⁵¹ 496 U.S. 226 (1990).

¹⁵² *Id.* at 250.

¹⁵³ See *id.* ("The proposition that schools do not endorse everything they fail to censor is not complicated.") Justice Kennedy, joined by Justice Scalia, concurred in the judgment. *Id.* at 258 (Kennedy, J., concurring). Justice Kennedy rejected any endorsement test (perceived or otherwise) and instead reasoned that no Establishment Clause violation would exist unless school officials coerced students to participate in religious activity. See *id.* at 261-62 (Kennedy, J., concurring).

¹⁵⁴ See *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1508-10 (8th Cir. 1994); *Hedges v. Wauconda Community Sch. Dist. No. 118*, 9 F.3d 1295, 1298-300 (7th Cir. 1993).

¹⁵⁵ 113 S. Ct. 2141 (1993).

¹⁵⁶ *Id.* at 2149.

the perceived endorsement argument.¹⁵⁷ The Court had “no trouble” rejecting the defendants’ argument.¹⁵⁸

Lower federal courts have followed the Supreme Court’s lead. In fact, in a series of cases involving religious displays in public fora, the federal courts of appeals have been more emphatic than the Supreme Court has been in rejecting the notion that fear of perceived endorsement of religion either requires or justifies excluding religious expression from those fora.¹⁵⁹ The courts of appeals’ cases recognize that to censor or discriminate against private citizens’ religious speech because of fear of perceived endorsement “is at war with the free speech clause.”¹⁶⁰ The perceived endorsement argument smuggles something akin to the long-rejected “heckler’s veto”¹⁶¹ back into free speech jurisprudence. Like the heckler’s veto, this “obtuse observer’s veto”¹⁶² allows religious speakers’ free speech rights to depend on others’ perceptions. But as one federal judge has put it: “Just as bellicose bystanders cannot authorize the government to silence a speaker, so ignorant bystanders cannot make censorship legitimate.”¹⁶³ “Private errors do not justify public discrimination against speech.”¹⁶⁴

The perceived endorsement argument’s war with the Free Speech Clause is really a war with public manifestations of religion, since government “endorsements” (perceived or otherwise) of other ideas (e.g., condom distribution to school students) are not normally thought by the argument’s proponents to raise any constitutional concerns.¹⁶⁵ This war is a manifestation of

¹⁵⁷ *Id.* at 2148.

¹⁵⁸ *See id.* Specifically, the Court stated that given the facts there was “no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.” *Id.*

¹⁵⁹ *See* cases cited *supra* note 138. *But see* Chabbaad-Lubavitch of Vt. v. City of Burlington, 936 F.2d 109 (2d Cir. 1991) (holding that private religious displays in public fora violate the Establishment Clause because of the possibility of perceived government endorsement of religion); Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989) (same); Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990) (same).

¹⁶⁰ Sekulow et al., *supra* note 96.

¹⁶¹ *See* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966); *Hedges*, 9 F.3d at 1299 (citing Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978)). The heckler’s veto would allow police to squelch an unpopular speaker because his speech may make the crowd unruly. Such police action is impermissible; instead, “[t]he police must permit the speech and control the crowd.” *Id.*

¹⁶² Doe v. Small, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring). The Sixth Circuit has labeled the perceived endorsement argument the “ignoramus’s veto.” Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992); *see also* Pinette v. Capitol Square Review and Advisory Bd., 30 F.3d 675, 679 (6th Cir. 1994).

¹⁶³ *Hedges*, 9 F.3d at 1299-300.

¹⁶⁴ *Small*, 964 F.2d at 630 (Easterbrook, J., concurring).

¹⁶⁵ Professor McConnell has noted the bias against religion, present even in Justice

the attitude that religion is “divisive” and therefore must be kept private, lest the public manifestations offend and cause strife. The concern with “divisiveness” runs through Establishment Clause jurisprudence since *Everson*.¹⁶⁶ *Lemon* picked up on the theme, explaining that while vigorous and partisan political division are “normal and healthy manifestations of our democratic system of government, [the] potential divisiveness [caused by religion] is a threat to the normal political process.”¹⁶⁷

Talk about divisiveness is really just a way of disguising hostility toward believers who take their faith seriously enough to bring it with them into their public lives. It is a way of telling those believers: “Believe if you wish, but do it in private.” The hoped-for consequences of this privatization are that

[f]aith communities will more likely be loose associations of the already converted, and attempts at unified public action will be stymied not only by the overt entrance barriers thrown up by the Court, but by the believer’s own sense that public religion “imposes” one’s “values” on others—values

O’Connor’s actual endorsement test, which focuses on whether government action sends a message of approval or disapproval of one’s religion:

For example, when the New York public schools train their teenage pupils in the use of condoms, this plainly creates an appearance of ‘disapproval’ of a tenet of the Roman Catholic Church. . . . But there is no “religion” of condom advocacy on the other side—nothing but a particular secular view regarding public health and sexual hygiene. To solve difficulties of this sort, attorneys for traditionalist parents have tried to portray secular ideology as the religion of “secular humanism,” but this strategy has been a failure.

McConnell, *Religious Freedom*, *supra* note 8, at 152. McConnell also notes the case of *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987), in which the Sixth Circuit rejected parents’ claims that particular textbooks, read as a whole, denigrated their religion and therefore violated their right to free exercise of religion. *Id.* at 152-53. *Mozert* also illustrates the bias inherent in the “endorsement” test: “If enforced exposure to materials denigrating one’s religion does not communicate a ‘message of disapproval,’ I cannot imagine what would.” *Id.* at 153.

¹⁶⁶ As Professor Bradley notes:

Justice Jackson opined in *Everson* that the first amendment “above all” was designed to “keep bitter religious controversy out of public life” by denying access to public influence. . . . Justice Black, author of the majority opinion in *Everson*, wrote in 1968 that the establishment clause “was written on the assumption that state aid to religion . . . generates discord, disharmony, hatred, and strife among our people.” . . . Even Justice Harlan, normally not easily alarmed, observed in 1970 that “political fragmentation on sectarian lines must be guarded against” and expressly deputized “voluntarism” and “neutrality” as humble servants of this paramount concern.

Bradley, *Dogmatomachy*, *supra* note 29, at 301-02 (citations omitted).

¹⁶⁷ *Lemon*, 403 U.S. at 622.

that the believer has no reason to expect will be welcome in others' lives.¹⁶⁸

Those who favor this privatization effort likely are acting with sincere motives. But as somebody who believes religious beliefs have a positive influence on society, culture, and politics, and as one who believes religious people can get along and work for common causes in the culture and political system without compromising their deeply-held doctrinal differences,¹⁶⁹ I find this privatization effort disturbing. Cases such as *Widmar*, *Mergens*, and *Lamb's Chapel*, by rebuffing the perceived endorsement argument as applied to religious speech, are encouraging because they contravene the trend toward marginalization of religion as an aspect of public life.

One ought not raise false hope, however. Even within *Widmar*, *Mergens*, and *Lamb's Chapel*, there are disconcerting signs that the Court has not yet abandoned the notion that it must keep in check public manifestations of the religious world view, and that the *Lemon* test plays no small role in this effort. In *Mergens*, for instance, the plurality could have rejected the perceived endorsement argument as incompatible with the Free Speech Clause. That incompatibility exists no matter how old the students are; if students have speech rights, then those rights should not depend on others' perceptions.¹⁷⁰ Instead, the Court based its decision in *Mergens* in part on the premise that secondary school students are mature enough to understand that the government does not endorse everything that it does not censor.¹⁷¹ By failing to reject the perceived endorsement argument outright as repugnant to the Free Speech Clause, the Court gave at least some credence to the notion that there are situations in which government may allow an "obtuse observer's veto" to censor religious speech in public schools.¹⁷²

¹⁶⁸ Bradley, *Dogmatomachy*, *supra* note 29, at 314.

¹⁶⁹ For example, I have publicly endorsed the accord, CATHOLICS AND EVANGELICALS TOGETHER: THE CHRISTIAN MISSION IN THE THIRD MILLENNIUM (1992), reprinted in FOURNIER, *supra* note 16, app. The accord is a statement of common principle signed by both Catholics and Evangelical Christians. It honestly assesses the doctrinal differences between the groups, but goes on to set forth a theological and sociological foundation for how Evangelicals and Catholics can act together for the common cause of Jesus Christ and the restoration of American society and culture.

¹⁷⁰ For general discussions regarding this issue, see Sekulow et al., *supra* note 96; Laycock, *Equal Access*, *supra* note 20, at 51-52.

¹⁷¹ See *Mergens*, 496 U.S. at 250-51; see also *Lamb's Chapel*, 113 S. Ct. at 2148 (finding "no realistic danger that the community would think that the [d]istrict was endorsing religion").

¹⁷² To allow such a notion to prevail would be tragic. One commentator has sagely noted that under the perceived endorsement approach

[a] young Martin Luther King, Jr. would have to avoid religious references and themes during a high school speech class. A young Thomas Aquinas should wait

This term the Court has an opportunity to decide in *Capital Square Review and Advisory Board v. Pinette*¹⁷³ whether the perceived endorsement test retains any vitality. In *Pinette*, the Ku Klux Klan sought to display a Latin cross during the Christmas season in a publicly owned square on which the Ohio statehouse was located.¹⁷⁴ The square was a public forum.¹⁷⁵ The Capitol Square Review and Advisory Board, which had the authority to regulate the square, denied permission, and the Klan sought an injunction.¹⁷⁶ The Board defended by asserting that the location of the cross in front of the statehouse on the square "would lead a reasonable observer to conclude that the State of Ohio endorsed Christianity."¹⁷⁷

The Sixth Circuit forcefully rejected the Board's perceived endorsement argument, holding that "private religious speech in a public forum does not violate the Establishment Clause."¹⁷⁸ That some may mistakenly conclude that the government endorses the private speech does not matter because "[t]he freedoms guaranteed by the Constitution cannot depend upon the fanciful perceptions of some hypothetical dolt."¹⁷⁹

How the Court will decide *Pinette* is open to speculation. If the Court decides consistently with its decisions in *Widmar*, *Mergens*, and *Lamb's Chapel*, it should reject the perceived endorsement test and affirm the Sixth Circuit's conclusion that "[i]n a public forum, the religious content of private speech is absolutely irrelevant for First Amendment [free speech] purposes."¹⁸⁰ Perhaps the Court granted certiorari in *Pinette* to reject the perceived endorsement test once and for all. But the Court's previous failures to reject the test outright leaves room for doubt. Justice Stevens already has indicated at least some sympathy for the Board's argument.¹⁸¹ It is possi-

until college to begin exploring the nature of God in his writings, and a young Mozart should save his Mass in C Major for Sunday. In this way, young souls are silenced, some never exploring the mysteries of life, eternity, liberty, justice, and equality—mysteries of which they have had only a taste.

Fischer, *supra* note 8, at 348.

¹⁷³ 30 F.3d 675 (6th Cir. 1994), *cert. granted*, 115 S. Ct. 787 (1995).

¹⁷⁴ *Id.* at 676.

¹⁷⁵ *See id.* at 676-77, 678.

¹⁷⁶ *Id.* at 676.

¹⁷⁷ *Id.* at 678. As part of its argument, the Board asserted that "a cross is a powerfully religious symbol that cannot be 'sanitized' through the ameliorating secular gloss associated with the Christmas holiday." *Id.* To this argument, which neatly sums up the secularist mindset, the court appropriately responded that "[u]ntil today, we had not thought that there would be any circumstances under which it could seriously be argued that the United States Constitution requires that religious speech be 'sanitized.'" *Id.*

¹⁷⁸ *Id.* at 680.

¹⁷⁹ *Id.* at 679.

¹⁸⁰ *Id.* at 680.

¹⁸¹ *Capitol Square Review and Advisory Bd. v. Pinette*, 114 S. Ct. 626, 626-27 (1993) (Stevens, Circuit Justice, in chambers denying stay of injunction) ("Whether or

ble the Court may apply the perceived endorsement test and hold that in some circumstances the Establishment Clause provides a proper excuse for censoring a citizen's religious speech.¹⁸²

Another disconcerting sign for religious speech rights is the strange statement in *Widmar*, repeated in *Mergens*, that "[a]t least in the absence of empirical evidence that religious groups will dominate [an] open forum, . . . the advancement of religion would not be the forum's 'primary effect.'"¹⁸³ What exactly does this mean? Does it mean that if believers work harder than others in taking advantage of an open forum, the Court reserves the right to put those speakers back in their proper place? The idea that religious speech in a public forum may be regulated *if* religious speakers through their own efforts (and, perhaps, indifference by other speakers) become the predominant voice in the forum implicitly tells believers: "You may speak out, but don't speak too much or be too persuasive." It seems nothing more than a means for the Court to ensure that allegedly "divisive" religious speech does not get out of hand—that religious ideals and beliefs do not make *too much* of an intrusion into the public square.

One also cannot ignore that even after *Widmar*, *Mergens*, and *Lamb's Chapel*, the assault on public manifestations of religion continues. School districts have adopted strained readings of the Equal Access Act to avoid allowing student religious clubs to meet on school property. At least one of those attempts has received the blessing of a federal district court.¹⁸⁴ An-

not [the Board's] legal position is sound (and my opinion in *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), explains why I am not unresponsive to their arguments), [it] must shoulder the burden of persuading me that irreparable harm will ensue if I do not grant their application.") (citation omitted).

¹⁸² One hopes that the fact that the Ku Klux Klan sought to erect the cross will not have any bearing on the Court's decision in *Pinette*. The district court in *Pinette* summed up both the feelings of most reasonable persons (including myself) concerning the Klan and the role those feelings should play in determining the Klan's right to free speech:

It is ironic and in the most literal sense diabolical that a group bearing this name would seek to publicly display the symbol of Jesus of Nazareth known to Christians and non-Christians alike as the Prince of [P]eace. It should be obvious, however, that the constitutional right of freedom of speech would be meaningless if it did not apply equally to all groups, popular and unpopular alike.

Pinette v. Capitol Square Review and Advisory Bd., 844 F. Supp. 1182, 1188 (S.D. Ohio 1993).

¹⁸³ *Mergens*, 496 U.S. at 252; *Widmar*, 454 U.S. at 275.

¹⁸⁴ Specifically, in *Ceniceros v. Board of Trustees of the San Diego Unified School District*, No. 93-1015-GT, slip op., (S.D. Cal. 1993) (appeal pending), the district court interpreted the term "instructional time" in the Act to mean "time before the school day begins or after the school day ends." *Id.* at 5. This interpretation allowed a school board to evade the Act and to avoid allowing religious groups to meet by setting aside activity periods for student groups to meet during the school day, even if no actual classroom

other district court has held that the Establishment Clause *compelled* school officials to censor a student's valedictory speech because of its religious content.¹⁸⁵ Challenges have been brought against sex education programs teaching abstinence because the teaching of abstinence allegedly supports and promotes a particular religious view (as if handing out condoms does not).¹⁸⁶ In DeKalb County, Georgia, students were told they could not pass out Christian literature in school *or* on the public sidewalk in front of the school.¹⁸⁷ 2192

Other examples could be cited.¹⁸⁸ The point is that almost all of these examples depend on a view that the Establishment Clause mandates an essentially secular public order into which the intrusion of religious thoughts, ideas, and values must be kept to a minimum. This is the view that rigorous application of the *Lemon* test furthers. It is also a view that is inconsistent with the historical meaning of the Establishment Clause.

IV. THE ESTABLISHMENT CLAUSE IN HISTORICAL CONTEXT.

The majority decision and Justice Rutledge's dissent in *Everson*, which are the direct forbears of *Lemon* and its progeny, purported to base their expansive view of the Establishment Clause on the historical circumstances surrounding the Clause's enactment.¹⁸⁹ But *Everson's* modern conception of the Establishment Clause as mandating completely separate realms of religion and government and prohibiting the state from giving aid or encouragement of any sort to religion—not to mention even more recent efforts to prevent government from even *allowing* private religious speech on government property—is not supported by the Clause's language or history. As one

instruction occurs during those periods. This interpretation of "instructional time" is not compelled by the Act, which defines "instructional time" as "time set aside before actual classroom instruction begins or after actual classroom instruction ends," and is inconsistent with the Supreme Court's command in *Mergens* to avoid interpreting the Act in a way that would make it a nullity. For a critical discussion of *Ceniceros*, see Sekulow et al., *supra* note 96, part I.C.2.

¹⁸⁵ See *Guidry v. Broussard*, 897 F.2d 181 (5th Cir. 1990), in which the court of appeals affirmed on procedural grounds a district court's decision dismissing a student's 42 U.S.C. § 1983 claim alleging that school officials had violated her free speech rights by censoring her valedictory speech. *Id.* at 183. The district court held that the Establishment Clause compelled the censorship. *Id.* For a discussion of whether school officials have any justification for censoring a religious valedictory speech, see generally Sekulow et al., *supra* note 96.

¹⁸⁶ See PAT ROBERTSON, *THE TURNING TIDE* 310 (1993).

¹⁸⁷ See *id.* at 311. For a general discussion of public school students' rights to distribute religious literature on campuses, see generally Sekulow et al., *supra* note 96, part II.B.

¹⁸⁸ See ROBERTSON, *supra* note 186, at 307-12.

¹⁸⁹ See *supra* note 75.

scholar noted in 1949: "Justice Rutledge sold his brethren a bill of goods when he persuaded them that the 'establishment of religion' clause of the First Amendment was intended to rule out all governmental 'aid to *all* religions.'" ¹⁹⁰

Everson's secular imperative is not a natural reading of the Establishment Clause's language. The First Amendment nowhere mentions "separation" or "walls" or "fences" or anything else of the sort. The Establishment Clause does not state "government shall be completely separate from religion" or "religion shall have nothing to do with government" or that "Congress shall give no aid or encouragement of any kind to religion." Instead, the Clause states: "*Congress shall make no law respecting an establishment of religion*" ¹⁹¹

Note that the Clause prohibits "Congress" from acting. The Establishment Clause prohibits certain government action. Right away, that should eliminate the "perceived endorsement" argument or any other argument that would magically transform a private citizen's religious speech into state action. ¹⁹²

¹⁹⁰ Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 16 (1949).

¹⁹¹ U.S. CONST. amend. I, cl. 1 (emphasis added).

¹⁹² While on its face the Clause prohibits only the federal government, i.e., Congress, from acting, the Supreme Court has held that the Establishment Clause applies to the states by way of incorporation through the Fourteenth Amendment Due Process Clause. See *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1946); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). In truth, in its doctrine of incorporation the Supreme Court did violence to history. The Congress that was roughly contemporaneous with the passage of the Fourteenth Amendment specifically voted down what is known as the "Blaine Amendment," named after Senator James G. Blaine of Ohio. See John S. Baker, Jr., *The Religion Clauses Reconsidered: The Jaffree Case*, 15 CUMB. L. REV. 125, 137 (1984). That amendment, first proposed in 1875, would explicitly have prohibited *state* laws "respecting an establishment of religion." *Id.* This indicates at least that those proposing the amendment did not believe disestablishment applied to the states even after the Fourteenth Amendment's adoption. See BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 10. Only by judicial *fiat* which ignored clear congressional action was the incorporation of the Establishment Clause brought about. In any event, the Due Process Clause prohibits states from depriving persons of "life, liberty, or property" without due process of law. U.S. CONST. amend. XIV, § 1, cl. 3. The theory behind incorporation is that the word "liberty" encompasses certain provisions in the Bill of Rights. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.6, at 422 (1992). But if that is so, it is difficult to see how purely symbolic *state* actions that do not coerce religious belief or action, or payment in support of religion—i.e., actions that do not deprive anybody of liberty in any meaningful sense of the word—could be prohibited. See *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 270 (7th Cir. 1986) (noting the "semantic as well as historical difficulty in equating a law aiding religion, or even a particular denomination, to a law depriving persons of their religious liberty").

Moreover, the term "establishment of religion" had (and has) a traditionally accepted meaning. According to Blackstone: "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special advantages which are denied to others."¹⁹³ As Professor Bradley has noted, even modern dictionaries define "establishment" as "a state church."¹⁹⁴ In the late eighteenth century, as now, the common sense of the term "establishment of religion" connoted a church that the state set up or to which government gave special favors that it denied to other churches. In no way can the term's plain meaning be stretched to prohibit any aid or encouragement to religion in general, much less a requirement that the religious world view be kept out of politics and government.

The historical context surrounding the proposal and ratification of the Establishment Clause is instructive as to its meaning. Some have argued that history does not support the view that the Establishment Clause requires only that government not discriminate among sects in giving out aid.¹⁹⁵ That may or may not be so. But there is no question that the history does not support the *Everson* "no aid" position, and it certainly does not support the proposition that the First Amendment requires that religion be left completely private, completely separated from government and politics.

Both the majority opinion in *Everson* and Justice Rutledge's dissent purport to be based on history. However, the sum of their history essentially boils down to three words: Madison, Jefferson, and Virginia. Justice Black's majority opinion, after recounting a history of religious intolerance in the colonies that shocked "the freedom-loving colonials into a feeling of abhor-

As for perceived endorsement, one can draw a parallel with due process cases concerning the issue of state action. Private action does not violate the Due Process Clause. The fact that the state *allows* such action is not state action. Likewise, the fact that the state *allows* private speech endorsing, promoting, or supporting religion should not be sufficient state action to violate the Establishment Clause. See Sekulow et al., *supra* note 96.

¹⁹³ 1 WILLIAM BLACKSTONE, COMMENTARIES *296; see also Bradley, *Imagining the Past*, *supra* note 47, at 833; Corwin, *supra* note 190, at 16 (quoting THOMAS COOLEY, PRINCIPALS OF CONSTITUTIONAL LAW 224-25 (3d ed. 1898)).

¹⁹⁴ Bradley, *Imagining the Past*, *supra* note 47, at 833 (citing III THE OXFORD ENGLISH DICTIONARY 298 (1933); WEBSTER'S THIRD INTERNATIONAL DICTIONARY 778 (3d ed. 1981)); see also THE AMERICAN HERITAGE DICTIONARY 466 (2d college ed. 1991) (defining "establishment" as "an established church" and "established church" as "a church that is officially recognized and given support as a national institution by a government").

¹⁹⁵ See *Lee v. Weisman*, 112 S. Ct. 2649, 2668-76 (1992) (Souter, J., concurring); see also Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986) [hereinafter Laycock, "Nonpreferential" Aid].

rence,"¹⁹⁶ effectively reduced the First Amendment to the culmination of a struggle led by Madison and Jefferson in 1784 and 1785 to defeat a bill in the Virginia legislature that would have required general assessments to aid Christian teachers. In response to the bill, Madison wrote his *Memorial and Remonstrance*,¹⁹⁷ which presented Madison's arguments against the assessment. The bill was defeated, and in its place the legislature enacted the Virginia Bill for Establishing Religious Freedom, drafted by Jefferson.¹⁹⁸ That bill provided:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion¹⁹⁹

To make a long story short, Black's *Everson* opinion "essentially reduced the religion clauses to a federal codification of" Jefferson's bill.²⁰⁰ In Black's view, that bill—and hence the First Amendment—was summed up in Jefferson's comment in his letter to the Danbury Baptist Association that the Establishment Clause was meant to erect "a wall of separation between church and State."²⁰¹

Justice Rutledge, in Professor Bradley's words, "pursued the Virginia analogy with still more vigor."²⁰² His analysis differs from the

¹⁹⁶ *Everson*, 330 U.S. at 11. See generally *id.* at 8-11.

¹⁹⁷ James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson*, 330 U.S. 63-72 (Rutledge, J., dissenting).

¹⁹⁸ See *Everson*, 330 U.S. at 12-13.

¹⁹⁹ The Bill for Establishing Religious Freedom, reprinted in BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, app. I, at 149-50; see also *Everson*, 330 U.S. at 11-13. Others have noted that both the *Memorial and Remonstrance* and the Bill for Establishing Religious Freedom focus entirely on *coercive* practices; thus, even those documents do not support interpreting the Establishment Clause to prohibit noncoercive aid or support for religion. See *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135-36 (7th Cir. 1987); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 938-39 (1986) [hereinafter McConnell, *Coercion*].

²⁰⁰ Bradley, *Imagining the Past*, *supra* note 47, at 832; see *Everson*, 330 U.S. at 12-16; BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 3.

²⁰¹ *Everson*, 330 U.S. at 16 (citation omitted); see *supra* note 1 and accompanying text.

²⁰² BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 3. To confirm that assessment, see generally *Everson*, 330 U.S. at 31-42 (Rutledge, J., dissenting).

majority's mainly in that it focused more on Madison than on Jefferson. Indeed, Rutledge went so far as to call the Amendment "the compact and exact summation" of Madison's views.²⁰³ According to Justice Rutledge, the Amendment reflected Madison's "unyielding"²⁰⁴ view that all "state support, financial or other, of religion in any guise, form, or degree" be prohibited.²⁰⁵

The most striking feature of both *Everson* opinions is their almost complete equation of the Establishment Clause's meaning with the views Madison and Jefferson had expressed in fighting general assessments in Virginia four years before the Establishment Clause was even proposed. Although Justice Black asserted that the colonists' general abhorrence toward the prevailing practices concerning church-state relations prompted the Establishment Clause, the only source Justice Black cited for this proposition is a 1774 letter by Madison to a friend concerning the imprisonment of several men in Virginia for "publishing their religious sentiments."²⁰⁶ The excerpt from the quoted letter did not refer to any general abhorrence to such persecution, and neither Justice Black nor Justice Rutledge cited any other evidence to support the view that Madison's supposed opposition to such things as general assessments and blasphemy laws was widespread. As Professor Bradley has noted, "[t]he Court [in *Everson*] provided no foundation for this historical convergence" of the Establishment Clause with Jefferson and Madison's view, except for Madison's involvement in both the drafting of the First Amendment and the Virginia general assessment struggle.²⁰⁷

It is simply wrong to take Jefferson's or Madison's views of church-state relations as the final word on the meaning of the Establishment Clause. Jefferson, of course, was out of the country during the time the Clause was drafted, proposed, debated, and ratified,²⁰⁸ and his "wall" statement was made years after the Establishment Clause's ratification. More to the point, the decision regarding disestablishment, that is, the decision regarding the proper role the federal government was to take and the power the federal government was to have in matters regarding religion, was neither Jefferson's nor Madison's to make. The Establishment Clause did not become effective upon proposal; rather, the Clause had to survive the committee process, be approved by both houses of Congress, and then—most importantly—be ratified by three-quarters of the states. Moreover, it was the Amendment's language, and not any particular legislator's belief about the

²⁰³ *Everson*, 330 U.S. at 31 (Rutledge, J., dissenting).

²⁰⁴ *Id.* at 37 (Rutledge, J., dissenting).

²⁰⁵ *Id.* at 33 (Rutledge, J., dissenting).

²⁰⁶ *See id.* at 11 n.9.

²⁰⁷ BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 3.

²⁰⁸ *See id.* at 78.

language, that is binding.²⁰⁹

Madison's views regarding the proper relationship between church and state could be relevant in shedding light upon what the Amendment's words mean. But whatever light might be shed must be verified historically. To equate the First Amendment's meaning with Madison's views, one would have to establish that those who drafted, proposed, *and* (most importantly) ratified the Amendment understood that the language in the Amendment embodied those views, and that those persons adopted the Amendment with that understanding. In other words, one would have to conclude, given that the Establishment Clause's text does not compel the conclusion, that it was commonly understood that the Amendment's meaning embodied Madison's views (which, according to Justice Rutledge, required "strict separation"),²¹⁰ and that Congress would have passed and the states would have ratified such an Amendment.

Justice Rutledge, however, distorted Madison's religious views. Madison was trained in theology at Princeton University under the devout clergyman and later congressman, John Witherspoon.²¹¹ Madison's struggle for religious freedom was vigorously supported by Virginia's Baptists, my forbears among them, who had suffered repeated indignities at the hands of the established Anglican Church.²¹² Madison went from the Constitutional Convention to a seat in the newly formed House of Representatives. His first official duty in that chamber was to chair the committee which selected a Christian Chaplain to lead the assembled representatives in daily prayer.²¹³ It is inconceivable that the author of the First Amendment was so ignorant of the Constitution that he would begin his elected duties by violating it. Rather, reason would tell us that the founding Congress considered public prayers, paid for with public funds, to be completely in harmony with the clear meaning of the First Amendment, and not in anyway an impermissible "es-

²⁰⁹ Madison himself noted:

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. . . . The legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must not be in the opinions or intentions of the Body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the Authority which it possesses.

Id. at 111 (quoting C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 34 (1986)); *see also* Corwin, *supra* note 190, at 13.

²¹⁰ As we have already seen, the language of the Clause does not compel that conclusion. *See supra* notes 189-92 and accompanying text.

²¹¹ *See* JOHN EIDSNÖE, *CHRISTIANITY AND THE CONSTITUTION* 95 (1987).

²¹² *See* BRADLEY, *CHURCH-STATE RELATIONSHIPS*, *supra* note 47, at 40 (noting Virginia Baptists' opposition to the general assessment proposed in Virginia).

²¹³ *See* ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE—HISTORICAL FACT AND CURRENT FICTION* 23 (Baker Book House Co. reprint 1988) (1982).

tablishment of religion."

In any event, it is practically inconceivable that late eighteenth-century Americans would have ratified an amendment to the Constitution that would have required religion to be kept strictly separate from government or that would have prohibited any aid or encouragement for religion. American thinking at the time was "pervasively religious . . . more specifically, pervasively Protestant."²¹⁴ Americans of the time generally saw religion, and in particular Protestant Christianity, as essential to liberty and republican government.²¹⁵ "Thus, '[t]he vast majority of Americans . . . automatically expected that government would uphold the commonly agreed on Protestant ethos and morality.'"²¹⁶

Religion suffused the thinking of eighteenth-century Americans, and formed the basis for most political discourse of the period.²¹⁷ This is evident, as we have seen, in the Declaration of Independence.²¹⁸ As Professor Smith notes, the Bill of Rights itself also reflects our nation's Judeo-Christian heritage.²¹⁹ But, ironically, this suffusion of religious thought in political thinking is perhaps most evident in arguments defending individual religious freedom. Madison's *Memorial and Remonstrance* depends on explicit-

²¹⁴ Smith, *Separation and the "Secular,"* *supra* note 3, at 966; see also BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 122 (noting "an indelible fusion of nondenominational Protestantism and republican government in the early American mind").

²¹⁵ See *supra* notes 47-52 and accompanying text; see also BERMAN, *supra* note 47, at 210-11 ("[T]he authors of the Constitution, including those who were personally skeptical of the truth of traditional theistic religion, did not doubt that the vitality of the legal system itself depended on the vitality of religious faith, and more particularly, of the Protestant Christian faith that predominated in the new American Republic."); BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 123 (noting that Madison maintained in *The Federalist* that "liberty presupposed a virtuous citizenry").

²¹⁶ Smith, *Separation and the "Secular,"* *supra* note 3, at 966 (quoting THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 219 (1986)).

²¹⁷ See *id.* at 967. As Professor Smith notes, even the thinking of "enlightened" Americans like Jefferson and Thomas Paine on matters such as natural history, morality, and politics was grounded in a religious world view. Although this world view diverged from orthodox Christianity, it was religious in what seems (at least in retrospect) a not so untraditional sense. Nearly all the important conclusions in Jeffersonian thought depended on a belief in a divine Creator or on the moral teachings of Jesus.
Id. (citing DANIEL BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 27-56, 151-66, 243-48 (1948)).

²¹⁸ See *supra* notes 34-39 and accompanying text; see also Smith, *Separation and the "Secular,"* *supra* note 3, at 967.

²¹⁹ See Smith, *Separation and the "Secular,"* *supra* note 3, at 967 (citing Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1404 (1967)).

ly religious grounds in arguing against General Assessments.²²⁰ Jefferson's Bill for Establishing Religious Freedom is also explicitly theological; indeed, it is "an exercise in religious persuasion."²²¹ The preamble's first sentence declares: "Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain."²²² It goes on to state that attempts to influence the mind by legal coercion "are a departure from the plan of the holy author of our religion, who being Lord of both body and mind, yet chose not to propagate it by coercions on either."²²³

According to these excerpts, then: (1) God exists; (2) He is Almighty; (3) He created man; and (4) He has "Supreme Will," is the "author of our religion," and "chose" how to propagate that religion, all of which can be taken to imply that not only is God "Almighty," but that He also has certain attributes that indicate He is a personal God who chose to create. In other words, the Bill states many of the rudiments of theistic religion, all in an official promulgation of the Virginia legislature. Whether Jefferson believed all he wrote in the Bill (or whether Madison believed all he wrote in the *Memorial and Remonstrance*) is impossible to know. But even if not, the fact that "Jefferson and Madison thought it necessary to defend religious freedom on *religious* grounds" is an excellent indication of the religious mindset of the general public at the time.²²⁴ Moreover, it is an interesting irony that if government "endorsement" of religion or a particular religious view violates the Establishment Clause, the Bill to Establish Religious Freedom—from which Justice Black in *Everson* derived his interpretation of the Establishment Clause—itsself would violate the Establishment Clause.²²⁵

The prevailing view was reflected more concretely in both state and national legislation before and after the First Amendment's ratification. The Northwest Ordinance, enacted for the governance of the western territories by the Confederation Congress in 1787, declared that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."²²⁶ Territorial governments under the ordinance's authority set up means for supporting religion.²²⁷ Several states had established churches at that time, but even those that did not maintained general support and aid for

²²⁰ See *id.*

²²¹ *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135 (7th Cir. 1987) (Easterbrook, J., dissenting); see also Smith, *Separation and the "Secular," supra* note 3, at 967.

²²² BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, app. I, at 149.

²²³ See Cord, *supra* note 213, addendum 3.

²²⁴ See Smith, *Separation and the "Secular," supra* note 3, at 969 n.78 (emphasis added).

²²⁵ See *id.* at 969 n.77; *American Jewish Congress*, 827 F.2d at 136.

²²⁶ See *supra* note 48 and accompanying text.

²²⁷ See *infra* notes 269-76 and accompanying text.

religion.²²⁸

Particularly instructive are the situations in Pennsylvania, Delaware, and New Jersey. While there is considerable debate among scholars about how many states had established churches at the time the First Amendment was proposed and ratified,²²⁹ there is little dispute that "Pennsylvania, New Jersey, and Delaware 'never experienced any establishment of religion.'"²³⁰ Yet, despite the fact that "these . . . states were self-consciously nonestablishment from the day they were settled, . . . all aided, encouraged, and sponsored Christianity, including providing direct material and financial assistance to religious institutions and societies."²³¹ For example, Pennsylvania had laws punishing Sabbath breakers and those who blasphemed "Almighty God, Christ Jesus, the Holy Spirit, or the Scripture of Truth."²³² Pennsylvania also granted tax exemptions to churches, and established trusteeships at state colleges and universities for religious clergy.²³³ In New Jersey, which prohibited establishment in its constitution, the legislature was authorized to appoint and maintain ministers, and "the assembly liberally bestowed substantial land grants on religious societies . . ."²³⁴ Like Pennsylvania, Delaware and New Jersey both punished Sabbath breakers and blasphemers.²³⁵

Given the great emphasis that the *Everson* opinions place on the experience in Virginia, it also is instructive to look at some practices in that state. Virginia formally disestablished the Anglican Church in 1786.²³⁶ Madison is rightly regarded as a leader in the fight for disestablishment, and religious liberty in general, in Virginia. Yet, on the very day that Madison introduced Jefferson's Bill for Establishing Religious Freedom, he also proposed a bill providing penalties for Sabbath breakers.²³⁷ Both bills passed.²³⁸ In fact,

²²⁸ See generally BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 19-57 (marshalling the data regarding the support for religion in the various states).

²²⁹ See *id.* at 20 (noting that "[w]hen twentieth-century commentators and justices look for religious establishment at the time the Bill of Rights was enacted, they are not sure how many [states with an established religion] there were in America").

²³⁰ Leonard Levy, *No Establishment of Religion: The Original Understanding*, in LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 192 (1972); see also LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 25 (1986). Bradley notes that this conclusion is "typical of historians' judgment." BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 46.

²³¹ BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 46.

²³² *Id.* at 48.

²³³ *Id.*

²³⁴ *Id.* at 51. Bradley notes that as land became scarce in the eighteenth century the New Jersey legislature granted dispensations from the state's general ban on lotteries to fund church construction. *Id.* Moreover, although not codified until 1851, tax exemptions for churches and schools were "universally extended." *Id.*

²³⁵ *Id.* at 49-52.

²³⁶ *Id.* at 30-31, 40.

²³⁷ Smith, *Separation and the "Secular,"* *supra* note 3, at 970 (citing Robert L. Cord,

even during and after the struggle to disestablish the Anglican Church "nobody in Virginia opposed all aid and encouragement to religion."²³⁹

Throughout the 1776-1786 period, the legislature granted a number of requests from religious organizations for lotteries to fund church construction, where lotteries were otherwise prohibited. . . . Before and after disestablishment in 1786, the legislature continued to proclaim fast and thanksgiving days and to pay for special sermons, and in 1777 it exempted the property . . . of religious societies from taxation.²⁴⁰

Virginia's experience with education also indicates that the founding generation did not think disestablishment and aid to religious institutions to be mutually exclusive. In 1796, the legislature passed an act allowing counties to offer free schools.²⁴¹ However, counties did not take advantage of the enabling law; instead, a movement arose to charter private schools, including sectarian and nondenominational Protestant schools.²⁴² Between 1777 and 1820, the legislature granted at least fifty charters.²⁴³ Charters allowed schools, among other things, to raise funds by lotteries, which otherwise were illegal.²⁴⁴ Moreover, religiously run schools received grants of escheated lands, and even cash grants.²⁴⁵ Professor Bradley sums up the situation in Virginia: "After a painfully self-conscious disestablishment, the nonestablishment home state of Jefferson and Madison aided—through tax exemptions, escheated lands, lottery dispensations, and cash grants—sectarian and nondenominational Protestant schools."²⁴⁶

Given the religious mindset of most eighteenth-century Americans, the

Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation, 10 HARV. J.L. & PUB. POL'Y 47, 49 (1987)).

²³⁸ *Id.*

²³⁹ BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 40. "[N]ot even Baptists [who opposed religious tests on theological grounds]—and not even Jefferson—rejected the more general proposition that the state ought to foster and encourage Christianity, if only (as for Jefferson) because it was an effective instrument of social control." Bradley, *No Religion Test*, *supra* note 65, at 688 (citing WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 31 (1976)).

²⁴⁰ BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 41.

²⁴¹ *Id.* at 30.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 130-31.

²⁴⁶ *Id.* at 131. As Professor Bradley notes, even public education in the colonies during the late 18th and early 19th centuries (where it existed) was explicitly religious. See *id.* at 125-31.

general belief that religion (specifically Protestant Christianity) was necessary for republican government, and the general expectation that government would (and should) promote Christianity (even in states that had disestablished state churches and that had never had established churches in the first place), it is dubious at best to suppose that Americans would have understood the First Amendment's prohibition against laws "respecting an establishment of religion" as mandating a secular political society in which the new government could not in some ways encourage, promote, or aid religion. It also is dubious to suppose that Congress would have proposed, or that Americans would have ratified, such an amendment.²⁴⁷

A look at the proposal and ratification processes bears this out. Madison, who did not originally favor a bill of rights, proposed what is now the First Amendment in May 1789 out of political expediency; he had promised amendments as a sop to antifederalists and to Virginia voters, and he had to deliver to save his political career and perhaps even the Constitution.²⁴⁸ Madison was not on a crusade to write his personal views regarding church-state relationships (or what the Court in *Everson* considered to be his views) into the Constitution. "The truth is that Madison's personal philosophy, whatever that may have been, has nothing to do with the meaning of the Establishment Clause."²⁴⁹

It was vital to Madison that his proposals succeed. Therefore, he could not afford to be controversial. Most, if not almost all, members of Congress were hostile to Madison's personal views on church-state relations.²⁵⁰ Many of the important figures were committed to public aid to religion.²⁵¹ "[T]he vast majority of the House certainly held distinctively un-Madisonian

²⁴⁷ Others have reached the same conclusion. *See id.* at 131 ("Not only did [the Framers] not erect a wall of separation between religion and government, the givens in their mental world mean they literally could not."); Smith, *Separation and the "Secular,"* *supra* note 3, at 966 (arguing that "the separation of politics and religion, or of government and religion" did not present 18th century Americans with "a genuine option" and that "Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out").

²⁴⁸ *See* BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 85-86. Indeed, the first draft of the Establishment Clause Madison proposed stated: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 87. Madison stated that the amendment responded to a fear that one sect, or one or two sects combined, may "establish a religion to which they would compel others to conform." *Id.* at 87. Madison interpreted a later draft that stated "no religion shall be established by law" to mean that Congress could not establish a religion legally and compel people to observe it. *See id.* at 87-88.

²⁴⁹ *Id.* at 87.

²⁵⁰ *Id.* at 89.

²⁵¹ *See id.*

views.”²⁵² As for the Senate,

[t]he considerable historical evidence reveals not a single senator whose personal views were even close to Madison’s (much less those attributed to him by the Supreme Court). . . . [A] proposal that prohibited all aid, encouragement, or support of religion would not have been milk and water to them; it would have scandalized them. Such an amendment would not have garnered two votes, much less two-thirds.²⁵³

To make a long story short, Madison did not offer any extreme proposal incorporating his views (or what the Supreme Court in *Everson* thought to be his views) into the Establishment Clause.²⁵⁴ He never offered the *Memorial and Remonstrance* or the Bill for Establishing Religious Liberty as explanations for the proposals he made, for any of the other versions of the Amendment voted on in the House, or for the final version that Congress passed and proposed to the states for ratification.²⁵⁵

What finally emerged from Congress is what we now know as the Establishment Clause: “Congress shall make no law respecting an establishment of religion”²⁵⁶ That proposal had legal force only if ratified by

²⁵² *Id.* at 90.

²⁵³ *Id.*

²⁵⁴ As one commentator has noted: “One need only read the amendment’s history to see that Madison worked as an advocate of sensible legislative compromise and not as an advocate of incorporating Virginia’s Statute of Religious Liberty as told in *Everson*.” Fischer, *supra* note 8, at 332. For a painstaking account of the Amendment’s history in Congress, see generally BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 85-97. For a contrary view of the same evidence, concluding that the Establishment Clause does prohibit even nonpreferential financial aid to religion, see Laycock, “Nonpreferential” Aid, *supra* note 195, at 879-94.

²⁵⁵ See Corwin, *supra* note 190, at 13. As noted earlier, Madison offered explanations for his original proposal and for a later proposal. James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 63-72 (Rutledge, J., dissenting). As Bradley notes: “[N]owhere in either published or private debate during this period did Madison deviate from” the explanations of the two proposals. BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 88.

²⁵⁶ U.S. CONST. amend. I, cl. 1. Justice Souter, in his concurring opinion in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), makes much of the drafting history that led to this proposal in arguing for the proposition that the Establishment Clause does not allow even nonpreferential aid to religion. The gist of his argument is that during the drafting process, the House rejected several versions of the Amendment that would more clearly have allowed nonpreferential aid. *Id.* at 2668-69 (Souter, J., concurring). The final version that emerged from the House and was passed to the Senate stated that “Congress

the states. The Court's theory in *Everson* was that "freedom loving colonials" had become so chagrined at existing church-state practices that they endeavored to root out those practices by completely separating religion from government and prohibiting any aid to religion.²⁵⁷ Given the general religious mindset of the American people and the prevalence of state aid to religion (even, as noted, in states without established churches), the Court's theory essentially was that in ratifying the First Amendment, the American people effected a revolution in church-state relations.

As Professor Bradley notes, however, such revolutions are not normally accompanied by silence.²⁵⁸ One would think that an amendment that required, as Justice Rutledge put it, "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"²⁵⁹ would have drawn some public controversy. Yet, for the most part, the "ratification of

shall make no law *establishing Religion* or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.* at 2669 (Souter, J., concurring) (emphasis added). The Senate rejected this version, and several others, before finally settling on this language: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." *Id.* The final version, "Congress shall make no law respecting an establishment of religion . . .," was a House-Senate compromise in which, according to Justice Souter, the House conferees won out. *Id.* Given that the Framers had rejected much more explicit language that would have allowed nonpreferential aid, Justice Souter concludes that the nonpreferentialist position requires the premise that the Framers were simply bad drafters. *See id.* at 2669-70 (Souter, J., concurring); *see also* Laycock, *Nonpreferential Aid*, *supra* note 195, at 879-83.

My concern is not to establish the nonpreferentialist position; it is only to show that the Establishment Clause does not mandate a completely secular political society or prohibit all government aid or encouragement for religion. However, I note that the drafting history argument is a two-edged sword. Besides rejecting language that would more clearly have stated the non-preferentialist position, Congress also rejected language (in the final House version) that would more clearly have stated the "no aid" position. Justice Souter places great stress on the drafters' supposed knowledge of the events in Virginia leading to disestablishment there, but fails to note that the views Madison expressed during that time were not shared by most of his fellow congressmen. Moreover, Justice Souter ignores the prevailing religious world view and the general program of aid to religion in all states, and as I shall discuss, the incongruity of the Amendment's noncontroversial ratification in light of that background. Finally, Justice Souter provides no evidence that the drafting history was known to the ratifiers, who were asked to ratify an amendment containing a key term, "establishment of religion," that had an established legal meaning inconsistent with the "no aid" position. In short, the drafting history of the Establishment Clause does not support the expansive definition given the Clause by the Court in *Everson* or by modern advocates of a secular society.

²⁵⁷ *Everson*, 330 U.S. at 11.

²⁵⁸ *See* BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 112-15.

²⁵⁹ *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting).

the Bill of Rights . . . was (in composite profile) perfunctory, without significant debate or opposition"²⁶⁰ Newspapers of the period revealed no controversy.²⁶¹ The most plausible inference to be drawn from this evidence is that the ratifiers did not effect the revolution found by the Court in *Everson*.

The ratification process in Virginia was not so perfunctory, and there is a record of how the Virginians interpreted the Religion Clauses. Virginia rejected what is now the First Amendment, and accompanied that rejection with a critique of the Amendment.²⁶² The Virginians' interpretation of the Amendment does not support the complete separation or "no aid" view. Rather, the Virginians noted about the Establishment Clause that

although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.²⁶³

As Bradley notes, this critique, published in the Richmond newspaper, "stands as the clearest, most concise, most authoritative definition of the religious clauses in the entire history of ratification by the states."²⁶⁴

Thus, neither the text of the Establishment Clause nor its historical background support the view that the Clause merely summed up Madison's and Jefferson's views regarding church-state relationships, much less the view that the Clause requires a complete separation between religion and government prohibiting all government aid to or encouragement of religion.²⁶⁵

²⁶⁰ BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 114.

²⁶¹ See *id.* at 115 ("[T]he newspaper editors, usually avid, entirely partisan observers of things political, said almost nothing about the journey of the amendments through the states.").

²⁶² See *id.* at 117-18.

²⁶³ *Id.* at 117 (quoting KATE MASON ROWLAND, THE LIFE OF GEORGE MASON, 1721-1792, at 321 (1853)) (emphasis added); see also Corwin, *supra* note 190, at 12 n.33.

²⁶⁴ See BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 118.

²⁶⁵ In any event, importing Jefferson's and Madison's views of church-state relationships into the First Amendment does not support the strict separationist view, at least if we judge Jefferson and Madison by their actions. Jefferson, for example, signed treaties with the Indians calling for payments for churches and priests. See *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 136 (Easterbrook, J., dissenting). He also approved a plan allowing religious denominations to establish schools on the University of Virginia campus to allow students the opportunity to receive religious training. Re-

Certainly the first several generations of American legislators (including those who actually drafted the Amendment) did not think that government aid to or encouragement of religion was inconsistent with the Religion Clauses. The laws these men enacted are compelling evidence against the secularist interpretation of the First Amendment.²⁶⁶

As others have noted the early legislation in detail, it is sufficient here to note Professor McConnell's comment that "[e]xponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the first amendment: the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy, and so on."²⁶⁷ Indeed, the very day after recommending what is now the First Amendment to the states for ratification, the House (apparently without dissent from Madison) passed a resolution calling on President Washington to proclaim a national day of thanksgiving and prayer.²⁶⁸ This was not the action of a group of men who believed that

port of the Rector and Visitors of the University of Virginia (Oct. 7, 1822), in 19 THE WRITINGS OF THOMAS JEFFERSON 413-16 (1905); Letter from Thomas Jefferson to Dr. Cooper (Nov. 2, 1822), in 15 THE WRITINGS OF THOMAS JEFFERSON, 403-06 (1905). Besides sponsoring the Sabbath-breaker law in the Virginia legislature, Madison voiced no objection when the first House appointed a chaplain, or called on President Washington to proclaim a day of prayer and thanksgiving, and himself offered Thanksgiving proclamations as president. For a more detailed account of Jefferson's and Madison's official actions regarding religion, see CORD, *supra* note 213, at 27-47.

²⁶⁶ As Professor Bradley notes, the Supreme Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provision." BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 97 (quoting *Hampton Co. v. United States*, 276 U.S. 394, 412 (1928)).

²⁶⁷ McConnell, *Coercion*, *supra* note 199, at 939. For a detailed account of such legislation, see CORD, *supra* note 213, at 23 (congressional chaplain appointed by first Congress); *id.* at 27-29 (successful House vote on resolution calling for presidential thanksgiving proclamation, made the day after the House voted to recommend the First Amendment to the states); *id.* at 51-82 (thanksgiving proclamations, chaplaincies, Indian treaties calling for financial support of religious organizations, and treaties providing financial support to religious schools and teachers).

²⁶⁸ CORD, *supra* note 213, at 27. The Senate also requested a thanksgiving proclamation, and President Washington delivered such a proclamation on October 3, 1789. *Id.* at 51-52. The proclamation set aside a day "to be devoted . . . to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be." *Id.* at 52. The proclamation went on to call for Americans to "unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions" and generally to bestow His blessings on the nation. *Id.* Apparently, Washington did not share Justice

government and religion were to be kept completely separate.

The Northwest Ordinance, and the early governance of the territories, are of special interest. As noted, the Confederation Congress enacted the Northwest Ordinance in 1787 to provide for the governance of the western territories.²⁶⁹ The First Congress, in the same year it proposed the Establishment Clause to the states, reenacted the ordinance.²⁷⁰

As noted earlier, the Northwest Ordinance proclaimed that "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."²⁷¹ More important than this, however, is that "[t]he territorial regime established during the Confederation, expressly validated and continued by the First Congress and its successors, was suffused with aid, encouragement, and support for religion. . . . [T]he first congressmen knew [this] when they reenacted the ordinance."²⁷² Thus, for instance, land reservations were made for the support of religion.²⁷³ Church construction was supported by lottery exemptions.²⁷⁴ Territories enacted blasphemy and Sabbath-breaking laws.²⁷⁵ Even after the Eighth Congress expressly declared null and void any territorial enactments that conflicted with the Constitution, territorial governments continued to aid and support religion.²⁷⁶ All in all, the Northwest Ordinance and governance in the territories illustrate that the founding generation did not consider aid to religion to be inconsistent with the Establishment Clause.

Some commentators have acknowledged that many of the legislative actions of the founding generation—the thanksgiving proclamations, the legislative chaplaincies, the Northwest Ordinance, the Indian treaties, and so forth—are inconsistent with a broad reading of the Establishment Clause.²⁷⁷ These commentators have maintained that those practices show only that the framers did not fully understand the implications of what they

O'Connor's concern about the impropriety of "endorsing" religion.

²⁶⁹ See BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 98.

²⁷⁰ *Id.*

²⁷¹ NORTHWEST ORDINANCE art. III; see *supra* note 48 and accompanying text.

²⁷² BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 98. Professor Bradley provides a detailed discussion of the ordinance, territorial governance, grants to religious groups for work among the Indians, and treaties obliging the federal government to fund sectarian missions. See generally *id.* at 97-104.

²⁷³ *Id.* at 98-99. Along the same lines, during the decade after the Establishment Clause was ratified, Congress appropriated 12,000 acres of land for the United Brethren to propagate the Gospel among the Indians. *Id.* at 100; CORD, *supra* note 213, at 41-46.

²⁷⁴ BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 102 (discussing church financing in Orleans Territory).

²⁷⁵ *Id.* at 102-03.

²⁷⁶ *Id.* at 101-02.

²⁷⁷ See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2670 n.3, 2675; Laycock, "Nonpreferential" Aid, *supra* note 195, at 919.

had written, or simply that old habits are hard to break.²⁷⁸ But given the general public view at the time toward religion and government's relationship with religion, and the personal views of the majority of the congressmen who actually recommended the First Amendment to the states for ratification,²⁷⁹ a more reasonable inference is that the legislators of the founding generation were acting consistently with their own—and the general public's—understanding of the Establishment Clause's prohibitions.

Justice Story, writing much closer to the time of the Establishment Clause's adoption, would not have attributed the Framers' actions to misunderstanding or "backsliding."²⁸⁰ In his *Commentaries on the Constitution*,²⁸¹ Justice Story accurately captured the prevailing sentiment in the country during the late 1780s when he wrote:

Probably at the time of adoption of the Constitution, and of the amendment to it, now under consideration, the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. *An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.*²⁸²

Justice Story's interpretation is light years from the prevailing view that

²⁷⁸ See *Weisman*, 112 S. Ct. at 2670 n.3 (Souter, J., concurring) (commenting that the Framers' actions "prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle"); *id.* at 2675 (Souter, J., concurring) (brushing off Madison's "failure to keep pace with his principles in the face of congressional pressure" as "backsliding," and suggesting that actions such as Washington's and Adams's thanksgiving proclamations "prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they . . . could raise constitutional ideals one day and turn their backs on them the next"); Laycock, *Nonpreferential Aid*, *supra* note 195, at 919 (attributing the Framers' actions to "unreflective bigotry" or the dynamics of the political process); see also Smith, *Separation and the "Secular,"* *supra* note 3, at 972 n.96 (citing other commentators making this general argument).

²⁷⁹ See *supra* notes 214-53 and accompanying text.

²⁸⁰ *Weisman*, 112 S. Ct. at 2675 (Souter, J., concurring).

²⁸¹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

²⁸² *Id.* § 1874 (emphasis added); see Corwin, *supra* note 190, at 15. Likewise Thomas Cooley, in the middle and late 1800s, took "establishment of religion" to mean state favoritism for one sect over another. See *id.* at 15-16 (citing THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 469 (2d ed. 1871); THOMAS COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 224-25 (3d. ed. 1898)).

(with a few minor exceptions) the First Amendment was meant to separate the realms of government and politics from the realm of religion, and that religion is a private matter that should be left at home or in the church. The history surrounding the First Amendment's enactment tells us that the present view does not accurately reflect the Establishment Clause's original meaning. The Clause does not require that religion be kept completely separate from government and politics. Nor does it prohibit all aid to or encouragement of religion. These modern ideas would have, in Justice Story's words, "created universal disapprobation if not universal indignation"²⁸³ among the founding generation.

Scholars have suggested different doctrinal approaches that are truer to the historically-revealed meaning of the Establishment Clause than the *Lemon* test or *Everson*'s "no aid" principle from which that test ultimately derives.²⁸⁴ While these approaches may draw lines in different places, those differences are not important for present purposes. At a minimum, an historically correct interpretation of the Establishment Clause would not create a constitutional crisis when private citizens or public officials bring their religious beliefs to bear in the public square or political arena. Thus, the notion of perceived endorsement, which stifles private religious speech in public fora by magically transforming that speech into state action, should be put

²⁸³ *Id.* at 15 (quoting STORY, *supra* note 281, §1874).

²⁸⁴ Several scholars have suggested that the guiding principle is nonpreferentialism or sect neutrality. See, e.g., BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47; CORD, *supra* note 213; Corwin, *supra* note 190. Under this view, aid to religion does not violate the Establishment Clause so long as it does not discriminate in favor of one particular religion. As Professor Bradley notes, this approach is not necessarily politically conservative or liberal. BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 145. For example, although financial aid to all religious private schools would be constitutional under a regime of sect neutrality, state-sponsored school prayer likely would not be, since it is probably impossible to compose a truly "neutral" prayer. See *id.*

Professor Smith, on the other hand, has advanced the theory that the Establishment Clause requires only separation between government and religious institutions. See Smith, *Separation and the "Secular," supra* note 3, at 971. Thus, in Smith's view, governmental actions that do not constitute excessive intrusion into the internal affairs of religious institutions do not violate the Establishment Clause. See generally *id.* As Smith notes, this interpretation reconciles Justice Story's view that the Clause was not intended to "level all religions" and that "Christianity ought to receive encouragement from the state" with Jefferson's "wall" metaphor. *Id.* at 974. Neither Story nor Jefferson asserted that the decision to prohibit establishments separates religion from government; rather, as Jefferson's metaphor literally states, the required separation is between the institutions of church and state. Under Smith's approach, a brief nondenominational school prayer likely would be constitutional under the Establishment Clause, although if not voluntary it would present a free exercise or free speech problem. See *id.* at 974-75. Aid to religious schools would be constitutional under this approach unless the government so conditioned the aid as to require excessive governmental intrusion into the schools' governance. See *id.* at 1022-23.

to rest once and for all. Government officials should not have to fear that their legislative work will necessarily be invalid because they were honest about their religious motives or purposes, or that the legislation “promotes” or “endorses” a religious point of view.

Specifically, *Widmar*, *Mergens*, and *Lambs Chapel* were correctly decided but should have been more forthright in rejecting the perceived endorsement argument (something the Court should remedy in *Pinette*). Both *Jaffree* and *Edwards* were wrong. That objective presentation of secular data (for example, fossil records) might lead students to a conclusion that reinforces religious beliefs should not invalidate a state’s legitimate curricular choice.²⁸⁵ The fact that legislators might have hoped for this result should not matter, unless we expect legislators to leave behind their religious beliefs when they legislate. Likewise, states should be able to require schools to set aside time for voluntary reflection—even specifically *religious* reflection.²⁸⁶ An interpretation of the Establishment Clause that recognizes that the state can encourage religion should recognize that government need not be neutral between religion and nonreligion. Legislators may—and in some cases, should—enact laws that specifically encourage or accommodate religious practice, even if they are not neutral with regard to non-religious practices.²⁸⁷ Such “neutrality” amounts to “utter indifference” toward reli-

²⁸⁵ For example, should philosophy courses omit reference to Thomas Aquinas’ argument for the existence of God because some students will find that argument convincing?

²⁸⁶ Professor Bradley suggests that under a nonpreferentialist interpretation of the Establishment Clause, moment-of-silence laws might violate the Establishment Clause if they encourage “specifically religious reflection.” BRADLEY, CHURCH-STATE RELATIONSHIPS, *supra* note 47, at 145. While it is possible that a moment-of-silence law that mentioned only “prayer” may not be sect-neutral (because “prayer” implies a personal God who listens to prayer) it does not follow that encouraging generally religious reflection violates the sect-neutrality principle unless that principle also requires neutrality between religion and non-religion. I do not believe that is so; therefore, the Alabama statute, which encouraged “meditation or prayer,” should be constitutional since “meditation and prayer” are broad enough to encompass the universe of religious contemplation.

²⁸⁷ An historical analog for this would be the common practice in the founding era of allowing lotteries to fund church construction, even though lotteries were generally illegal. Based on the principle that the Establishment Clause does not prohibit the state from preferring religion over non-religion, I believe *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), was wrongly decided. In *Bullock*, the Court struck down a Texas statute that granted a sales tax exemption only to religious periodicals. *Id.* at 5. The Court found that this preference for religious publications “effectively endorses religious belief.” *Id.* at 17 (plurality opinion); *id.* at 28 (Blackmun, J., concurring). *Bullock* is correct only if the Establishment Clause requires neutrality between religion and non-religion; I believe history effectively refutes that contention.

gion, something the First Amendment, properly understood in its historical context, does not require.

V. CONCLUSION

Nothing I have said here should be interpreted to be a call for theocracy. I do not want the government to be the political auxiliary of any church (or the church to be the religious arm of government). As I noted at the outset, churches should not run the state and the state should not run churches. Nor should religious organizations get in the habit of lining up for their turn at the public trough. Such behavior can breed dependency, and dependency would inevitably weaken religion. This does not mean, however, that religion and religious beliefs must be squeezed out of the public square or be kept completely separate from the governmental and political processes. Indeed, as our founding generation recognized, religion and religious ideas are necessary to liberty and self-government. Therefore, within reasonable limits, government ought to aid and encourage religion, and religious believers should not need to check their beliefs at the capital door. Nor must believers be afraid to speak out in the public square for fear of being "divisive" (although charity and prudence require that believers not set out intentionally to offend).

An historically accurate interpretation of the First Amendment does not disable the government from promoting religion, or require religion to be divorced from the public policy process. The First Amendment did not create a secular public society. Current Establishment Clause jurisprudence, capsulized in the three-part *Lemon* test, is inconsistent with this insight. The Supreme Court has two opportunities to reconsider *Lemon* this term or next.²⁸⁸ For the sake of religious believers, our society, and our culture (and for the sake of doctrinally sound jurisprudence), the Court should abandon *Lemon* and the "no aid" principle from which it sprang.

²⁸⁸ See *Pinette v. Capitol Square Review and Advisory Bd.*, 115 S. Ct. 787 (1995), certifying questions to 30 F.3d 675 (6th Cir. 1994); *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 417 (1995), certifying questions to 18 F.3d 269 (4th Cir. 1994).