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“NONCOERCIVE” SUPPORT FOR RELIGION: ANOTHER FALSE CLAIM ABOUT THE ESTABLISHMENT CLAUSE

DOUGLAS LAYCOCK*

One of the fundamental and recurring controversies about the meaning of the First Amendment's religion clauses is whether government must be neutral between religion and nonreligion. The Supreme Court has always said yes in modern times, but persistent critics have always said no.

The Court's critics have offered two major alternatives to neutrality. The older alternative is nonpreferentialism: that government may aid religion so long as it does not prefer one religion over another.¹ The more recently proposed alternative is noncoercion: that government may aid or endorse all religions or particular religions so long as it does not coerce anyone to religious practice or belief. The fullest development of the noncoercion theory is in the briefs in *Lee v. Weisman*.² Michael McConnell proposed an academic version of the theory, arguing that coercion must at least be an element of any Establishment Clause analysis.³ McConnell's position was always more sensitive to the needs of religious minorities than the position in the *Lee* briefs, and in a more recent work, he has further moderated his position.⁴ Justice Kennedy has proposed a theory in which noncoercion is a prominent element, but he also adds a requirement that government refrain from proselytizing.⁵

* Alice McKean Young Regents Chair in Law, The University of Texas at Austin, and Associate Dean for Research in the School of Law. This article discusses *Lee v. Weisman*, a case in which I wrote an amicus curiae brief on behalf of several religious organizations and one secular civil liberties organization.

1. See, e.g., *Jaffree v. Wallace*, 472 U.S. 38, 105-06 (1985) (Rehnquist, J., dissenting); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

2. See Brief for the Petitioners; Brief for the United States as Amicus Curiae Supporting Petitioners, in the Supreme Court of the United States (No. 90-1014).

3. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

4. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. ____ (forthcoming 1991).

5. *County of Allegheny v. ACLU*, 492 U.S. 573, 659, 661 (Kennedy, J., dissenting).

In earlier work, I have explored the possible meanings of neutrality,⁶ argued against nonpreferentialism,⁷ and sketched the beginnings of an argument against the noncoercion theory.⁸ In this article, I wish to clarify the relationship among the three theories, and then further develop the argument for neutrality, this time concentrating on noncoercion.

Lee v. Weisman is pending as I write, but the noncoercion issue should remain after the case is decided. There is no reason for the Court to decide the case on so broad and ill-fitting a ground. And at the oral argument, the Justices expressed skepticism or even hostility toward a pure coercion theory.⁹

Lee involves the constitutionality of invocations and benedictions at high school graduation ceremonies and middle school promotion ceremonies in Providence, Rhode Island. The case was litigated in the lower courts as a simple dispute about the application of settled precedents to stipulated facts.¹⁰ Plaintiff argued that it was controlled by the school prayer cases,¹¹ because the prayers were school-sponsored, at a school function, with children present.¹² The Providence School Committee argued that the case was controlled by a decision upholding prayers to open sessions of the legislature,¹³ because the relevant category was prayer at civic ceremonies.¹⁴ In the School Committee's view, the fact that this was a school ceremony was incidental.

The district court and court of appeals held the prayer unconstitutional. The Supreme Court may affirm in a straightforward application of the school prayer cases. Or it may reverse, holding that one minute of prayer a year is *de minimis*. There is no need to render a sweeping decision on the noncoercion theory. There is good reason not to do so, because the noncoercion theory should not affect the result in *Lee* itself. Children desiring to attend their graduation are coerced to participate in prayer.

6. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

7. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986).

8. *Id.* at 915-16, 921-22.

9. Linda Greenhouse, *Justices Appear Wary in Argument Over Prayer at School Graduations*, N.Y. TIMES, Nov. 7, 1991, at A14.

10. *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

11. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

12. Appellee's Brief, *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990) (No. 90-1151), *cert. granted*, 111 S. Ct. 1305 (1991).

13. *Marsh v. Chambers*, 463 U.S. 783 (1983).

14. Brief for Appellant's (sic), *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991) (No. 90-1151).

Even so, new counsel in the Supreme Court urged a decision based on the noncoercion theory. The School Committee argued that "government coercion of religious conformity is a necessary element of an Establishment Clause violation."¹⁵ The Bush Administration agreed, in an amicus brief filed on behalf of the United States.¹⁶ As argued, *Lee* presents the Court with a sweeping choice between two theories of the Religion Clauses -- between neutrality and noncoercion. This article examines that choice.

I. NEUTRALITY, NONPREFERENTIALISM, AND NONCOERCION

Nonpreferentialism and noncoercion have common political origins, and Justice Rehnquist has endorsed them both.¹⁷ Each theory originates with the political desire for government support of religion, and each relies on the historical observation that government in the founding era did support religion in a variety of ways. Each theory is an attempt to state a principle that will distinguish permissible and impermissible forms of government support for religion. But neither theory produces acceptable results for a pluralistic society, and neither theory captures the practices of the Founders.

It is important to clearly distinguish the two theories. They are not the same, and they have very different implications. Under nonpreferentialism, government must be neutral among religions, but it need not be neutral as between religion and disbelief. The essence of nonpreferentialism is the claim that government should be free to encourage or subsidize religious belief and practice so long as it encourages or subsidizes all religions equally. Nonpreferentialists do not urge the point, but their theory would permit government to require all persons to attend some church, so long as it let each individual choose which church to attend.

Under noncoercion theory, the Religion Clauses are not violated unless government coerces an individual to religious practice or belief. Neither neutrality nor nonpreferentialism is part of the noncoercion standard; government need not be neutral between religion and nonreligion, and it need not be neutral among competing religions. Government may endorse generic theism, generic Protestantism, Roman Catholicism, Seventh-Day Adventism, or the Twelfth Street Pentecostal Holiness Church. Congress could charter The Church of the United States, so long as it did not coerce anyone to join.

15. Brief for Petitioners, *supra* note 2, at 14.

16. Brief for U.S., *supra* note 2.

17. Compare *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (nonpreferentialism); with *County of Allegheny v. ACLU*, 492 U.S. 573, 659, 661 (1989) (Kennedy, J., dissenting, joined by Rehnquist and others) (noncoercion).

Under noncoercion theory, government at all levels could take sides in debates about the nature of Christ, salvation by works or by faith, scriptural inerrancy, the authority of the Book of Mormon, or any other religious matter. The President, the Congress, or the Providence School Committee could adopt and promulgate creeds. Noncoercionists believe that "government may participate as a speaker in moral debates, including religious ones."¹⁸

In theory we might combine the two alternatives to neutrality. That is, we might permit government to aid religion only in ways that are both noncoercive and nonpreferential, if anyone can think of such a way. But so far as I am aware, no one has proposed that, and neither theory leaves room for that.

Thus, nonpreferentialists endorse tax support for church-affiliated schools, on the ground that any church could start schools and such aid would be nonpreferential. I think it is common ground that taxation is coercive,¹⁹ so nonpreferentialists would permit coercion. I doubt that many nonpreferentialists would really permit government to coerce nonbelievers to pick some church and attend it. But to avoid that result, they would have to supplement their theory of the Establishment Clause, or they would have to resort to the Free Exercise Clause.

It is equally clear that noncoercionists would not require nonpreferentialism. One of the more visible issues that noncoercionists seek to resolve is the government-sponsored creche, or nativity scene. The creche symbolizes the alleged miracle of Christ's Incarnation, a claim that is central to Christianity, heretical or blasphemous to Judaism and Islam, and largely irrelevant to the world's other great religions. If noncoercionists mean to permit government creches, they plainly mean to permit government to endorse particular religions. One can imagine a practice of noncoercive, nonpreferential religious displays, in which a government would give equal prominence to displays symbolizing central events of all religions. But no government has such a practice, and no defenders of government sponsored religious observances have proposed that government must observe all religions or none.²⁰

Certainly the Bush Administration's argument in *Lee* did not propose any combination of noncoercion and nonpreferentialism. The Administration's argument did not at all depend on the brevity or content of the prayers in that

18. *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting).

19. See McConnell, *supra* note 3, at 938.

20. *But cf. Weisman v. Lee*, 908 F.2d 1090, 1099 (1st Cir. 1990) (Campbell, J., dissenting) (proposing that Providence rotate the graduation prayer among all faiths and philosophies), *cert. granted*, 111 S. Ct. 1305 (1991).

case. The claim that no one was coerced would be equally true or false if the Providence School Committee awarded diplomas at a Solemn High Mass, or at a full length worship service of any other faith.

The most obvious observation about the proposed noncoercion standard is that it leaves no independent meaning to the Establishment Clause. Even after *Employment Division v. Smith*,²¹ the government would violate the Free Exercise Clause if it coerced persons to attend or participate in religious observances against their will. The noncoercion test is also inconsistent with precedent and with sound policy toward religion, and its claimed basis in original intent is dubious at best. I begin with history.

II. THE HISTORICAL MEANING OF THE ESTABLISHMENT CLAUSE

A. *Endorsement in the Time of the Founders*

Neither nonpreferentialism nor noncoercion explains the practices of the Founders. As I have argued elsewhere, government supported religion in the Founders' time in those contexts in which no significant group of Protestants complained.²² But when a Protestant complaint focused the founding generation's attention on a practice, they rejected both nonpreferentialism and noncoercion.

The classic religious establishments known to the Founders consisted of several elements in varying combinations. In the worst cases, government had endorsed an official religion, interfered with that religion's self-governance, suppressed all other religions, and required everyone to adhere to the official religion, support it with taxes, and participate in its worship. This extreme case roughly describes most sixteenth-century European establishments and seventeenth-century Massachusetts.²³

One by one these elements were relaxed or eliminated. Dissenters were first exempted from attending the established worship services,²⁴ then allowed to practice their own faith,²⁵ then exempted from paying taxes to support the established church.²⁶ Eventually defenders of establishment proposed to make

21. 110 S. Ct. 1595 (1990).

22. Laycock, *supra* note 7, at 917-19.

23. See THOMAS J. CURRY, *THE FIRST FREEDOMS, CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 1-28* (1986) [hereinafter CURRY].

24. See, e.g., *id.* at 25.

25. See, e.g., *id.* at 25-27.

26. *Id.* at 89-90.

tax support available to minority religions as well as to the preferred religion,²⁷ and then government relaxed its control over the official religion.²⁸ The strategy of defenders of establishment in the United States was to make the establishment less coercive and less preferential. But the one element that they could never give up short of total surrender was state endorsement. The only universal element of every establishment was government endorsement of one or more religions.

What happened when a state eliminated all the coercive elements of the establishment and was left with a bare endorsement of a preferred religion? Would that alone be considered an establishment in the Founders' generation? There is not as much evidence on this issue as on the issue of nonpreferentialism. But the preponderance of evidence is that opponents of establishment were unwilling to accept even a bare endorsement of the established churches.

The point is most clearly illustrated by the experience of Virginia and South Carolina between 1776 and 1790.²⁹ Before independence, the Church of England was the established church in these states. Each of these states initially responded to independence by attempting to eliminate coercion and preference while preserving establishment. Each state created an establishment by endorsement: it designated an established religion while eliminating all tax support and all coercion to believe or to attend services. These reforms proved insufficient to satisfy the American demand for disestablishment, and the endorsements were subsequently repealed. It is possible to point to arguable remnants of coercion in these schemes; preferred churches were permitted to incorporate, and that may have had some advantages over operating as a trust or an association. But the principal surviving element of these establishments was endorsement of a preferred religion, and those endorsements were unacceptable to opponents of establishment. Endorsement of a religion was an establishment in the political understanding of the Founders' generation, at least when their suspicions were aroused and their attention focused on the issue.

The path to disestablishment in Virginia began in 1776, when the legislature exempted dissenters from the tax to support the Anglican Church. A tax on Anglicans remained on the books, but the legislature suspended collection. The

27. *Id.* at 136-48, 153-54, 164; *infra* notes 46-54 and accompanying text.

28. *See infra* note 37 and accompanying text.

29. For histories of these events, see THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (1977) [hereinafter BUCKLEY]; CURRY, *supra* note 23; HAMILTON ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910) [hereinafter ECKENRODE]; ANSON PHELPS STOKES, 1 CHURCH AND STATE IN THE UNITED STATES 366-97, 432-34 (1950) [hereinafter STOKES].

legislature suspended this tax annually until 1779, when the tax was permanently repealed.³⁰ "[N]o taxes for religious purposes were ever paid in Virginia after January 1, 1777."³¹

The legislature in 1776 also repealed English laws restricting freedom of worship. Some provisions for licensing clergy remained in effect but were not enforced.³² As the leading historian of disestablishment in Virginia summarizes the situation, "Religion in Virginia had become voluntary, and a man could believe what he wished and contribute as much or as little as he thought fit to whichever church or minister pleased him."³³

But it was equally clear that the legislature "had not disestablished the Church of England."³⁴ The American branch of the Church of England, soon to be known as the Protestant Episcopal Church, was still the official church in Virginia. This designation had no coercive effect on dissenters; no one was required to attend or support the Episcopal Church. The principal effect of the establishment was simply an endorsement.

The Episcopal clergy retained one vestige of coercive power: only they could perform legally recognized marriage ceremonies. The other denominations condemned this monopoly, but no one then or now would contend that the coercive effect of this monopoly was the only vestige of establishment. The legislature repealed this monopoly in 1780,³⁵ and residual licensing rules were eliminated in 1783 and 1784.³⁶

The Episcopal Church found that its establishment carried the disadvantage of legislative supervision. The church sought to escape this supervision through an act incorporating the church and empowering it to govern itself. Such an act was passed in 1784, repealing all prior laws regulating the relationship between the state and the established church.³⁷ This made the established church independent of the state, but it did not satisfy the opponents of establishment.

The opponents insisted that the law incorporating the Episcopal Church still gave the church special recognition and a preferred status. A Presbyterian resolution condemned the act as giving the Episcopal Church "Peculiar

30. CURRY, *supra* note 23, at 135-36.

31. ECKENRODE, *supra* note 29, at 53.

32. BUCKLEY, *supra* note 29, at 36.

33. *Id.*

34. *Id.* at 37.

35. ECKENRODE, *supra* note 29, at 67-69.

36. *Id.* at 80, 100; BUCKLEY, *supra* note 29, at 111-12; 1 STOKES, *supra* note 29, at 383-84.

37. BUCKLEY, *supra* note 29, at 106; 1 STOKES, *supra* note 29, at 384-87.

distinctions and the Honour of an important name," and making it "the Church of the State."³⁸ A Baptist committee denounced it as "inconsistent with American Freedom."³⁹ Other petitions said the legislature had given Episcopalians "the particular sanction of and Direction of your Honourable House."⁴⁰

These objections go to endorsement and nothing more. It is hard to identify any residual coercive effect of the Episcopal incorporation act; its effect was to give the Episcopal Church special recognition not given to other churches. If other churches desired to incorporate, Episcopal incorporation was preferential. But it was not coercive, because the state did not tell other churches that they could incorporate if they complied with certain conditions. If there were any residual coercive effect, it fell on Episcopalians; perhaps their self-government was in some way affected by the terms of the incorporation act. But they were not complaining; the act had been designed to solve that problem.

Thus, the structure of the act supports the point of the quoted objections: the objection was that other faiths perceived an endorsement. Note too that the state's endorsement was implicit rather than explicit; the opponents' objection was not limited to open and formal declarations of establishment.

Finally, in 1787, the legislature repealed the Episcopal incorporation act, repealed all laws that prevented any religious society from regulating its own discipline, confirmed all churches in their existing property, and authorized all churches to appoint trustees to manage their property.⁴¹ This act finally repealed the last vestige of state endorsement of the Episcopal Church in Virginia.

The one remaining issue in Virginia was the disposition of church property acquired with public funds before 1777. That was finally resolved in 1802, with the Episcopal Church retaining its churches but giving up its glebes, or land for the support of clergy.⁴² Continuing resentment of the glebes certainly helped motivate the continued attention to the vestiges of establishment in Virginia. But with their attention focused on the issue, the founding generation in Virginia was not content to eliminate coercion, tax support, and the glebes. They also insisted on eliminating symbolic endorsements of a particular faith.

An even broader attempt at noncoercive establishment appeared in Article

38. BUCKLEY, *supra* note 29, at 165.

39. *Id.* at 140.

40. ECKENRODE, *supra* note 29, at 121, 122.

41. BUCKLEY, *supra* note 29, at 170; 1 STOKES, *supra* note 29, at 394.

42. BUCKLEY, *supra* note 29, at 171-72.

38 of the South Carolina Constitution of 1778.⁴³ The first sentence guaranteed religious toleration to all monotheists who believed in public worship and a future state of rewards and punishments; this would have included substantially the whole population. The second sentence provided that "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." The third sentence from the end forbade any tax for the support of churches.

The one coercive element was that only established churches could obtain a corporate charter. Other churches apparently were organized as trusts or unincorporated associations; there was a synagogue in Charleston.⁴⁴ Churches desiring to incorporate were required to subscribe to five Protestant tenets set out in Article 38, their ministers were required to swear an oath set out in Article 38, and the churches were required to select their ministers by majoritarian processes. Unlike the Virginia situation, these provisions may have had some tendency to coerce churches toward the prescribed tenets. But it would be myopic to say that incorporation rather than endorsement was the essence of this establishment. If non-established churches had been allowed to incorporate, and if free exercise had been extended beyond monotheists to include absolutely everybody, but the rest of Article 38 had been retained, Protestantism would still have been the established religion of South Carolina. The establishment inhered in the official endorsement of Protestantism. This establishment by endorsement was abolished by Article 8 of the Constitution of 1790.⁴⁵

The bare endorsements of South Carolina's Constitution and Virginia's Episcopal incorporation act were the extreme instances of the strategy of making establishments more inclusive, less preferential, and less coercive. Other proposals pursued the same strategy less aggressively and with correspondingly less success.

43. S.C. CONST. of 1778, art. XXXVIII, in FRANCIS N. THORPE, 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3255-57 (1906). The provision is discussed and reprinted in 1 STOKES, *supra* note 29, at 432-34. It is also discussed in CURRY, *supra* note 23, at 149-51.

44. CURRY, *supra* note 23, at 151.

45. S.C. CONST. of 1790, art. VIII, in 6 THORPE, *supra* note 43, at 3264. The provision is discussed and reprinted in 1 STOKES, *supra* note 29, at 434. It is also described in CURRY, *supra* note 23, at 151. Other provisions of the South Carolina Constitution of 1778 restricted voting rights to monotheists. Eleven of the thirteen states had religious qualifications for voting, CURRY, *supra* note 22, at 162-63, 221, including states that otherwise guaranteed free exercise and disestablishment. The issues were viewed as separate, and repeal of religious voting qualification did not require repeal of the endorsement of Protestantism in Article 38.

The point is illustrated by unsuccessful proposals for general assessments to support the clergy in Virginia and Maryland. In each state, the supporters of establishment proposed a tax for the support of clergy, in which each taxpayer could designate the clergyman to receive his tax.⁴⁶ It allowed taxpayers to refuse to designate any clergyman, in which case their tax would be paid to support local schools.⁴⁷

The element of choice in the taxpayers was said to make the establishment nonpreferential and noncoercive. The law did not require anyone to support any religion other than his own. Even more dramatic, the option to support schools meant that the law did not require anyone to support religion at all. Baptists would not be required to violate conscience by supporting their own clergy through the instruments of government.⁴⁸ Supporters of the Virginia bill invoked the slogan "Equal Right and Equal Liberty", and argued that "assessment imposed *not 'the smallest coercion'* to contribute to the support of religion."⁴⁹

In fact the bill would have been coercive. Citizens desiring to support an unpopular religion, or desiring to support no religion at all, would have had to declare their unusual preference on the public record. Surely in many Virginia communities there was considerable social pressure to support the dominant religious leader, and the state-imposed occasion for publicly recording one's dissent would have aggravated that pressure. But school children experience intense social pressure to attend their graduation and promotion ceremonies and to conform their posture and behavior to that of all the others joining in the prayers that are offered. The position of the School Committee⁵⁰ and the Bush Administration⁵¹ in *Lee v. Weisman* is that this sort of social pressure does not count, even when government sponsors both the religious observance and the civic event that give rise to the social pressure. Under the noncoercion rule proposed to the Supreme Court, social pressure to designate one's tax in acceptable ways would not have made the Virginia general assessment coercive.

There remained one irreducible element of coercion in the Virginia bill. Those who paid their religion tax to a school instead of to a minister would eventually wind up paying more than their share of the expense of schools. This

46. The Virginia bill is reprinted in the Appendix to Justice Rutledge's dissent in *Everson v. Board of Education*, 330 U.S. 1, 72-74 (1947).

47. *Id.* at 74. The bill's reference to "seminaries of learning" meant secular schools. See BUCKLEY, *supra* note 29, at 108-09, 133; Laycock, *supra* note 7, at 897 n.108.

48. For the Baptist objection, see CURRY, *supra* note 23, at 89.

49. *Id.* at 145, quoting petitions to the legislature in 1784 and 1785 (emphasis added).

50. Brief for Petitioners, *supra* note 2, at 35-44.

51. Brief for U.S., *supra* note 2, at 24-28.

would presumably be coercive even under the Bush Administration's definition. The sponsors of the Virginia bill had attempted to eliminate all coercion, but they had not quite succeeded.

The Maryland bill came closer. Each taxpayer could pay his tax to the minister of his choice, or to a fund for the poor.⁵² In addition, any taxpayer who declared "that he does not believe in the Christian religion . . . shall not be liable to pay any tax for himself in virtue of this act."⁵³ So no one would be forced to support a church, and non-Christians would not be forced to support anything. Again there would be a state-created occasion for expressing one's religious dissent and exposing oneself to the social coercion of the community, but again, that same problem faces students at graduation, and the Bush Administration says that is not coercion. But the Maryland bill would have coerced Christians either to support their own ministers through taxation (violating the conscience of Baptists) or to file false declarations of nonbelief; I hope the Bush Administration would recognize that as coercive. So the Maryland bill too fell short of being completely noncoercive.

Both the Maryland and Virginia assessment bills were the subject of great public debate, and each was soundly defeated. The Virginia bill was the occasion for Madison's Memorial and Remonstrance Against Religious Assessments, and for many similar memorials by Presbyterians, Baptists, and other religious dissenters.⁵⁴ State assistance to churches was rejected as an establishment, even with the right to designate the recipient of the tax, to pay the tax to secular uses instead of religious ones, and in Maryland, to escape the tax altogether by declaring nonbelief.

Each of these bills retained elements of coercion, despite the sponsors' best efforts to eliminate them. But it would be a mistake to focus only on coercion. Dramatically reducing the coercive elements had not satisfied the opponents of establishment, and no one at the time appears to have thought that further steps to eliminate the remnants of coercion would have made any difference. No one suggested that the state enact an assessment with an unconditional exemption, in which the state would calculate a fair share contribution, serve as keeper of records and agent for collection and distribution, and collect only from those unconditionally willing to pay. Reducing or eliminating coercion did not affect the essence of what made these bills establishments. The essence of establishment, then as now, was state support for religion.

These debates in the states are directly relevant to the original meaning of

52. CURRY, *supra* note 23, at 155.

53. CURRY *supra* note 23, at 155.

54. See BUCKLEY, *supra* note 29, at 113-43; ECKENRODE, *supra* note 29, at 103-11.

the federal Establishment Clause. In sweeping terms, the Constitution prohibits any law respecting an "establishment." "Establishment" is not defined. Unavoidably, the word would have been understood in light of the recent debates over disestablishment in the states. These debates are the principal evidence of "how the words used in the Constitution would have been understood at the time."⁵⁵ As Justice Rutledge observed, "the Congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled."⁵⁶ The Court's long standing rule that government may not aid or endorse religion is soundly based in the Founding generation's principle that government may not aid or support religion, even by bare endorsements in toothless laws.

B. A Note on Interpretive Method

A second thread to the argument for government-sponsored prayer is that government prayer must be constitutional because the Founders did it.⁵⁷ The premise of this argument is that anything the Founders did is constitutional. In fact Justice Kennedy has gone further, claiming that the Constitution permits anything the Founders did and "any other practices with no greater potential for an establishment of religion."⁵⁸

The Supreme Court has squarely rejected this argument, and properly so.⁵⁹ The argument proves far too much. Equally important, it ignores the political origin of constitutional rights.

Constitutional rights are designed to prevent the recurrence of historic abuses. Eliminating such abuses often requires major political battles. The People create constitutional rights when the winners of one of these political battles believe the issue to be so important, and the danger of regression so great, that the issue must be put beyond reach of the usual political processes. Because constitutional rights emerge from major controversies, we should not expect to find a consensus that unites both supporters and opponents of a constitutional provision, or even a fully consistent view of all related issues among the supporters. The winners muster a super-majority for a broad statement of principle, but they do not achieve unanimity on the principle or even consensus on the details of its application. Every constitutional amendment has bitter opponents, and in a system of federalism and separated powers, those opponents may control whole states or branches of government. The attitudes

55. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990) [hereinafter BORK].

56. *Everson v. Board of Educ.*, 330 U.S. 1, 42 (1947) (Rutledge, J. dissenting).

57. *See Marsh v. Chambers*, 463 U.S. 783 (1983).

58. *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting).

59. *Id.* at 604-05.

that gave rise to the losing side of the controversy do not instantly disappear, and neither do the abusive practices that made the amendment necessary.

It ignores political reality to remove from the scope of constitutional rights any practices that survived ratification.⁶⁰ By that principle, the Alien and Sedition Acts are an authoritative interpretation of the Free Speech and Press Clauses, *de jure* segregation of schools in the District of Columbia is an authoritative interpretation of the Equal Protection Clause, and the many devices that led to near total disenfranchisement of black voters for most of a century are an authoritative interpretation of the Fifteenth Amendment. Moreover, these abuses would become the standard for further interpretation: government could engage in any other practice no more restrictive of constitutional rights than the Alien and Sedition Acts, school segregation, and disenfranchisement of black voters. Reliance on post-ratification practice leads to such absurd consequences because it proceeds backwards. It lets the behavior of government officials control the meaning of the Constitution, when the whole point is for the Constitution to control the behavior of government officials.

The relevant original understanding is not determined by every specific act of the Founders. The nation's "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause."⁶¹ Rather, as Robert Bork has said, the original understanding of a constitutional clause consists not of a conclusion but of a major premise. The "major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action."⁶²

Another leading originalist has also explained that original intent depends on identifiable principles and not on every unexamined practice of the Founders:

Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the Establishment Clause, and demonstrate that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the Clause. . . . The insistence on a principle, and not just historical fact, follows from the function of interpretation as enforcing the Constitution as law. If the Constitution is law, it must embody *principles* so that we can ensure that like cases are treated alike, and that those governed by the Constitution can understand what is

60. See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 688-91 (1990).

61. *County of Allegheny*, 492 U.S. at 604-05.

62. BORK, *supra* note 55, at 162-63.

required of them.⁶³

The basic principle of a constitutional clause is best identified from the controversies that gave rise to it. These controversies were consciously examined under political pressure that made the debate real and not just academic. These controversies identify the core target of the constitutional right. Interpreters can then search for a coherent principle, consistent with the constitutional text and as broad as the text, that centers on the core problem the text was intended to resolve.⁶⁴

The religion clauses had two great defining controversies. One was the long Protestant-Catholic conflict in the wake of the Reformation. The other was the battle over disestablishment in the states. These are the contexts in which the Founders thought about the meaning of establishment, and we should look to these controversies to learn what they meant by establishment. I have already discussed the battle over disestablishment in the states. It is also revealing to examine the American continuation of Protestant-Catholic battles in the nineteenth centuries.

C. *The Protestant Bible Controversy*

Government prayer and religious proclamations, and the role of religion in public education, were not real controversies in the Founders' time. There were multiple reasons for this lack of controversy, but the most important was simply that the nation was overwhelmingly Protestant, and no significant group of Protestants was victimized by these practices. If a religious practice was not controversial among Protestants, it was not sufficiently controversial to attract political attention.

Theological and liturgical differences among Protestants were large, but for a variety of reasons, these differences appear to have been bridgeable in the rudimentary schools of the time.⁶⁵ Most schools were small, and many served a relatively homogenous local population. Some were run by local governments, some by associations of neighbors, some by entrepreneurial teachers, some by churches. Some of these schools defied characterization as public or private. In some urban areas, parents had many choices.

The historian Carl Kaestle describes the movement for a more organized

63. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362-63 (1988) (emphasis in original).

64. See Laycock, *supra* note 60, at 690.

65. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860* at 13-61 (1983) [hereinafter KAESTLE].

system of state-supported schools as growing out of a "Native Protestant ideology" that was comprehensive in its scope, including religious, political, and social reform principles.⁶⁶ This ideology naturally incorporated religious instruction into the new common schools. The common school movement attempted to bridge the religious gaps among Americans with an unmistakably Protestant solution: by confining instruction to the most basic concepts of Christianity, and by reading the Bible "without note or comment." The Protestant leaders of the common school movement assumed that no one could object to reading the Bible, and by forbidding teachers to explain the passages read, they thought they had avoided sectarian disagreements about interpretation.

That solution was not entirely satisfactory even among Protestants. Conservative and evangelical Protestants accused Unitarians like Horace Mann of secularizing the public schools; stripped-down, least-common-denominator religion was not acceptable to them.⁶⁷ One spokesman for the critics charged Horace Mann's Massachusetts schools of teaching "nothing more than Deism, bald and blank."⁶⁸ But Protestants largely abandoned their disagreements to unite against the wave of Catholic immigration in the mid-nineteenth century.⁶⁹

Catholics fundamentally challenged what seemed to them Protestant religious instruction in the public schools.⁷⁰ For one thing, Catholics used the Douay translation of the Bible, and objected to reading the King James translation, which they called "the Protestant Bible."

More important, Catholics condemned the "solution" of reading the Bible without note or comment as a fundamentally Protestant practice.⁷¹ Protestants taught the primary authority of scripture and the accessibility of scripture to every human. Catholics taught that the scripture must be understood in light of centuries of accumulated church teaching. For Catholic children to read the Bible without note or comment was to risk misunderstanding. Protestant practices were being forced on Catholic children.

The controversy over the Protestant Bible in public schools produced mob violence and church burnings in Eastern cities.⁷² The resulting controversies

66. *Id.* at 75-103.

67. CHARLES GLENN, *THE MYTH OF THE COMMON SCHOOL* 131-32, 179-96 (1988) [hereinafter GLENN]; see also KAESTLE, *supra* note 65, at 98-99.

68. Matthew Hale Smith, *quoted in* GLENN, *supra* note 67, at 189.

69. GLENN, *supra* note 67, at 179; KAESTLE, *supra* note 65, at 98.

70. GLENN, *supra* note 67, at 196-204; DIANE RAVITCH, *THE GREAT SCHOOL WARS* 3-76 (1974) [hereinafter RAVITCH].

71. GLENN, *supra* note 67, at 199; RAVITCH, *supra* note 70, at 45.

72. KAESTLE, *supra* note 65, at 170; RAVITCH, *supra* note 70, at 36, 66, 75; 1 STOKES, *supra* note 29, at 830-31.

were major political issues for decades. The anti-Catholic, anti-immigrant Know Nothing Party swept elections in eight states in the 1850s.⁷³ Among other things, these issues gave rise to the proposed Blaine amendment to the Constitution, which would have codified the Protestant position by permitting Bible reading but forbidding "sectarian" instruction in any publicly-funded school. This amendment was defeated by Democrats in the Senate.⁷⁴ In Senator Blaine's subsequent campaign for the Presidency, these issues gave rise to one of the most famous gaffes in American politics, the jibe that Democrats were "the party of Rum, Romanism, and Rebellion."⁷⁵

Thus, in the wake of Catholic immigration, religion in the public schools produced exactly the sort of violent religious confrontation the Founders had sought to avoid. Religion in schools initially had been a nonproblem that raised no concern. Under changed social conditions, religion in schools became a serious violation of the disestablishment principle, which inflicted precisely "those consequences which the Framers deeply feared."⁷⁶ The principle of disestablishment did not change, but the nation was forced to confront a previously ignored application of the principle. Just as government could not endorse religion in statutes or state constitutions, neither could it endorse religion in public schools.

The first cases forbidding religious observances in public schools date from the latter part of this period.⁷⁷ On the other hand, some schools whipped or expelled Catholic children who refused to participate in Protestant observances, and some courts upheld such actions.⁷⁸ Neither side drew the line between coercion and noncoercion. Those who understood the grievance of religious minorities abandoned the offending practice; those who saw no grievance saw no reason not to coerce compliance.

The dispute over the Protestant Bible revealed the impossibility of conducting "neutral" religious observances even among diverse groups of Christians. Protestant education leaders did not set out to victimize Catholics; they genuinely thought that reading the Bible without note or comment was fair to all and harmful to none. What seemed harmless from their perspective was

73. 1 STOKES, *supra* note 29, at 836-37.

74. 2 STOKES, *supra* note 29, at 68-69.

75. HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968 at 1606 (Arthur Schlesinger ed., 1971).

76. Abington School Dist. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring).

77. State *ex rel.* Weiss v. District Board, 44 N.W. 967 (Wis. 1890) (mandamus against Bible reading); Board of Educ. v. Minor, 23 Ohio St. 211 (1872) (upholding and defending school board's decision to eliminate Bible reading and hymns).

78. Commonwealth v. Cooke, 7 Am. L. Reg. 417 (Boston Police Ct. 1859); Kaestle, *supra* note 65, at 171; 1 Stokes, *supra* note 29, at 829.

not harmless when applied across the full range of American pluralism.

Today, the range of religious pluralism in America is vastly greater. Immigration has brought Jews, Muslims, Buddhists, Hindus, Sikhs, Taoists, animists, and many others into the country. Significant numbers of atheists and agnostics have been with us since the late nineteenth century; they were little more than a theoretical possibility to the Founders.⁷⁹ The possibility of "neutral" religious observance remains a fiction.

III. THE SUPREME COURT PRECEDENT

The Providence School Committee and the Bush Administration acknowledge that their new rule would require modification of the familiar test of *Lemon v. Kurtzman*.⁸⁰ The *Lemon* test has been the subject of widespread academic criticism,⁸¹ and I have been one of the critics.⁸² But the Bush Administration's attack is not aimed at the unworkable or misguided parts of the *Lemon* test. The Administration rejects the sensible core of the *Lemon* test, and the whole line of pre-*Lemon* cases requiring government neutrality toward religion.

The neutrality requirement did not originate in *Lemon*. The familiar three-part *Lemon* test is simply a convenient formulation of "the cumulative criteria developed by the Court over many years."⁸³ The third prong, excessive entanglement, came from *Walz v. Tax Commission*.⁸⁴ The first two prongs -- the proposition that government conduct should not have the primary effect of either advancing or inhibiting religion -- came verbatim from one of the school prayer cases, *Abington School District v. Schempp*.⁸⁵ It is these two prongs, the *Schempp-Lemon* test, that drew the Bush Administration's principal attack.

The Bush Administration says simply that "The problem is *Lemon*."⁸⁶ But

79. See JAMES TURNER, *WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA* (1985).

80. 403 U.S. 602 (1971).

81. See, e.g., Phillip Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 825-31 (1984); Philip Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 17-20 (1978).

82. 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); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L. REV. 409, 449-50 (1986).

83. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

84. 397 U.S. 664, 674 (1970).

85. 374 U.S. 203, 222 (1963).

86. Brief for U.S., *supra* note 2, at 20.

the Administration's "problem" is not *Lemon*. The Administration's problem is nearly the whole history of Establishment Clause jurisprudence in the Supreme Court. The *Schempp-Lemon* formulation was simply an elaboration of the fundamental rule that government must be neutral with respect to religion.⁸⁷ The Court stated that rule in global terms in its first modern Establishment Clause decision, *Everson v. Board of Education*: the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and nonbelievers."⁸⁸

The Court has never abandoned *Everson's* neutrality requirement, although it has sometimes interpreted neutrality in inconsistent ways,⁸⁹ and it has twice rationalized failure to enforce rigorous neutrality against religious observances that it apparently considered harmless.⁹⁰ The Court has never suggested that government may comply with the Establishment Clause merely by refraining from coercion. The Court rejected the proposed noncoercion test at its first opportunity and at every opportunity since. A majority of a full Court firmly and explicitly rejected it just two years ago.⁹¹ It is true that many opinions have mentioned the evil of coercing persons to participate in religious observances. That is the most egregious case of establishment, and any form of government support for religion readily slides into coercion by imperceptible degrees. But none of the Court's opinions have distinguished coercion from mere government persuasion, condemning one and approving the other. Rather, the early opinions treated coercion and government persuasion interchangeably, condemning either as unconstitutional. Because the misimpression seems widespread that "the problem is *Lemon*," it is worthwhile reviewing in some detail the full line of cases on government-sponsored religious observance.

Justice Black wrote for the majority in *Everson*:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force *nor influence* a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.⁹²

This passage treats force and influence in matters of religion as equally objectionable. It treats aid to religion as the essence of establishment. And the

87. *Schempp*, 374 U.S. at 222.

88. 330 U.S. 1, 18 (1947).

89. See Laycock, *supra* note 6, at 1007-11.

90. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983).

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

92. 330 U.S. at 15 (emphasis added).

Court certainly did not suppose that government could "set up a church" if no one were coerced to support it.

Justice Rutledge for the four dissenters in *Everson* was even more explicit about noncoercive violations of the Establishment Clause. He listed coercive violations of the Establishment Clause, and he contrasted these with "the serious surviving threat[s]" of financial aid to religious institutions and "efforts to inject religious training or exercises and sectarian issues into the public schools."⁹³ Thus, none of the nine Justices in *Everson* believed that coercion was an element of every Establishment Clause violation.

The Court again equated coercion and persuasion in *Zorach v. Clausen*,⁹⁴ upholding programs under which schools released students to attend private religious instruction. The Court said:

. . . if it were established that any one or more teachers were using their office *to persuade* or force students to take the religious instruction, a wholly different case would be presented.⁹⁵

The Court distinguished the released time program in *Zorach* from the similar program in *Illinois ex rel. McCollum v. Board of Education*,⁹⁶ on grounds that it had nothing to do with coercion. The charge of coercion in both cases rested on the claim that limiting students to study hall or religious instruction coerced them to choose religious instruction.⁹⁷ *Zorach* rejected that claim, finding neither coercion nor persuasion. Thus, *Zorach's* explanation of *McCollum*, essential to the holding in both cases, is that there was no coercion in *McCollum*, but there was an Establishment Clause violation in *McCollum* -- necessarily an Establishment Clause violation without coercion. This coercion-free violation was adjudicated in 1948.

The Court distinguished the cases on the ground that religious instruction was off campus in *Zorach*, but on campus in *McCollum*.⁹⁸ The key to an Establishment Clause violation was not coercion, but use of school property. Justice Brennan believed that the use of school property mattered because it augmented the persuasive powers of the religious teachers:

To be sure, a religious teacher presumably commands substantial

93. *Id.* at 44 (Rutledge, J., dissenting).

94. 343 U.S. 306 (1952).

95. *Id.* at 311.

96. 333 U.S. 203 (1948).

97. *Zorach*, 343 U.S. at 309-10.

98. *Id.* at 309.

respect and merits attention in his own right. But *the Constitution does not permit that prestige and capacity for influence to be augmented* by the investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.⁹⁹

In *McGowan v. Maryland*,¹⁰⁰ the Court quoted *Everson's* explanation of establishment, permitting "neither force nor influence,"¹⁰¹ and it quoted and italicized Justice Rutledge's identification of religious exercises in public schools as a noncoercive threat to disestablishment.¹⁰²

Thus it was no innovation when the Court squarely rejected a noncoercion test in the first school prayer case, *Engel v. Vitale*.¹⁰³ Nor did the Court announce a distinction between direct and indirect coercion, as Justice Kennedy has suggested.¹⁰⁴ The *Engel* Court said that the Establishment Clause went far beyond even indirect coercion:

When the power, *prestige* and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *But the purposes underlying the Establishment Clause go much further than that.* Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.¹⁰⁵

The language elsewhere in the opinion confirms the depth of the Court's belief that coercion is no essential part of Establishment Clause analysis. It was unconstitutional for New York "to encourage recitation of the Regents' prayer,"¹⁰⁶ to place "its official stamp of approval" on any religion,¹⁰⁷ or to use its "prestige" to "support or influence the kinds of prayer the American people can say."¹⁰⁸

The Court reaffirmed its commitment to government neutrality toward

99. *Abington School Dist. v. Schempp*, 374 U.S. 203, 263 (1963) (Brennan, J., concurring) (emphasis added).

100. 366 U.S. 420 (1961).

101. *Id.* at 443.

102. *Id.* at 444 n.18.

103. 370 U.S. 421, 430-31 (1962).

104. *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting).

105. *Engel*, 370 U.S. at 431 (emphasis added).

106. *Id.* at 424 (emphasis added).

107. *Id.* at 429 (emphasis added).

108. *Id.* (emphasis added).

religion in the second school prayer case, *Abington School District v. Schempp*.¹⁰⁹ The Court said that the purpose of the First Amendment was "to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business . . ." ¹¹⁰ And the Court said, the state cannot "perform or aid in performing the religious function."¹¹¹

The Court first quoted the entirety of *Engel's* holding that coercion is not an element of an Establishment Clause violation,¹¹² and then for emphasis paraphrased it more succinctly.¹¹³ And elaborating on "the wholesome 'neutrality' of which this Court's cases speak," the Court formulated what became the first two prongs of the *Lemon* test: "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."¹¹⁴

Justice Stewart in dissent suggested that coercion should be the key,¹¹⁵ so the issue was squarely presented. He attracted no vote but his own. But his sensitive understanding of coercion makes clear that he would find coercion in *Lee v. Weisman*. He recognized the dangers of "psychological compulsion to participate,"¹¹⁶ and he thought it would be coercive if students who failed to attend religious exercises had to forgo "the morning announcements."¹¹⁷ Graduation is a far more important event than morning announcements; if requiring students to miss the morning announcements is coercive, a fortiori requiring them to miss their graduation is coercive. All nine Justices in *Schempp* rejected the Bush Administration's position in *Lee v. Weisman*.

In 1968, the Court applied the *Schempp* test in *Epperson v. Arkansas*,¹¹⁸ and reaffirmed the government's duty to "be neutral in matters of religious theory, doctrine, and practice."¹¹⁹ That same year brought the first of the long series of cases on financial aid to church-affiliated schools. These cases are largely irrelevant to the proposed noncoercion test. Financial aid is always

109. 374 U.S. 203, 215, 218, 222, 225-26 (1963).

110. *Id.* at 216, quoting *Everson v. Board of Educ.*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting) (emphasis added).

111. 374 U.S. at 219, quoting *Everson*, 330 U.S. at 52 (Rutledge, J., dissenting) (emphasis added).

112. 374 U.S. at 221.

113. *Id.* at 223 (" . . . a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended. ").

114. *Id.* at 222.

115. *Id.* at 316-20.

116. *Id.* at 318.

117. *Id.* at 320 n.8.

118. 393 U.S. 97, 107 (1968).

119. *Id.* at 103-04.

coercive, because it requires taxation. Distinctions in financial aid cases turn on other factors, and the real argument should center on whether the dominant aspect of the state's conduct is aid to religion or aid to compulsory education in secular subjects. But the financial aid cases were the occasion for incorporation of the two-part *Schempp* test into the three-part *Lemon* test, and the resulting *Lemon* test was quoted and applied in case after case.

The real issue for the proposed noncoercion test is government-sponsored religious observances. In cases arising in the public schools, the Court has struck down every such observance it has considered. In *Stone v. Graham*,¹²⁰ Kentucky posted the Ten Commandments on the walls of schoolrooms. If ever it were plausible to say there is no coercion in a school case, *Stone* would have been the case. But the Court summarily invalidated the Kentucky practice, citing state "auspices" and "official support" for religion as unconstitutional.¹²¹

Two years later, the Court unanimously invalidated a statute that authorized students and teachers to volunteer to lead the class in prayer.¹²² The statute ineffectually provided that "no student or teacher could be compelled to pray," but that did not save the statute or even require full argument.

The following term the Court decided *Marsh v. Chambers*,¹²³ upholding prayer in the Nebraska legislature. The opinion announced no new standard, and it did not question the general rule of government neutrality toward religion, although the result was inconsistent with that rule. Chief Justice Burger wrote a narrow opinion, relying on the "unique history" of legislative prayer,¹²⁴ and the fact that the person claiming injury was an adult.¹²⁵ Legislative prayer appeared to be an unprincipled exception to the general rule of neutrality toward religion. In the same term, another opinion by Chief Justice Burger quoted and reaffirmed the *Schempp-Lemon* test,¹²⁶ and condemned a "symbolic benefit" to religion.¹²⁷ Eight Justices joined this opinion.

The following Term suggested that *Marsh* did not apply to schools, and perhaps did not apply to anything other than the "unique" case of legislative prayer. The Court unanimously affirmed invalidation of a statute authorizing

120. 449 U.S. 39 (1980).

121. *Id.* at 42, quoting *Schempp*, 374 U.S. at 222.

122. *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).

123. 463 U.S. 783 (1983).

124. *Id.* at 791.

125. *Id.* at 792.

126. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

127. *Id.* at 125.

public school teachers to lead willing students in prayer.¹²⁸ And all nine Justices claimed to apply the *Schempp-Lemon* test to the municipal Christmas display in *Lynch v. Donnelly*.¹²⁹ But the majority created another exception, finding the display sufficiently secular to justify a finding of secular purpose and effect.¹³⁰ This time the majority created an exception without admitting that it was doing so, and the resulting opinion is an intellectual embarrassment. *Marsh* and *Lynch* showed that the Court would not enforce neutrality with any rigor, but the Court did not threaten to wholly abandon the principle.

It was in *Lynch* that Justice O'Connor offered her endorsement test to clarify the first two prongs of the *Lemon* test.¹³¹ The Court incorporated Justice O'Connor's endorsement test into its analysis the following year in *Wallace v. Jaffree*.¹³² The Court quoted and applied the *Schempp-Lemon* test, but it also accepted the endorsement test as an authoritative elaboration:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.¹³³

Wallace was also the occasion for Justice Powell's emphatic defense of the *Lemon* test as the settled law of the Supreme Court.¹³⁴

The endorsement test was so readily assimilated to the *Schempp-Lemon* test in this context because government-sponsored religious observances rarely present the ambiguities that the endorsement test was designed to clarify. The endorsement was offered as a way of explaining that it is not a forbidden benefit to religion to exempt conscientious objectors or otherwise remove burdens from religious practice.¹³⁵ In the context of religious observances, which do not remove burdens and rarely have plausible secular purposes, it was immediately

128. *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd mem.*, 466 U.S. 924 (1984).

129. 465 U.S. 668 (1984).

130. *Id.* at 681-82.

131. *Id.* at 690.

132. 472 U.S. 38 (1985).

133. *Id.* at 56 n.42, quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). For similar statements by the Court, see *Wallace*, 472 U.S. at 58 n.45, 59, 61 & n.52.

134. 472 U.S. at 63 & n.5 (Powell, J., concurring).

135. *Id.* at 83 (O'Connor, J., concurring). See also Laycock, *supra* note 82, at 21-22 (purpose to avoid discrimination against religion is a legitimate purpose, whether considered secular or religious). I have been persuaded that even the endorsement test does not communicate this distinction without further elaboration. See McConnell, *supra* note 4.

clear that the endorsement test and the *Schempp-Lemon* test were compatible.

Two years later, in *Edwards v. Aguillard*,¹³⁶ the Court again applied the *Schempp-Lemon* test,¹³⁷ as clarified by the endorsement test,¹³⁸ to strike down a statute requiring balanced treatment of evolution and "creation science." The Court noted that *Marsh v. Chambers* had been the only case in which the Court failed to apply the *Schempp-Lemon* test.¹³⁹

Most recently, the Court applied the *Schempp-Lemon* test, as clarified by the endorsement test, to prohibit display of a creche in a county courthouse.¹⁴⁰ The Court did not say that the display was coercive; rather, it said that the display "has the effect of endorsing a patently Christian message."¹⁴¹ The Court continued:

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principal remains the same. The Establishment Clause, at the very least, prohibits government from *appearing to take a position* on questions of religious belief¹⁴²

The Court explained *Lynch v. Donnelly* as holding "that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine."¹⁴³ Celebrating Christmas without endorsing Christianity would seem to be an obvious impossibility, but the *Allegheny* majority took the *Lynch* majority at its word. *Lynch* had implausibly said that Pawtucket's creche was principally secular; *Allegheny* more accurately said that Pittsburgh's creche was not.

Justice Kennedy's dissent in *Allegheny* proposed a fundamentally different standard: that "government may not coerce anyone to support or participate in any religion or its exercise,"¹⁴⁴ and that government may not "proselytize on behalf of a particular religion."¹⁴⁵

The majority emphatically rejected this standard: "*Justice Kennedy's reading of Marsh would gut the core of the Establishment Clause, as this Court*

136. 482 U.S. 578 (1987).

137. *Id.* at 582-83.

138. *Id.* at 585.

139. *Id.* at 583 n.4.

140. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

141. *Id.* at 601 (emphasis added).

142. *Id.* at 593-94 (emphasis added).

143. *Id.* at 601 (emphasis added).

144. *Id.* at 659.

145. *County of Allegheny*, 493 U.S. at 661.

understands it."¹⁴⁶ And, the Court might have added, as the Court has long and all but unanimously understood it. The *Schempp* test was adopted eight to one, and the dissenter, Justice Stewart, understood coercion much more expansively than the Bush Administration in *Lee v. Weisman*. The *Lemon* test was adopted seven to one -- eight to one with Justice Brennan's concurrence. The dissenter, Justice White, has never voted to uphold school-sponsored religious observances in a public elementary or secondary school.

The opinions reviewed here, committing the government to neutrality between religion and nonreligion, and forbidding government persuasion or influence in religious matters, have been joined by nearly every Justice appointed since the issues first reached the Supreme Court: by Chief Justices Vinson, Warren, and Burger, by Justices Black, Reed (in *Everson*¹⁴⁷ although not in *McCullum*¹⁴⁸), Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton, Clark, Minton, Harlan, Stewart (in *Lemon*¹⁴⁹ although not in *Schempp*¹⁵⁰), Brennan, White (in *Wallace*,¹⁵¹ *Stone*,¹⁵² *Epperson*,¹⁵³ and *Schempp*, although not in *Lemon*), Goldberg, Fortas, Marshall, Blackmun, Powell, Stevens, and O'Connor. If the new majority abandons the requirement of government neutrality toward religion, it will not be to correct the excesses of a few extreme liberals. It will be the work of one political faction rejecting the nearly unanimous view of all modern justices. As Justice Scalia once said, when he did not have five votes, "It is not right -- it is not constitutionally healthy -- that this Court should feel authorized to refashion anew our civil society's relationship with religion" ¹⁵⁴

IV. THE HARM TO RELIGION

It is common to assume that the objection to government-sponsored religious observances comes only from non-believers who are hostile to religion. It is easy to see that non-believers might object when government adds a prayer service to a secular function. A requirement that government be neutral as between religious belief and disbelief is designed to protect non-believers.

But a ban on government-sponsored religious observance is also necessary to neutrality among believers, and it is important to understand that. A

146. *Id.* at 604.

147. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

148. *Illinois ex rel. McCollum v. Board of Ed.*, 333 U.S. 203 (1948).

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

150. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

151. *Jaffree v. Wallace*, 472 U.S. 38 (1985).

152. *Stone v. Graham*, 449 U.S. 39 (1980).

153. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

154. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 45 (1989) (Scalia, J., dissenting).

nonpreferentialist instinct informs much of the popular reaction to *Lee v. Weisman*: who besides an atheist could object to a short and simple prayer? That question deserves an answer.

The relevance of nonpreferentialism is political rather than doctrinal. As noted above, nonpreferentialism is no part of the proposed noncoercion test in *Lee v. Weisman*. The Bush Administration's brief would let government be as sectarian as it likes, so long as it refrains from coercion. But even if government attempts to sponsor religious observances that are neutral among believers, it will fail. Government-sponsored religious observances hurt believers as well as nonbelievers.

Such observances hurt all religions by imposing government's preferred form of religion on public occasions. It is not possible for government to sponsor a generic prayer; government inevitably sponsors a particular form of prayer. Whatever form government chooses, it imposes that form on all believers who would prefer a different form.

In some communities, government-sponsored prayer unabashedly follows the liturgy of the locally dominant faith in the community.¹⁵⁵ "Sensitive" communities such as Providence attempt to delete from public prayer all indicia of any particular faith, leaving only the least common denominator of majoritarian religion. But these stripped-down prayers to an anonymous deity are as much a particular form of prayer as any other prayer.

The school teachers who plan the ceremony decide what prayers are acceptable and what not, and what clergy are acceptable and what not. In this process, the schools establish a religion of mushy ecumenism. The clergy for these prayers are determined by the limits of acceptability to the mainstream. In Providence and many other cities, the guidelines for these prayers are supplied by the National Conference of Christians and Jews. The NCCJ's guidelines implement its commitment to minimizing religious and ethnic conflict. The guidelines emphasize "inclusiveness and sensitivity," and they offer a specific list of "universal, inclusive terms for deity."¹⁵⁶ Government adoption of these guidelines establishes an uncodified but generally accepted book of common prayer. This least-common-denominator strategy is the same strategy followed by the Protestant school reformers of the nineteenth century, and it fails for similar reasons. By removing from religious observance all those

155. See, e.g., *Jager v. Douglas County School Dist.*, 862 F.2d 824, 826 (11th Cir. 1989) (frequent references to Christ); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1039 (5th Cir. 1982) (evangelical Protestant school assemblies).

156. NATIONAL CONFERENCE OF CHRISTIANS AND JEWS, PUBLIC PRAYER IN A PLURALISTIC SOCIETY 2.

specifics on which different faiths overtly disagree, the school is left with an abstract impersonal God that nearly all faiths reject. What is left is unacceptable to many believers who take their own faith seriously.

The problem is as fundamental and intractable as the question of Whom to pray to. To pray to or in the name of Christ is a blasphemy to most Jews; not to do so is theologically and liturgically incorrect to most Christians. Is it better to silently affront the Christian majority by leaving Christ out of prayer, or to overtly offend the Jewish minority by praying in Christ's name? Given the sad history of Christian-Jewish relations, leaving Christ out is probably the lesser of the evils. The Supreme Court once said that leaving Christ out is constitutionally required.¹⁵⁷ But leaving Christ out of prayer is not a solution; it is at the core of the problem.

Whichever choice government makes, it endorses that choice. Government-sponsored prayer on public occasions lends the weight of government practice to a preferred form of prayer. By their example, schools that leave Christ out of prayer endorse that practice as more tolerant, as more enlightened, as government approved. They lend the authority of government to a desacralized, watered-down religion that demands little of its adherents and offers few benefits in return.

The attempt to be inclusive amplifies the message of exclusion to those left out. Because such prayers are carefully orchestrated not to offend anyone who counts in the community, the message to those who are offended is that they do *not* count -- that they are not important enough to avoid offending. The message is:

We go out of our way to avoid offending people we care about, but we don't mind offending you. If you have a problem with this, you are too marginal to care about. This is our graduation, not yours.

It is not just nonbelievers who may be offended or excluded by prayers like those in *Lee v. Weisman*. Such prayers also exclude serious particularistic believers, those who take their own form of prayer seriously enough that they do not want to participate in someone else's form of prayer. There are still millions of Americans who believe that all religions are not equal, that their own religion is better, or even that their own religion is the one true faith, and that their faith should not be conglomerated into something that will not offend the great majority.

157. *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989).

Those who would not pray at all, those who would pray only in private, those who would pray only after ritual purification, those who would pray only to Jesus, or Mary, or some other intermediary, those who would pray in Hebrew, or Arabic, or some other sacred tongue, are all excluded or offended by the prayers in *Lee v. Weisman*. Those who object to the political or theological content of those prayers are similarly excluded — those whose vision of God is not the government's vision, those whose concept of God does not track the National Anthem, whose God is not "the God of the Free and Hope of the Brave," but perhaps the God of the oppressed and the Hope of the fearful.¹⁵⁸

On occasion, religious observances in public schools still produce ugly confrontations between those who object to least-common-denominator prayer and those who support it. A detailed account of such an incident appears in *Walter v. West Virginia Board of Education*,¹⁵⁹ where an eleven-year old Jewish child was condemned as a Christ killer because he did not appear to pray during a moment of silence. Most contemporary religious dissenters in public schools suffer in silence, and we have had no recent repetitions of the mob violence of the nineteenth century. But reduction of violence is not a reason to relax constitutional protections. Religious dissenters should not have to provoke violence to call attention to their constitutional rights.

The political content of the prayer in *Lee* illustrates another core danger of established religion. When government sponsors religious observances, it appropriates religion to its own uses and unites religious and governmental authority. The message of the invocation in *Lee v. Weisman* was an essentially political message — that American government is good, that freedom is secure, that courts protect minority rights, that America is the land of the free and the home of the brave, etcetera.

The invocation's political message is popular but not uncontroversial. The school can deliver that political message if it chooses. The rabbi can deliver that message if he chooses. But the school and the rabbi cannot unite the authority

158. The invocation in *Lee* reads as follows:

God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust. For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN.

Weisman v. Lee, 908 F.2d 1090, 1098 n.* (Campbell, J., dissenting).

159. 610 F. Supp. 1169, 1172-73 (S.D.W. Va. 1985).

and prestige of church and state in support of that message. The school cannot recruit a rabbi to wrap that political message in religious authority. The school cannot misappropriate the authority of the church to prop up the authority of the state.

It has long been a common observation that religion has thrived in America without an establishment, and declined in Western Europe with an establishment.¹⁶⁰ It is less commonly observed that the established Congregationalist and Episcopalian churches of colonial America declined in numbers and influence, while the dissenting Baptists and Presbyterians, who insisted on rigorous disestablishment, grew and flourished.¹⁶¹

These long term religious trends reflect in part the baleful effects of government sponsorship. Religion does not benefit from public prayer that "degenerates into a scanty attendance, and a tiresome formality."¹⁶² The Providence School Committee actually quoted this description of congressional devotions, apparently to show that nonbelievers need not fear being persuaded to belief.¹⁶³ But the Constitution is equally violated if government makes religion less attractive rather than more so. Government sponsorship of religion is always clumsy, and usually motivated more by political concerns than religious ones. In intolerant communities it tends inevitably toward persecution; in tolerant communities it tends inevitably toward desecralization. One function of the Establishment Clause is to avoid this dilemma.

V. JUSTICE KENNEDY'S ALTERNATIVE

In his dissent in the Pittsburgh creche case, Justice Kennedy proposed that the Establishment Clause might be satisfied if government refrained either from coercion or from proselytizing.¹⁶⁴ The Court squarely rejected Kennedy's proselytizing test,¹⁶⁵ and no one urged it in *Lee v. Weisman*. But it seems more likely that if the Court sharply reinterprets the Establishment Clause, it will move to Kennedy's test, which has already received four votes, instead of to the Bush Administration's more extreme proposal that would let government proselytize as long as it does not coerce.

160. See, e.g., 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 308-14 (Phillips Bradley ed., 1945).

161. See Andrew M. Greeley & Michael Hout, *Musical Chairs: Patterns of Denominational Change*, 72 *SOCIOLOGY & SOCIAL RESEARCH* 75, 81 Table 3 (1988).

162. *Madison's "Detached Memoranda"*, 3 *WM. & MARY Q.* 534, 539 (3d Ser. 1946) (Elizabeth Fleet ed.).

163. Brief for Petitioners, *supra* note 2, at 32 n.33.

164. *County of Allegheny v. ACLU*, 492 U.S. 573, 659, 661 (1989).

165. *Id.* at 602-13.

I have only the vaguest idea which endorsements of religion would count as proselytizing. Apparently, proselytizing is a matter of degree. Some government endorsements of religion would be permitted, but persistent endorsements would be forbidden proselytizing,¹⁶⁶ and presumably insistent endorsements or explicit calls to conversion would be forbidden proselytizing.

Much prayer would be proselytizing, which may be why no one urged the proselytizing test in *Lee*. Prayers are an important, powerful, and frequent means of proselytizing. Evangelists lead their audience in prayer; proselytizers pray privately with individuals. No one would doubt the proselytizing intent of a pastor at commencement who prayed "that the Holy Spirit pass through this class, and touch every heart, and lead these graduates to Jesus." There are endless variations of proselytizing more subtle than this example. Unless courts and school boards are to parse the content of prayers, the only way to avoid proselytizing at commencement is to avoid prayer at commencement.

More fundamentally, the proselytizing test violates the Establishment Clause for most of the same reasons a coercion test would violate the Establishment Clause. First, the proselytizing test is inconsistent with the original meaning of the Clause. The bare endorsements of the South Carolina Constitution and the Virginia Episcopal incorporation act presumably did not amount to proselytizing, but they were establishments in the understanding of the founding generation.

Second, the proselytizing test is inconsistent with historical applications of the original principal. Reading the Bible "without note or comment" was an attempt to avoid proselytizing as well as sectarian division. But as shown above, this program was the source of bitter religious strife. Religious observances in the public schools, with or without overt proselytizing, led to the very evils the Establishment Clause was designed to prevent.

Third, the proselytizing test is inconsistent with the Supreme Court's modern precedents. From the beginning, the Court has properly insisted that government be neutral toward religion. Government was not to refrain merely from coercion, or from proselytizing, but from "persuasion," from "influence," from any "stamp of approval," from any departure from "neutrality."

Fourth, government-sponsored religious observances inflict the same harms on religion whether or not government proselytizes. The vagueness of a proselytizing test may steer some governmental units away from the specific liturgy of any particular faith, but this will only reinforce the tendency to desacralization. There is no avoiding the central dilemma: when government

166. *Id.* at 661 (Kennedy, J., dissenting) (year-round cross on city hall would be proselytizing).

conducts religious rituals, it must conduct them in some concrete form, and whatever form it chooses is endorsed and tendered to the community as a model. For all these reasons, the proselytizing test is an inadequate protection for religious liberty.

VI. THE BUSH ADMINISTRATION'S CONCEPTION OF COERCION

An essential feature of *Lee* is a captive audience of young children. It is not merely that children are in attendance, or that children want to be in attendance. It is also that the event is planned especially for children, to honor children on one of the major accomplishments of their young lives. Providence says to its high school graduates, and to its middle school promotees: if you wish to be honored on your promotion, you must first be "compelled to listen to the prayers" of others.¹⁶⁷

The children have no realistic choice but to sit through the prayers attentively and respectfully. They must give every outward appearance of joining in the prayers. This is not like a passive display, where people can "turn their backs."¹⁶⁸ Nor is it like a legislature, where adults come and go at will, and can avoid the invocation by the simple expedient of arriving late.

The Providence School Committee seemed to assume there is no coercion unless children are compelled to *believe in* the religious premises of the prayers.¹⁶⁹ But that is absurd. That standard would permit the state to compel church attendance, or any other religious behavior. It is impossible to compel belief; outward manifestations of belief are all that the state can ever hope to compel. When the state compels children to give respectful attention to prayers, it has violated even the coercion test.

The prayers in *Lee* are also especially problematic because of the state's role in planning and supervising the content of the prayers. School teachers plan the ceremony. They decide whether to include prayers, how many prayers, and at what point. They select the clergy to offer the prayers. They give the clergy "guidelines" to acceptable prayer. They call to make sure the clergy understand the guidelines.¹⁷⁰ Participating clergy cannot avoid the inference that they are unlikely to be invited again if they depart from the guidelines. Government and religion are hopelessly entangled in this process. Just as "it is no part of the

167. *Wallace v. Jaffree*, 472 U.S. 38, 72 (O'Connor, J., concurring).

168. *Cf. County of Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting).

169. *See* Brief for Petitioners, *supra* note 2, at 41 (heading 3).

170. Joint Appendix in *Lee v. Weisman*, No. 90-1014 in the Supreme Court of the United States, at 12-13.

business of government to compose official prayers,"¹⁷¹ so it is no part of the business of government to prescribe official guidelines for prayer.

The teachers' central role in planning and supervising these prayers negates any claim that the clergyman they select is simply a private speaker. *Lee* is wholly unlike *Board of Education v. Mergens*,¹⁷² where there was no school sponsorship and a wholly voluntary audience. It is wholly unlike religious imagery in a commencement address by Martin Luther King, where a prominent public figure was invited to speak on any topic of his choice. In *Lee*, carefully selected clergy are invited solely to pray, at times designated by the school and in accordance with liturgical guidelines imposed by the school.

Lee is not a free speech case or an equal access case. It is a school prayer case, plain and simple. In terms of school sponsorship, government entanglement, and coercion of children, *Lee* is indistinguishable from *Engel* and *Schempp*. It differs from those cases only in the frequency of the constitutional violation. If the Court holds that school prayer is permitted occasionally but not daily, it will be faced with a long series of cases asking how often is too often, and which occasions are special enough. If commencement is exempt from the school prayer cases, what about holidays, student assemblies, athletic events, pep rallies, and any other day on which an "occasion" can be identified?

School-sponsored and school-supervised prayer is not the only way to take religious note of graduation. A private baccalaureate service, sponsored by the local association of churches and synagogues, is the obvious constitutional alternative. Un-sponsored student groups exercising their rights under *Mergens* might organize religious observances of the occasion. Either of these alternatives would leave religious worship in religious hands, either would avoid coercion of young children, and either would avoid government sponsorship.

VII. CONCLUSION

It is too often forgotten that the Establishment Clause and the Free Exercise Clause both protect religious liberty. They both protect religious believers as well as nonbelievers. In the words of the Presbyterian Church (U.S.A.):

Together the two Clauses guarantee that the people will have the fullest possible religious liberty. The state may not interfere with the private choice of religious faith *either by coercion or by persuasion*. It may not interfere with the expression of faith either by inducing

171. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

172. 110 S. Ct. 2356 (1990).

people to abandon the religious faith and practice of their choice, or by inducing them to adopt the religious faith and practice of the government's choice.¹⁷³

The noncoercion standard would abandon the goal of government neutrality toward and among religions. It would encourage government to denigrate, embarrass, and discomfit nonbelievers. But it would also leave America's many religions exposed to the corrupting intrusions of government. Government could sponsor preferred churches, preferred theologies, preferred liturgies, preferred forms of worship, and preferred forms of prayer. All this is entailed when government undertakes to sponsor a "civil religion."

Government by its sheer size, visibility, authority, and pervasiveness could profoundly affect the future of religion in America. For government to affect religion in this way is for government to change religion, to distort religion, to interfere with religion. Government's preferred form of religion is theologically and liturgically thin. It is politically compliant, and supportive of incumbent administrations. One function of the Establishment Clause is to protect religion against such interference. To government's clumsy efforts to assist religion, several religious amici said "No thanks. Too much of such" assistance "and we are undone; the Constitution protects us from assistance such as this."¹⁷⁴

173. *God Alone Is Lord of the Conscience: A Policy Statement Adopted by the 200th General Assembly of the Presbyterian Church (U.S.A.)* (1988) at 7, reprinted in 8 J.L. & RELIGION 331, 332 (1990).

174. Amicus Curiae Brief of the American Jewish Congress, *et al.*, in Support of Respondents 8.

