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Comment: God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom

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GOD SAVE US FROM THE COERCION TEST: CONSTITUTIVE DECISIONMAKING, POLITY PRINCIPLES, AND RELIGIOUS FREEDOM

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I. INTRODUCTION

The coercion principle states that the government must not coerce individuals in their free exercise of religion. The major premises of the Dean Smith and Professor Paulsen articles are that the Rehnquist Court will (and should) decide Establishment Clause cases using this principle and that *Lee v. Weisman*[1] should be read as supporting the coercion test in Establishment Clause cases.[2] I disagree. There is no convincing evidence in *Weisman* that Justice Kennedy and a majority of the Court has accepted a simple coercion test.

I also argue against Professor Paulsen's view that the *Lemon v. Kurtzman* test[3] is dead. I argue that a majority of the Rehnquist Court, including Justice Kennedy, will continue to support the polity or institutional separation prong of the *Lemon* test, that there be no excessive government entanglement with religion, and its

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1. 112 S. Ct. 2649 (1992).

2. *See* Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993); Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of the End to the Wandering of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993).

3. Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Lemon* test requires that for a law or government policy to be upheld under the Establishment Clause it must 1) have a secular purpose, 2) have a principal or primary effect that neither advances nor inhibits religion, and 3) not foster excessive entanglement with religion. *Id.* at 612-13.

corollary, that the Court should ensure that political divisiveness does not result from government laws and actions regarding religion.[4] The question of whether the Rehnquist Court continues to support the vitality of the *Lemon* test is not identical to the question of whether the Court eschews polity-based institutional entanglement and fear of political divisiveness concerns in favor of a coercion test. The primary issue is not whether *Lemon* is dead; rather, it is whether the polity elements of the *Lemon* test will continue to be important to the Rehnquist Court. In contrast to Paulsen, I argue that the Rehnquist Court will continue to enforce the polity elements of *Lemon*. Paulsen may be making a valid argument that the *Lemon* test will not be applied in the future in its full-blown form, as a fixed test in root and branch.[5] However, if this is so, it is not a very great change because the *Lemon* test has never been applied as if it were a closed-ended legal code. Different prongs (or seeds) of the *Lemon* test have come to the fore in different cases.[6] I argue that such application will continue into the future because a majority of the Rehnquist Court agrees that each of the prongs of the *Lemon* test, including its polity principles, will continue to inform Establishment Clause decisionmaking.[7]

To conflate free exercise and institutional polity principles within the Establishment Clause into a simple principle based on

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4. *Id.* at 622-23 (The Court supported the institutional separation prong by describing the divisive political potential of government entanglement with religion. The Court cautioned, "Political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

5. Paulsen, *supra* note 2, at 861-62 (In closing, Professor Paulsen states that unless there are significant changes in the makeup of the Supreme Court, *Lemon* will never again be used as the sole basis in deciding Establishment Clause cases.).

6. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989) (focusing on the excessive entanglement prong of *Lemon* in deciding whether the charitable contributions provision of the Internal Revenue Code violated the Establishment Clause); Wallace v. Jaffree, 472 U.S. 38 (1985) (focusing on a lack of any secular purpose in a state's law regarding voluntary school prayer); Mueller v. Allen, 463 U.S. 388 (1983) (upholding a state law allowing tax deductions for certain private school expenses incurred by parents by focusing on the primary effect prong of *Lemon*).

7. See LEONARD W LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 75-119 (1986) (a most powerful statement for the separation of church and state and against the non-preferentialist position). *See also* Douglas Laycock, *"Non-Preferential" Aid To Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 875 (1986) (arguing that history refutes claims that "the Framers specifically intended to permit government to aid religion so long as that aid does not prefer one religion over others.") Professor Laycock has written extensively arguing against non-preferentialism as the underlying principle of the Establishment Clause.

freedom from government coercion, and to negate the excessive entanglement and political divisiveness elements of the *Lemon* test, as Dean Smith and Professor Paulsen do, undermines important concerns by the Founders regarding the negative effects of religious conflict on the political system.[8] Moreover, this conflation makes it more difficult for the Court to protect, and society to honor, the free exercise rights of all citizens.

Important evidence for the proposition that a majority of the Rehnquist Court will not accept a simple free exercise, rights-based, coercion test as the sole or primary basis for Establishment Clause decisionmaking is also provided by the joint opinion of Justices Kennedy, O'Connor and Souter in *Planned Parenthood v. Casey*[9] and opinions in other cases decided at the time of *Weisman*.[10] This evidence is in the form of clearly stated premises, polity principles, about the importance of *stare decisis*, the role of the Court, and the responsibilities of the Court, which would be violated were the Court to denude the Establishment Clause of polity principles.

To conflate polity and rights principles within the Establishment Clause also runs counter to the constitutive decisionmaking process on the Supreme Court, in which polity and rights principles and their relationship inform constitutional choices, of which the *Lemon* test is a product.[11] The *Lemon* test brought together long-standing Establishment Clause polity and rights principles as applied in many precedents.

Therefore, this article will first discuss polity and rights principles, the constitutive Supreme Court decisionmaking process, and their relationship to Establishment Clause jurisprudence.[12] Only by

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8. *See also*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986) (analyzing the history of the Religion Clauses and concluding that they were designed to remedy the problem of government coercion).

9. 112 S. Ct. 2791 (1992).

10. *See* United States v. Fordice, 112 S. Ct. 2727 (1992); R.A.V v. St. Paul, 112 S. Ct. 2538 (1992).

11. *See* RONALD C. KAHN, THE SUPREME COURT AND CONSTITUTIONAL THEORY 1953 -1993 31-56 (forthcoming 1994) (a full discussion of the constitutive decision-making process on the Supreme Court).

12. *See* Ronald C. Kahn, *Ideology, Religion, and the First Amendment, in* JUDGING THE CONSTITUTION 409 (Gerald L. Houseman & Michael W. McCann eds., 1989) [hereinafter Kahn, *First Amendment*]; Ronald C. Kahn, *Polity and Rights Values in Conflict: The Burger Court, Ideological Interests, and the Separation of Church and State*, 3 STUD. IN AM. POL. DEV. 279 (1989) [hereinafter Kahn, *Polity and Rights Values*] (both discussing the terms of polity and rights principles and providing an analysis of Supreme Court Establishment Clause opinions between 1970 and 1986, which demonstrate that members

placing Supreme Court Establishment Clause jurisprudence in this larger framework can the limitations of Dean Smith's and Professor Paulsen's arguments that the Rehnquist Court is on a path to eschewing polity principles in the Establishment Clause and *Lemon* test be understood fully [13] The *Casey* decision offers important evidence to counter the argument that the coercion test will become the Establishment Clause test on the Rehnquist Court.

II. CONSTITUTIVE SUPREME COURT DECISIONMAKING

The constitutive decisionmaking process on the Supreme Court, in which polity and rights principles and their relationship inform Court choices, has been a long-standing pattern in Establishment Clause jurisprudence and in all doctrinal areas. Approaches to constitutional interpretation, the debate between the federalists and the antifederalists at the founding, and modern Establishment Clause jurisprudence, include the ongoing debate over which polity and rights principles should inform Court decisionmaking and the development of constitutional law A major problem of the free exercise coercion test that is defended by Dean Smith and Professor Paulsen is that they fail to consider the proper balance between polity and rights principles. In short, they espouse a rights-only based test.

Polity and rights principles, therefore, are central to understanding the Supreme Court decisionmaking process, the constitutional choices made by each justice, and differences in decisionmaking and jurisprudence among Court eras. Polity principles are justices' deeply-held ideas about where decisionmaking power should be located when deciding questions of constitutional significance. Polity principles involve beliefs about whether courts

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of the Supreme Court applied polity and rights principles in a coherent way as they decided cases).

13. *See generally* Smith, *supra* note 2; Paulsen, *supra* note 2. I will not explore Smith's interesting ideas about the problems caused by the Rehnquist Court's elusive and undefined concept of coercion or of the problems presented by protecting the right of conscience rather than religious freedom because I don't view this as the primary problem with Smith's and Paulsen's view of *Weisman* and the Rehnquist Court's Establishment Clause jurisprudence. Instead, I argue the primary problem with their analyses is that they assume that free exercise rights are, and should be, the sole basis for Establishment Clause jurisprudence. This assumption will undermine not only religious freedom and the rights of the non-religious, but also undermine the strength of religious organizations in our pluralist political system. Nor do I focus on Smith's and Paulsen's concerns for greater clarity of coercion test principles or their concerns about ensuring a clearer distinction between protecting freedom of religion and freedom of conscience.

or electorally accountable political institutions are the most appropriate forum for constitutional decisionmaking. They also include beliefs about whether state, local, or national levels of government are proper forums for the making of constitutionally significant decisions.

Polity principles may be formal in nature and involve questions of the separation of powers between the President, Congress, and the Court, checks and balances, federalism, and the relationship between government and religious institutions, as in the Establishment Clause. The term "polity principles" may also refer to less formal views about the American political system held by justices, such as their views about how well the pluralist political system is operating and how complex or simply justices and Court eras view structural inequality as a basis for the Court increasing its power of judicial review Polity principles inform the debate in constitutional law, practice, and theory about whether federal courts or electorally accountable institutions should make choices, and, as a matter of principle, the degree of institutional autonomy that should be granted to electorally accountable institutions and courts.

Courts must decide how much weight polity principles should be given when balanced against individual rights, which are usually of a less defined and potentially more substantive open-ended nature. Thus, at their most persuasive, judicial choices based on polity values are grounded structurally on powers enumerated in the Constitution, polity principles which are informed by these powers, and the overall principles of governance in the Constitution. For some justices these values imply judicial self-restraint, reliance on existing political power structures, and a firm faith in participational and access norms to ensure a normally-functioning democratic system. The polity principles of other justices lead them to favor judicial activism and support expanded individual rights by the Supreme Court as a counter to what they perceive as malfunctions in the political system.

Rights principles are beliefs held by justices, as well as judicial advocates and constitutional scholars, concerning individual rights — in contrast to polity questions concerning the function and role of proper government. Rights principles do not usually include issues of power among branches of the majoritarian political process. Instead, they involve protections afforded individuals based on fundamental principles in the Constitution and in its amendments, such as the Bill of Rights and the Fourteenth Amendment. Rights may be "thou shalt not" prohibitions against govern-

ment interference with the liberty of individuals or groups, such as the right to be free from unreasonable searches and seizures. They also may constitute, as in modern equal protection law, federal courts' determinations of affirmative responsibilities on the part of government. Rights may include the assurance that goods and services that are allocated by legislatures and declared essential to life and liberty be distributed under a set of rules and processes that are neither capricious nor arbitrary Rights principles force one to think of the individual or group and about liberties, like freedom of speech or the right to privacy, that inhere in the individual. Polity values force one to think about the nature of governmental powers, the political process, or the judicial process, as an entity Thus, while polity and rights principles may be viewed as analytically distinct for heuristic purposes, in the analysis of cases they work together to form the bases of an individual justice's approach to constitutional questions, and changing doctrine in different Court eras.[14]

As an example of the importance of polity and rights principles in individual cases consider *Planned Parenthood v. Casey*.[15] In their joint majority opinion, Justices Souter, O'Connor, and Kennedy emphasized that they could not overturn the right of abortion choice first pronounced in *Roe v. Wade*,[16] in large part because doing so would violate their deeply-held polity principles, such as respect for *stare decisis*, the role of the Supreme Court as a counter-majoritarian institution in our system of separation of powers and checks and balances, and the autonomy of the Court from day-to-day electoral politics.[17] Clearly, in this case, as in others, the justices did not just decide the case based on their policy wants or a simple view of fundamental rights, but instead decided the case based on their commitment to polity principles, such as the need to follow precedent and views about the power of

14. *See* KAHN, *supra* note 11, at 36-38.

15. 112 S. Ct. 2791 (1992),

16. 410 U.S. 113, 153 (1973) ("This right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

17. In *Casey*, the Court explicitly mentioned "the force of stare decisis" as a primary reason for declining to overrule *Roe*. *Casey*, 112 S. Ct. at 2808. Additionally, the Court reasoned that overruling the holding in *Roe* would "seriously weaken the Court's capacity to exercise judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Id.* at 2814. The Court also discussed the need for decisions to be "grounded truly in principle" and not merely "compromises with social and political pressures." *Id.*

judicial review that they viewed as basic to a rule of law [18]

Changing points of intersection between polity and rights principles in specific cases, in decisions of individual justices, in the constitutional theories of Court scholars, and in different Court eras are central to understanding the constitutive decisionmaking process of the Supreme Court, in which justices draw on polity and rights principles to make their constitutional choices. No justice relies exclusively on a pure polity or rights theory, but different justices, scholars, and Court eras might place greater emphasis on one over the other. The relative weights given to constitutional questions concerning polity compared to rights principles have changed throughout the history of our nation. Polity principles continue to inform the development of constitutional law in cases primarily concerned with the nature of individual rights.

The way polity and rights principles dovetail, or fail to dovetail, in each Court era defines the Court. Justices seek coherence in polity and rights principles to increase their influence over the development of constitutional principles within the Court and wider society Members of the Supreme Court create personal constitutional visions in which their views of polity and rights principles, their underlying moral values, and their attitudes towards the history of the Court and the nation, are central. These personal theories, which inform judicial choices, develop over the course of a justice's years on the Court. The concern for coherence by a justice means that she cannot think only of the case outcomes, or the individual case, but rather must consider implications of her choice for her later application of polity and rights principles.[19]

Finally, constitutional theories and interpretations which emphasize only polity or only rights principles, and not both, and thus undervalue the connectedness of polity and rights principles, result in misinterpreting what the Supreme Court does when it makes constitutional choices and fail as guides to future Court action. This has been the case with regard to the theories of many constitutional scholars since the 1970s, such as John Hart Ely and Laurence Tribe, who argued for theories based on either polity or individual rights principles, respectively [20] As I will argue below,

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18. *Id.* at 2808-09.

19. *See generally* Kahn, *First Amendment*, *supra* note 12 (discussing the terms polity and rights principles, as applied to the Burger Court's aid to parochial education cases); Kahn, *Polity and Rights Values*, *supra* note 12 (same).

20. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 92 (1980) (arguing that the original

this is also a major problem with employing the free exercise rights only-based coercion test of Smith and Paulsen to Establishment Clause jurisprudence.

An analysis of the interplay of polity and substantive rights values, and of the justices' ideological interests in support of different concepts of polity and rights values, indicates that under our liberal tradition rights are usually linked to polity values, and are subject to the justices' views of institutional relationships in society Through the analysis of cases we can assess to what extent each justice has a set of polity and rights priorities. From such an analysis we can see differences in the manner in which various justices make principled choices, and the implications of different types of principles for the development of constitutional theories.

In particular, this approach allows us to pinpoint differences among the justices, and scholars, as to the degree to which they view constitutional law as prescriptive of public official and citizen action, and whether they trust political institutions or other venues, such as churches, to make choices of constitutional significance. Justices decide cases by fitting them into their continuing polity and substantive rights values rather than by deciding outcomes and then making any argument they can in support of the outcome. Justices are ideological in the sense that these polity and rights principles provide definable limits on the range of values that they can use in development of more innovative Court doctrine. The volatility of such principles indicates not a tendency on behalf of the Court to engage in simplistic bargaining as the hallmark of its activity, but rather, an "ideological jurisprudence" that is highly motivated and highly competitive, with certain ends clearly in sight for all justices who hold such principles as key elements of their informed knowledge about an increasingly complex polity Thus, justices differ in the way they view and balance polity and rights

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Constitution was "dedicated to concerns of process and structure and not to the identification of specific substantive rights"); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980) (arguing that the most crucial commitments of the Constitution define "the values that we as a society, acting politically, must respect"). *See also* KAHN, *supra* note 11, at 330-79 (providing a statement of the problems of the Ely and Tribe approaches to constitutional interpretation); Ronald C. Kahn, *Process and Rights Principles in Modern Constitutional Theory* (Book Review), 36 STAN. L. REV. 253, 253, 255 (1984) (reviewing JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984)) (discussing Tribe as arguing for an interpretation of the Constitution as protection for individual rights against government action and characterizing Ely as a scholar who uses complex polity concepts in his work).

principles, and whether they see them as rigid or permeable; in these differences we can explain the growth of constitutional law and see how the wider society and interpretive community are in a dialogue with the Supreme Court.

III. THE FOUNDING, POLITY AND RIGHTS PRINCIPLES, AND THE ESTABLISHMENT CLAUSE

The juxtaposition of polity and rights visions has informed the development of constitutional law throughout the centuries, with the balance between polity and rights visions changing over time. Historically, the clash between polity and rights principles extends back to the founding period, when the Article VII structural credo necessary for ratification of the Constitution at the Philadelphia Convention was countered, or, for some, buttressed by the first ten amendments. In the founding period a central issue was the distribution of power among state/local and national political institutions. The Founders perceived this issue as a question of whether individual rights could be better protected by securing polity principles in the Constitution — establishing limits on national or state power — as compared to protecting individual rights by stating them in the Bill of Rights or stating that natural rights, not listed in the Bill of Rights or the body of the Constitution, continue nevertheless to exist.[21]

Of central concern to both federalists and antifederalists was whether governing bodies of small or large constituencies offer better protection for individual rights. The antifederalists wanted to protect state sovereignty because they felt that states, being smaller and more homogeneous in composition, would be better forums for the teaching of civic virtue and for deliberation. They questioned the federalist assumption that national political institutions and the separation of powers under a theory of national supremacy of law would protect citizen rights, add to the confidence of citizens in the Constitution and the new governing institutions, and protect against the problem of majority and minority factions, a key concern of the federalists.

The federalist theory of government won out over antifederalist arguments. This occurred, in part, because some of

21. *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439-40 (1987) (arguing that the Constitution was a compromise to create a government that is powerful yet with limitations placed on its exercise of power).

the antifederalists themselves feared that the effects of minority factions in the states would retard the economic development and military security of the nation. Yet, the antifederalists, having lost most of the battles over polity principles, secured the listing of individual rights against intrusion by the national government in the Bill of Rights and the main body of the Constitution. Both federalists and antifederalists saw the power of judicial review and judges' lifetime tenure as a means to limit the effects of faction.

Thus, the relationship between the structure of polity and the protection of individual rights was of central concern to both the antifederalists and the federalists. The syntax of this period involved the question of what governmental structures might better protect individual rights and the aggregate interests of all the citizens and the nation as a whole, and thus secure the confidence of the people in the government and the Constitution.[22]

We must understand Establishment Clause principles at the Founding and the presence of separate Establishment and Free Exercise Clauses as part of this larger picture in our evaluation of whether Establishment Clause jurisprudence should rest on a coercion test, incorporating only Establishment Clause free exercise principles. In regard to the Establishment Clause, polity principles inform the relationship between public bodies and private religious institutions, as well as between the government and believers and non-believers, not in their role as holders of free exercise rights, but rather as citizens and public officials concerned about political stability I say this because many polity principles in the Establishment Clause, such as a limitation on the entanglement between government and religion, speak both to the government's relationship to the learning process, and teachers' and students' religious values within parochial schools and the ability of religious institutions to be free of government direction, support, or opposition.

Polity arguments in church and state cases are balanced against the substantive rights interests of individuals, religious minorities, or nonbelievers who cannot count on the institutional support of polity-oriented outcomes for protection.[23] Rights protec-

22. *See* GERALD GARVEY, CONSTITUTIONAL BRICOLAGE 9-25 (1971) (discussing a syntactical approach that explores the fit between law and changes in political culture to the study of constitutional law and politics).

23. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon relgious minorities to conform to the prevailing officially

tion requires the courts to take a more positive, interventionist role, at least potentially Hence, conflicts over dual obligations are at the heart of the Establishment Clause. Free exercise rights central to deciding questions of government establishment of religion are conceived of as either external or internal to a religious institution or activity The religious atmosphere of society and government external to the institutions in question is at issue. Free exercise rights for believers and nonbelievers in a generally hospitable political and cultural environment is the ideal. The question of how the state may encourage such an environment without invoking the clear requirement of the Establishment Clause that the government not signal its support for one religion, or for religion versus non-religion, remains.

The rights principles in church and state cases also involve what I shall label an internal right to individual free exercise of religion within particular institutions. Justices differ as to the external free exercise rights of believers and nonbelievers and the degree to which internal free exercise rights need protection from government intrusion. The question before the justices has not been whether to sanction individual rights or guarantees, but rather how to best integrate and accommodate the general logic of the doctrine regarding separation of church and state and free exercise rights within modern society Thus, the Religion Clauses ask the Court to look at both polity (institutional separation) and substantive rights (free exercise) principles.

Analysis of religious liberty and separation of church and state, like property, are part of the broader separation of thought and reality into public/political and private/civil spheres under liberal theory [24] This tension has allowed for much leeway in judicial policy-making and has generated a surprisingly wide spectrum of disputes in modern judicial interpretations of church and state doctrine, which center around both polity and rights principles in the Establishment Clause.

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approved religion is plain."); McGowan v. Maryland, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting) ("A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected — unless it crosses the line of criminal conduct.").

24. *See* KARL MARX, *On the Jewish Question*, *in* THE MARX-ENGELS READER 24, 26 (Robert Tucker ed., 2d ed. 1978) (discussing the relationship of religious liberty and the separation of church and state to larger questions of the separate public and private spheres in liberal theory).

Absolute state neutrality toward any religion — the "wall-of-separation" judicial view — has had some prominent adherents on the Court, and the Court abides mainly to a strict adherence to the prohibitions imposed on the government by the Establishment Clause.[25] This principle of hermetically sealed, exclusive spheres of church or state is a polity principle that many justices have seen as unrealistic in the light of modern-day complexity Other justices see separation as the only means of maintaining the integrity of religious practice and principled adjudication by the Supreme Court in protection of such rights.[26] For Dean Smith and Professor Paulsen, the Establishment Clause's institutional separation polity principles are viewed as a restriction on government, as limiting state accommodation to religion.[27] They view sole reliance on the free exercise-based coercion test, the eschewing of all polity principles, as the way out of this dilemma.

IV THE COERCION TEST, *WEISMAN*, AND THE REHNQUIST COURT

Dean Smith and Professor Paulsen argue that *Lee v. Weisman*,[28] *Texas Monthly v. Bullock*,[29] and *Allegheny County v.*

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25. *See, e.g.*, Robert F. Kane & Fred M. Blum, *The International Year of Bible Reading — The Unconstitutional Use of the Political Process to Endorse Religion*, 8 N.Y.L. SCH. J. HUM. RTS. 333, 346-47 (1991) ("In 1947 the Supreme Court recognized that the establishment clause was intended, in the words of Thomas Jefferson, to erect 'a wall of separation between Church and State. In recent years, however, Jefferson's wall of separation has been besieged and some justices have even threatened to dismantle it. Nevertheless, most acknowledge that, at a minimum, the establishment clause means that neither Congress nor states may pass a law which grants a preference to a particular religion or sect.").

26. *See, e.g.*, School Dist. of Abington v. Schempp, 374 U.S. 203, 256 (1963) (Brennan, J., concurring) (stating that "the Establishment Clause [is] a co-guarantor, with the Free Exercise Clause, of relgious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone."). *See also* Note, *Rethinking the Incorporation of the Establishment Clause*, 105 HARV. L. REV. 1700, 1711 (1992) (noting Justice Brennan's implicit suggestion "that a separation of church and state is necessary for religious liberty").

27. Paulsen, *supra* note 2, at 810 ("The First Amendment does require 'separation' or 'non-entanglement, but it does so as a matter of the Free Exercise Clause's protection of religion from government intrusion on personal and institutional religious autonomy. That is, religion may be entitled to a private sphere separate and independent from its regulations."); Smith, *supra* note 2, at 930-35 (arguing that it is clear that the majority in *Weisman* viewed the Establishment Clause as significantly limiting government coercion of conscience).

28. 112 S. Ct. 2649 (1992).

29. 489 U.S. 1 (1989).

ACLU[30] offer clear evidence that the Rehnquist Court is moving towards a free exercise, rights only coercion test as the basis for its Establishment Clause decisionmaking. In so doing they must expect that the traditional constitutive decisionmaking process does not apply to Establishment Clause cases. They advocate a constitutional theory of the Establishment Clause that is based only on free exercise principles.

Their primary concerns center on the lack of clarity, and substance, of the components of the Rehnquist Court's coercion test found in *Weisman* and prior decisions. Dean Smith views his primary contribution as making suggestions as to how the Court can improve and clarify coercion principles.[31] Professor Paulsen, using more dramatic language, cheers the death of the *Lemon* test, and the use of polity principles in Establishment Clause jurisprudence, and advocates that the Court stop waffling in establishing the coercion test so that government can accommodate religions and the religious.[32]

Dean Smith mistakenly argues that the Rehnquist Court is willing to focus on free exercise rights as at the core of Establishment Clause principles:

> *Weisman* and *Texas Monthly* demonstrate that the Court is willing to permit government accommodation of conscience under the aegis of the Establishment Clause [T]he Court is willing to focus on the notion of conscience in Establishment Clause cases and often refers to that notion as a right. Unfortunately, however, the Court has been distracted by disagreements over coercion and endorsement, and has ignored the need to pursue questions raised by the use of conscience — the term of preference for the majority in Establishment Clause analysis.[33]

Polity principles raised by an endorsement test are viewed as a distraction to what is really needed: a coercion test with clear principles of how to protect free exercise rights as at the core of the Establishment Clause. We see Dean Smith's emphasis on view-

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30. 492 U.S. 573 (1989).

31. Smith, *supra* note 2, at 957 (arguing that the Supreme Court needs to formulate a coercion theory).

32. Paulsen, *supra* note 2, at 833-34 (arguing for refinement to the coercion test if it is to be a permanent successor to *Lemon*).

33. Smith, *supra* note 2, at 934-35.

ing free exercise rights as now at the core of Establishment Clause cases in his lament that recent Free Exercise Clause cases have supported the restriction of free exercise rights.[34]

Dean Smith's support of the legitimacy of a coercion test, as opposed to Establishment Clause jurisprudence based on polity principles, becomes apparent in his argument that the Founders were men of the enlightenment who "may well have believed that rights could be expanded but not contracted (in a ratchet like sense), and that the right of religious exercise would be expanded to provide a broader right of conscience. "[35] He does not view this as non-originalism, but rather as the work of originalists who are not narrowly deferential to text, "who endeavor to remain true to the natural rights or libertarian aspirations of the Framers in interpreting the Constitution."[36] Having accepted a coercion principle for all Establishment Clause jurisprudence, the problem for Dean Smith centers on what he calls the "attenuation" problem, which is to explore the cost to religions and the religious if freedom of conscience, rather than freedom of religion, become the core of the coercion test and Establishment Clause jurisprudence.[37]

Professor Paulsen, like Dean Smith, favors coercion principles as the best single test for Establishment Clause cases.[38] He also views Establishment Clause questions as limited to issues of individual free exercise rights and is far more ringing in his endorsement of the coercion test, with no polity principles, as a basis for Establishment Clause jurisprudence. Professor Paulsen's objective is to encourage the coercion test as the "doctrinal successor" to the *Lemon* test.[39] He writes:

> I believe that the coercion principle, properly understood, is the best single test of when government action violates the Establishment Clause. The Establishment Clause of the First Amendment is about direct and indirect forms of government compulsion in matters of religious exercise. The principle may be summarized as follows: *Government may not, through direct legal sanction (or threat thereof) or as a condition of some other right, benefit, or privilege, require*

34. *Id.* at 948 & n.91.
35. *Id.* at 947.
36. *Id.* at 947 n.90.
37. *Id.* at 949-50.
38. Paulsen, *supra* note 2, at 797.
39. *Id.*

> *individuals to engage in acts of religious exercise, worship, expression or affiliation, nor may it require individuals to attend or give their direct and personal financial support to a church or religious body or ministry.*
>
> In forbidding government coercion to engage in religious activity, the Establishment Clause is the perfect complement to the Free Exercise Clause, which also prohibits direct and indirect forms of government compulsion in matters of religious exercise. The two clauses protect a single central liberty — religious freedom — from two different angles. The Establishment Clause prohibits the use of coercive power of the state to *prescribe* religious exercise; the Free Exercise Clause prohibits the use of government compulsion to *proscribe* religious exercise.[40]

Professor Paulsen, like Dean Smith, does not like the statement of coercion test principles by Justice Kennedy, because it is overly concerned with private, as opposed to direct public coercion. He argues, "There is language in Kennedy's majority opinion that is greatly disturbing in its confusion of private and state action in considering what should count as unconstitutional coercion. And that confusion of private and state action is a point worth arguing about."[41] Paulsen opposes a principle of government neutrality to religion and believes it is proper for government to aid religions. Government must only not influence religious conduct. However, unlike Dean Smith, Professor Paulsen supports the holding of the *Weisman* decision. The invocation is a violation of his conception of a coercion test.[42] Professor Paulsen is even more adamant than Dean Smith in his support of free exercise rights as at the core of the Establishment Clause, his opposition to institutional entanglement and political divisiveness principles, and his conflation of polity and free exercise principles. He writes,

> The First Amendment does require "separation" or "nonentanglement," but it does so as a matter of the Free Exercise Clause's protection of religion from government intrusion on personal and institutional religious autonomy That is, religion may be entitled to a private sphere separate and independent from government power and immune from its

40. *Id.* at 797-98 (footnotes omitted).
41. *Id.* at 821.
42. *Id.* at 799.

> regulations. It never was legitimate to use the idea of separation to authorize *discrimination* against religion within the public sphere.[43]

Paulsen is most adamant in his opposition to a separate excessive entanglement prong of the *Lemon* test. He argues, "First, the [excessive entanglement] test belonged on the free exercise side of the coin."[44] The entanglement test was not to be "a means of coercing, promoting, or even endorsing religion."[45] Paulsen argues only a religious person, or group, may claim government entanglement under the Free Exercise Clause.[46] There are no collective institutional concerns about fears of religious and political conflict in Paulsen's view of the entanglement test. However, he admits the entanglement principle in Establishment Clause jurisprudence is still alive, but in a "defanged" form, due to recent cases.[47]

V POLITY PRINCIPLES, *WEISMAN*, AND THE REHNQUIST COURT

Much evidence contrary to the Dean Smith and Professor Paulsen view that the coercion test has become the sole or primary standard of the Rehnquist Court exists. In the *Weisman* majority opinion Justice Kennedy considers both polity and rights principles and concerns. Only after considering polity-institutional-entanglement-political divisiveness concerns does Kennedy move to issues of the coercion of students and the freedom of conscience.[48] In addition, Justice Kennedy makes it clear that the Establishment Clause, unlike the Free Speech Clause, is a specific prohibition to forms of state intervention into religious affairs which has no precise counterpart in the Speech Clause of the First Amendment.[49]

Justice Kennedy emphasizes that the Founders feared that de-

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43. *Id.* at 810.

44. *Id.* at 809.

45. *Id.*

46. *Id.*

47. *Id.* at 809. It is interesting that although Paulsen views the entanglement prong as too unprincipled and too subjective, he argues that the prayer in *Weisman* might have been permitted under the *Lemon* test's no excessive entanglement prong because of the nature of the guidelines that were given to clergy each year and the lack of entanglement between school board and local clergy once they received the guidelines. *Id.* at 820 n.100.

48. Lee v. Weisman, 112 S. Ct. 2649, 2655-58 (1992).

49. *Id.* at 2657 (The First Amendment protects freedoms of religion and speech differently: It spells out specific prohibitions on state interference with religion and no such specificity for speech.).

mocracy would be hurt if it were to dabble in religious ideas, which may move to indoctrination.[50] The state protects individual conscience, but it also is guided by polity/institutional norms as well. These two concerns are not conflated under a liberty of religious thought, as Dean Smith and Professor Paulsen would have us believe.

Kennedy is concerned about political divisiveness. He writes, "The reason for the choice of the rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent."[51] He continues,

> Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempt's to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment. [52]

The fact that there is no real alternative way for the student to participate in the graduation heightens for Kennedy the fear of political divisiveness.[53] Thus, while Justice Kennedy does not necessarily view political divisiveness alone as a trigger to suggest a denial of religious freedom, neither does he merely view coercion of the individual child or of a member of the clergy as the only concern the Court must examine in considering questions of establishment of religion. The fact that coercion of the child in this case is enough to invalidate the prayer and that coercion can be a sufficient cause of invalidating government establishment of religion, does not mean that Kennedy believes that coercion alone may be the only basis for the invalidation of government accommodation of religion. Polity principles, such as no entanglement or political divisiveness, may be a cause as well.

Moreover, Justice Kennedy emphasizes that the preservation and transmission of religious beliefs and worship is a responsibility

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50. *Id.* at 2658 (Justice Kennedy states that history teaches "the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce.").

51. *Id.* at 2655.

52. *Id.* at 2655-56.

53. *Id.* at 2656 (Justice Kennedy notes that, for all practical purposes, students are obligated to attend graduation).

committed to the private sphere.[54] The private sphere is to have a freedom to pursue that mission.[55] This notion of the difference between the public and private spheres, and the need for each to be viewed in different and separate terms, is not the language of a justice only thinking in terms of individual rights or free exercise The language expresses concern about institutional separation. Kennedy writes, "It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting non-believer, these same Clauses exist to protect religion from government interference."[56] Here we see Justice Kennedy speaking about protecting the rights of both believer and non-believer, as well as religious institutions from government.

For Justice Kennedy, the school board demeans the democratic process by acting in such a way as to devalue the participation of members and demand a level of homogeneity[57] Dean Smith views this point by Kennedy as an aside,[58] when in fact the justice is referring to institutional, not individual conscience, aspects of Establishment Clause principles. Nor does Smith deal with the point by Justice Kennedy that when cultural or private coercion is supplemented, or endorsed, by public action, it becomes almost overwhelming by carrying the imprimatur of the state.[59] That is, he does not see that when an individual's conscience is tested by the state endorsing religion, her conscience is devalued by government.

An examination of the concurring opinions in *Weisman* offers additional evidence that the Rehnquist Court will continue to apply polity principles in Establishment Clause jurisprudence. Justices Blackmun, Souter, O'Connor, and Stevens view entanglement and

54. *Id.* ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.").

55. *Id.*

56. *Id.* at 2656-57.

57. *Id.* at 2656.

58. Smith, *supra* note 2, at 932.

59. *Weisman*, 112 S. Ct. at 2655 ("The State's involvement in school prayers challenged today violates [the] central principles [of the Establishment Clause]."). *See also* School Dist. of Abington v. Schempp,. 374 U.S. 203, 222 (1962) ("The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.").

institutional concerns as important strands of Establishment Clause decisionmaking.

In Blackmun's concurrence, joined by Justices Stevens and O'Connor, we see the following institutional/entanglement/political divisiveness argument: Government may not promote or affiliate with any religious doctrine or organization, nor may it intrude itself into the internal affairs of any religious institution.[60] Blackmun draws on the wall of separation language in *Everson v. Board of Education*.[61] After stating the *Lemon* test, he writes, "After *Lemon*, the Court continued to rely on these basic principles in resolving Establishment Clause disputes."[62] To Blackmun, the prayer at the Nathan Bishop Middle School violates the *Lemon* test.[63] Blackmun notes that since 1971, in all but one of thirty-one Establishment Clause cases, *Marsh v. Chambers*,[64] the Court has rested its decisions on basic principles of *Lemon*, as it did in *Board of Education v. Mergens*[65] — allowing equal access for religious and non-religious based groups to high schools.[66] Blackmun emphasizes that proof of government coercion is not a necessary, but is a sufficient, condition to prove an Establishment Clause violation.[67] Blackmun also notes that the First Amendment includes two distinct guarantees: that government shall make no law respecting the establishment of religion and that government not prohibit the free exercise of religion.[68]

In contrast to the Paulsen and Smith analyses, Justices

60. *Weisman*, 112 S. Ct. at 2661-62 (Blackmun, J., concurring).

61. *Id.* at 2662. According to Justice Blackmun, Justice Black's opinion in *Everson* provides the outline of the considerations that have become a fundamental part of Establishment Clause jurisprudence. *Id.* (citing Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)). In *Everson*, Justice Black had expanded on Jefferson's wall of separation, enumerating the many ways in which government is forbidden to interact with religion. *Everson*, 330 U.S. at 15-16.

62. *Weisman*, 112 S. Ct. at 2662 (Blackmun, J., concurring).

63. *Id.* at 2664 (stating that prior decisions of the Court prohibit allowing the prayer in this case).

64. 463 U.S. 783 (1983) (Upholding the use of a prayer to open sessions of the Nebraska legislature. The Court did not rely on *Lemon* and instead held that despite the facts that a minister of the same denomination had been used for a number of years and was paid at the public expense, and that the prayers were Judeo-Christian, the prayer, when weighted against historical background, was not invalid under the Establishment Clause.).

65. 496 U.S. 226 (1990).

66. *Weisman*, 112 S. Ct. at 2663-64 n.4 (Blackmun, J., concurring).

67. *Id.* at 2664.

68. *Id.* at 2665.

Blackmun, Stevens, and O'Connor, as well as Justice Kennedy, view individual rights and institutional aspects of the Establishment Clause as separate and distinct, even though as with all constitutional decisionmaking, justices differ as to the emphasis they place on individual rights and polity principles. In this case Justice Kennedy finds he does not have to resort to polity principles of entanglement. He is not, however saying they are not part of Establishment Clause decisionmaking.

Most importantly, Justice Blackmun, joined by O'Connor and Stevens, emphasizes, "When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation."[69] "The mixing of government and religion can be a threat to free government, even if no one is forced to participate."[70]

The institutional separation of religion and government helps both government and religious institutions. This is not an individual coercion argument. Protecting democratic politics from conflict is key to Blackmun, Stevens, and O'Connor. Blackmun writes, "To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform."[71]

Moreover, Justice Souter, joined by Justices Stevens and O'Connor, offers a concurring opinion in which he argues that a simple non-preference to the establishment of a single religion is not the standard, because non-preferentialism requires the Court to make theological distinctions, a polity or institutional problem for Souter.[72] The Constitution protects non-believers as well as believers from governmental, and Court, entanglement in religion.

Souter, after specifically referring to Michael McConnell's scholarship on the coercion standard,[73] writes, "But we could not adopt that reading without abandoning our settled law, a course that, in my view, the text of the Clause would not readily per-

69. *Id.* at 2666.

70. *Id.* at 2665.

71. *Id.* at 2667.

72. *Id.* at 2671 (Souter, J., concurring) (Non-preferentialism requires courts to distinguish between sectarian and ecumenical religious practices. The former would violate the Establishment Clause while the latter would not.).

73. *See generally* McConnell, *supra* note 8.

mit."[74] Souter, in supporting *stare decisis*, a general polity principle with regard to the process of judicial review, and polity as well as rights principles in the Establishment Clause, lists non-coercive state laws which the Supreme Court has not allowed to stand in the *County of Allegheny v. ACLU*,[75] *Grand Rapids School District v. Ball*,[76] and *Epperson v. Arkansas*.[77]

Moreover, Justice Souter also rejects "'non-preferential' state promotion of religion" as constitutionally permissible, whether or not there is proof of coercion.[78] For Justice Souter, even though this case is concerned with freedom of conscience for believer and non-believer alike, this does not mean that the Establishment Clause is to be evaluated only under an individual rights test.[79] Therefore, Justices Souter, O'Connor, Stevens, Blackmun, and Kennedy have all indicated that polity, institutional principles, will and should play a role in Establishment Clause jurisprudence.

Dean Smith admits the importance of polity principles to these justices when he argues that it is difficult to view the Rehnquist Court as moving towards a simple coercion test.[80] Smith notes that Blackmun emphasizes that in prior Supreme Court cases, the Court has prohibited state endorsement of religion, its sponsorship, and "active involvement in religion, whether or not citizens are coerced."[81]

In making his argument for the Rehnquist Court moving to a coercion standard, Smith understates the significance of Justice O'Connor's use of the endorsement test rather than the coercion test as articulated by Justice Kennedy in *Weisman*. Smith justifies this by arguing that the focus of his article is on the meaning of and justification for the protection of conscience.[82] He fails to rec-

74. *Weisman*, 112 S. Ct. at 2671 (Souter, J., concurring).

75. 492 U.S. 573 (1989) (holding the display of a creche in the county courthouse during the holidays is an impermissible government endorsement of religion).

76. 473 U.S. 373 (1985) (holding supplementary program offering remedial and enrichment courses to non-public school students impermissibly promotes religion even though the courses were not religious classes).

77. 393 U.S. 97 (1968) (holding state law prohibiting the teaching of evolution in state supported schools or universities is not religiously neutral).

78. *Weisman*, 112 S. Ct. at 2671-72 (Souter, J., concurring).

79. *See id.* at 2676-77 ("Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules ").

80. Smith, *supra* note 2, at 957-58 (contending that both the majority and dissent relied on differing versions of the coercion test).

81. *Id.* at 932 (quoting *Weisman*, 112 S. Ct. at 2667 (Blackmun, J., concurring)).

82. *Id.* at 927 n.27.

ognize that a government endorsement test has within it institutional or polity principles about the separation of church and state, not only principles about the free exercise rights of individuals.

Smith limits his concerns about both the endorsement and coercion tests to their indeterminacy when they stand alone. For Smith these tests will only have meaning when we have clear standards as to whether they refer to religion or conscience.[83] Smith's definition of indeterminacy as the core problem in Establishment Clause cases leads him to disregard a full range of issues which are central to fully evaluating the coercion test and whether the Rehnquist Court has moved, or is moving, toward viewing Establishment Clause cases in individual free exercise rather than polity/institutional terms.

In opposition to the major premise of his article, Dean Smith notes that Justice Kennedy has moderated his views on the right of conscience as the basis for Establishment Clause decisions[84] and that Justice Brennan's plurality decision, joined by Justices Marshall and Stevens, in *Texas Monthly v. Bullock*[85] made reference to endorsement, not coercion, as the government action being questioned.[86] Moreover, Smith argues that *Texas Monthly* and *Weisman* demonstrate the inclination of the Rehnquist Court "to move toward an Establishment Clause jurisprudence based on accommodation (in a nonpreferential way) of conscience; however, the Justices have neither justified nor explained the reasons supporting such a move."[87] They have not justified such a move affirmatively because as yet there is not a majority to do so.

VI. THE *LEMON* TEST IS NOT DEAD: ITS SEEDS ARE MERELY SCATTERED

Professor Paulsen argues in the early pages of his article that the *Lemon* test is dead and has been replaced with a coercion test.

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83. *Id.* at 928 n.27.

84. *See id.* at 927 n.26.

85. 489 U.S. 1, 15 (1989) (The Court concluded that the state's narrow sales tax exemption for religious publications was a violation of the First Amendment since it appeared to be a clear case of state sponsorship of religion. The Court held that when there is a subsidy granted by the state that is not required by the Free Exercise Clause and the subsidy "either burdens nonbeneficiaries markedly or cannot be reasonably seen as removing a significant state-imposed deterrent to the free exercise of religion," it sends a message of endorsement.).

86. Smith, *supra* note 2, at 927 n.27.

87. Smith, *supra* note 2, at 950.

Paulsen writes:

> My proposition in this article is that the Court has indeed interred the *Lemon* test and replaced it with the coercion test, albeit one of uncertain parameters and an uncertain future. I do not mourn *Lemon's* passing. There was much that was dreadfully wrong with *Lemon* during its approximately twenty-year life and we are better off without it. I come not to praise *Lemon*, but to bury it.[88]

Paulsen continues, "Let the joyous word be spread, *Lemon v. Kurtzman* at last is dead!"[89]

The *Lemon* test requires that a government law or conduct 1) have a secular purpose; 2) have a "primary effect" that "neither advances nor inhibits religion"; and 3) not foster "excessive entanglement" of the state with religion.[90] Paulsen argues that the test has major flaws and is quite ambiguous, and "packaging the test as one in which all three requirements must be satisfied compounded these problems by cumulating them."[91] The major problems with the test for Paulsen are the following: 1) it improperly assumes that "the Establishment Clause imposes a constitutional disability *on religion*;"[92] 2) it is not protective of the freedom of religion, which he views as the primary objective of the Establishment Clause;[93] 3) it does not allow government accommodation of religion;[94] 4) it (incorrectly) assumes that the Free Exercise and Establishment Clauses have different objectives — one to stop government accommodation of religion, the other to allow free exercise of religion.[95] For Paulsen, the Establishment Clause is not an "anti-religion" counterweight to the "pro-religion" Free Exercise Clause.[96] Rather, like Smith, Paulsen believes protection of religious liberty is the objective of both Religion Clauses.[97]

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88. Paulsen, *supra* note 2, at 797.
89. *Id.* at 799.
90. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
91. Paulsen, *supra* note 2, at 800-01.
92. *Id.* at 801.
93. *Id.*
94. *Id.*
95. *Id.* at 801-02.
96. *Id.* at 801.
97. In so doing, Professor Paulsen is presenting a synopsis of the argument he developed in a previous article. *See* Michael S. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) (Paulsen maintains "that the Establishment Clause protects

Paulsen argues the following points in support of the death of the *Lemon* test: 1) the "primary effects" prong of the *Lemon* test is undermined in *Bowen v. Kendrick*,[98] *Mueller v. Allen*,[99] and *Widmar v. Vincent*;[100] 2) Justice Kennedy provided the key fifth vote in *Kendrick*, a case in which religious organizations were allowed government support for abortion and sexual counseling;[101] 3) since 1989, five justices have not supported some aspect of the *Lemon* test;[102] and 4) *Mergens*, *Allegheny County* and *Texas Monthly* are evidence that there is no majority for the *Lemon* test.[103]

However, within the Paulsen article there is evidence that the *Lemon* test may not be as dead as he boldly declares. He admits that Blackmun supports Establishment Clause principles of no government preference for religion, no entanglement in religious organization, and no endorsement tests, institutional separation aspects of the *Lemon* standard.[104] He also correctly views the concern of Justices Souter, Stevens and O'Connor for following precedent as indications that principles within the *Lemon* test may not be dead.[105]

Paulsen admits that it is Justice Scalia's dissent, joined by

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religious liberty; it safeguards much the same interests as the Free Exercise Clause but in a slightly different way. The Free Exercise Clause defines the important individual liberty of religious freedom while the Establishment Clause addresses *the limits of allowable state classifications affecting this liberty.*").

98. 487 U.S. 589 (1988) (holding federal grants to organizations providing services or conducting research related to teenage sexual relations and pregnancy did not have the effect of advancing religion despite allocation of funds to religiously affiliated organizations).

99. 463 U.S. 388 (1983) (upholding a Minnesota tax law allowing parents who send their children to private schools to deduct educational expenses as satisfying the primary effect inquiry).

100. 454 U.S. 263 (1981) (allowing religious groups free access to a state university forum created for student groups did not have the primary effect of advancing religion). *See also* Paulsen, *supra* note 2, at 811 (discussing the reinterpretation of the primary effect prong to more closely equate substantive neutrality).

101. Paulsen, *supra* note 2, at 811.

102. *Id.* at 812-13.

103. County of Allegheny v. ACLU, 492 U.S. 573 (1989); Board of Educ. v. Mergens, 496 U.S. 226 (1990); Texas Monthly v. Bullock, 489 U.S. 1 (1989). *See also* Paulsen, *supra* note 2, at 819 ("In the Court's three most recent Establishment Clause decisions, *Texas Monthly*, *Allegheny County*, and *Mergens*, the *Lemon* test had failed to command a majority.").

104. Paulsen, *supra* note 2, at 824.

105. *Id.* at 824-25 (noting Justice Souter's remarks that "we could not adopt that reading without abandoning settled law") (citing Lee v. Weisman, 112 S. Ct. 2649, 2671 (1992) (Souter, J., concurring)).

Chief Justice Rehnquist and Justices White and Thomas, rather than the majority opinion in *Weisman*, which declares the *Lemon* test dead.[106] He validly argues, "One should always be wary of such declarations of doctrinal death in dissents," especially since Scalia overstates the degree to which psychological coercion is "the very linchpin of the Court's opinion."[107]

In less ringing language than in the early stages of the article, Paulsen writes, "It is fair to read *Weisman* as having quietly discarded the [*Lemon*] test."[108] Paulsen tries to explain the failure of Kennedy's majority opinion in *Weisman* to formally declare *Lemon* dead, while arguing that it has been interred, as Kennedy's need to engage in "artful formulations" of the standard as required by the needs of a majority opinion writer on a Court in which the other four justices oppose a simple coercion test.[109]

In so doing, Paulsen incorrectly suggests that Kennedy's *Allegheny* formulation of a coercion test is both a doctrinal minimum and maximum for Justice Kennedy This argument is only valid if we do not take seriously the polity principles and views about the Court's role and *stare decisis* that Justice Kennedy supports in the joint opinion with Justices O'Connor and Souter in the *Casey* decision.

Finally, Paulsen admits, "There is room to fear backsliding, especially by Justice Kennedy," the critical fifth vote.[110] He views the possibility of backsliding if there is "some unnatural marriage of the coercion test to O'Connor's endorsement test — sort of a 'coercion-by-endorsement test that (sometimes) deems 'coercive' state action that 'endorses' religion in a sufficiently strong sense to be deemed government 'proselytization.'"[111] It is interesting that Paulsen views the coercion test, which he argues is replacing the *Lemon* test, as also unclear and unstable.[112]

Further evidence that the *Lemon* test is not dead is that Justice Blackmun, joined by Stevens and O'Connor, goes well beyond coercion as a test of government establishment of religion.[113] For

106. Paulsen, *supra* note 2, at 821.

107. *Id.* at 821 & n.102 (quoting *Weisman* at 2681).

108. *Id.* at 822.

109. *Id.* at 822-25 (arguing that Kennedy's opinion merely papered over the Court's differences).

110. *Id.* at 862.

111. *Id.* at 862-63.

112. *Id.* at 862 (noting that divisions in the Court make the new standard both unclear and unstable).

113. *See Lee v. Weisman*, 112 S. Ct. 2649, 2664-67 (1992) (Blackmun, J., concurring)

these justices coercion is sufficient, not only necessary, in order to find an Establishment Clause violation. In addition, Justice Souter, joined by Justices Stevens and O'Connor, not only rejects the coercion test as a limiting principle, but adds the notion, as in the *Casey* joint opinion, that settled law requires its maintenance.[114] Paulsen invalidly concludes that Justice Kennedy thinks coercion is all that the Establishment Clause prohibits.[115] He also incorrectly argues that: "It is clear, then, that the real *doctrinal* majority consists of Justice Kennedy and the four *Weisman* dissenters. The emergence of this new doctrinal majority is the big news of the case."[116] Paulsen then hedges his bets, and indicates concerns about Kennedy's reliance on coercion as the sole Establishment Clause test, when he writes, "If Kennedy indeed remains in the 'coercion' camp, then it may be further concluded that *Weisman* has not only interred the *Lemon* test, but has replaced it with some form of coercion test."[117]

VII. THE *CASEY* DECISION, THE REHNQUIST COURT, AND FUTURE ESTABLISHMENT CLAUSE JURISPRUDENCE

To understand why the Rehnquist Court will not eschew polity principles within the Establishment Clause, we must realize that the Rehnquist Court, like the Court eras before it, makes decisions based on a constitutive decisionmaking process which fashions choices from polity and rights principles. The 1992 Court Term is no exception to this rule. It shows the Rehnquist Court developing key polity and rights principles to guide future Court decisionmaking. We also must emphasize that general polity principles that are held by justices, and stated in contemporaneous cases that are outside the primary doctrinal area under discussion (Establishment Clause jurisprudence here), can inform the future direction of that doctrinal area better than reading a recent case (*Weisman*).

The Supreme Court's landmark abortion decision in *Planned Parenthood v. Casey*,[118] especially the rare joint plurality opinion

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(stating that the government must do more than restrain from compelling religious activity — it must also not engage in religious activities because to do sends a message of exclusion to people who do not practice the endorsed beliefs).

114. *Id.* at 2671 (Souter, J., concurring).

115. Paulsen, *supra* note 2, at 825.

116. *Id.*

117. *Id.*

118. 112 S. Ct. 2791 (1992).

by Reagan/Bush appointees O'Connor, Souter, and Kennedy, is such a contemporaneous decision. It has important implications for whether a majority of the Rehnquist Court will disregard polity principles in the Establishment Clause, past precedents, and the *Lemon* test. Moreover, it confirms that individual justices, including Justice Kennedy, and the Court as a collective decisionmaking institution, make constitutional choices based on both individual rights values, and key polity principles, including: a commitment to *stare decisis*, Supreme Court autonomy from the majoritarian political system, and the role of the Court as a counter-majoritarian institution in our system of checks and balances. *Casey* is a landmark decision because it sets out polity principles for this Court to follow in the future, not only on abortion rights, but in other doctrinal areas.

To understand the landmark decisions of the 1992 Term, including *Planned Parenthood v. Casey* as well as *Lee v. Weisman*,[119] *R.A.V v. St. Paul*,[120] and *United States v. Fordice*,[121] we must keep in check our usual tendencies to think of the Supreme Court as a policy-making institution, concerned mainly with fundamental rights and following the majority coalition in power. To understand these decisions, we must focus on both important rights principles and polity principles. The first polity reason that the *Casey* joint opinion gives for reaffirming *Roe v. Wade*[122] is the Court's continuing commitment to *stare decisis*, or following precedent: "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[123] The plurality makes it clear that a commitment to precedent is an important source of Court legitimacy in a system of checks and balances.

Moreover, Justices O'Connor, Souter, and Kennedy craft an important new test in *Casey* for when the Court should overturn past decisions. The joint opinion states that decisions will only be overruled if they 1) prove unworkable in practice, 2) cause inequities in effect, 3) damage social stability, 4) are abandoned by society, or 5) rely on key fact assumptions which have changed.[124]

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119. 112 S. Ct. 2649 (1992) (graduation prayers).
120. 112 S. Ct. 2538 (1992) (hate speech).
121. 112 S. Ct. 2727 (1992) (university desegregation).
122. 410 U.S. 113 (1973).
123. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992).
124. *Id.* at 2809.

Applying this test to *Roe v. Wade*, the plurality finds that it meets none of the conditions.[125]

In addition, the joint opinion states, "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."[126] A commitment to developing polity and rights principles guides all but the most conservative (originalist) justices, leading the plurality in *Casey* to reaffirm the central holding of *Roe* and strengthen the right of abortion choice: "the reservations any of us have in reaffirming the central holding in *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."[127]

Most important, the justices in *Casey* emphasize the polity principle that the Court is and should be autonomous of the political branches of government. Justice Blackmun, for example, in a concurring opinion states that since its founding, our country "has recognized that there are certain fundamental liberties that are not to be left to the whims of an election."[128] This concern that the Court remain a counter-majoritarian institution prevents it from following the lead of the majority coalition or the policy wants of individual justices. Rather than follow the lead of political or cultural elites, the Court seeks to uphold precedent, the rule of law, and its legitimacy *Casey* shows three Reagan/Bush appointees, and Justices Blackmun and Stevens, committed to the polity principle of maintaining the Court's autonomy, even though that means rejecting the Bush administration's policy wants, as well as the personal policy wishes of individual justices.

Evidence for the Court's commitment to autonomy as an important polity principle abounds in *Casey*. The joint opinion makes frequent mention of the danger to the Supreme Court's legitimacy that would come from overturning *Roe*. The joint opinion recognizes the "political pressure" on the Court to overturn *Roe*, but fears "an unjustified repudiation of the principle on which the Court staked its authority in the first instance."[129] The plurality further recognizes that "to overrule under fire in the absence of the most

125. *Id.* at 2809-12 (the Court considers and rejects each reason).
126. *Id.* at 2806.
127. *Id.* at 2808 (emphasis added).
128. *Id.* at 2854 (Blackmun, J., concurring in part and dissenting in part).
129. *Id.* at 2815.

compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[130] Finally, Justice Blackmun's concurring opinion seems to offer a clear rebuke of the Bush administration: "What has happened today should serve as a model for future Justices and as a warning to all who have tried to turn this Court into yet another political branch."[131]

Thus, Justices O'Connor, Kennedy, Souter, Blackmun and Stevens each hold polity principles that do not trust the majoritarian political system to protect individual rights. In *Casey*, these key polity principles are a respect for *stare decisis*, a commitment to Court autonomy from politics, and a concern for the Court's legitimacy and the rule of law In addition, we see alternative polity principles in Chief Justice Rehnquist's, Justice Thomas's, and Justice Scalia's deep trust of the political system to decide questions of individual rights.

The cases in the 1992 Term suggest that there are two groups of justices. One group, consisting of O'Connor, Souter, Kennedy, Blackmun, and Stevens hold polity principles that favor *stare decisis*, the rule of law, and continuing the place of the Supreme Court as a counter-majoritarian institution in our system of separation of powers. A second group, consisting of Chief Justice Rehnquist and Justices White, Scalia and Thomas hold polity principles that are more trusting of majoritarian politics to resolve individual rights questions; principles would undermine the settled constitutional rights when they personally disagreed with them. The first group of justices have staked out a new path for the Court — rejecting the originalist position of Rehnquist, Scalia, and Thomas, thus maintaining a commitment to the rule of law and developing polity and rights principles.

Justices also hold different views of what rights principles are at issue in *Casey* and how much the political system can be trusted to protect these principles. Most important, *Casey* shows that rights principles are not static, but continue to evolve as our nation changes. The plurality gives greater voice than ever before to a new right of personhood which complements and even enlarges the right of privacy developed in *Griswold v. Connecticut*,[132]

130. *Id.*

131. *Id.* at 2845 (Blackmun, J., concurring in part and dissenting in part).

132. 381 U.S. 479, 480 (1965) (holding that marriage is "within the zone of privacy created by several fundamental constitutional guarantees" and striking down a statute prohibiting the use of contraceptives).

Eisenstadt v. Baird,[133] and *Roe v. Wade*.[134]

It is true that the Court in *Casey* somewhat restricts the ability of women to procure an abortion from the near absolute right of privacy in *Roe*. This is due to a heightened recognition of the states' interest in protecting potential life. The point is not that the Rehnquist Court supports *Roe v. Wade* root and branch, for obviously it does not. What is important is that *Casey* demonstrates that polity and rights principles evolve in such a way that the Court refuses to think of itself as merely a policy-making institution. *Casey* is more than a confirmation of the central premise, even if in weakened form, of *Roe v. Wade*'s creation of a woman's right to abortion choice. *Casey*, when read in the light of the other landmark cases of this extraordinary Court session, is a clear statement that Justices Souter, O'Connor, and (most surprisingly) Kennedy have decided to make constitutional choices based on the precedents of the past and in light of the new complexities of life in the United States.

An analysis of *Lee v. Weisman*,[135] in light of the polity principles in *Planned Parenthood v. Casey*, offers additional evidence that the Rehnquist Court will not end constitutive decisionmaking in Establishment Clause jurisprudence. Justice Kennedy refused to uphold a junior high school's use of prayer at graduation ceremonies despite encouragement from the Bush administration to do so.[136] As in *Casey*, *Weisman* shows traditionally "conservative" Justices Kennedy, O'Connor, and Souter staking out polity and rights principles to guide the Court in the future.

The *Weisman* majority emphasizes the Court's autonomy from politics and the need for the Court to follow established precedents, rather than resorting to policy wants. Justice Kennedy states that "the controlling precedents as they relate to prayer and religious

133. 405 U.S. 438 (1972) (holding that the right of privacy guarantees that a person, married or single, should be free from "unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

134. 410 U.S. 113 (1973).

135. 112 S. Ct. 2649 (1992).

136. Brief for the United States as *amicus curiae* at 28, Lee v. Weisman, 112 S. Ct. 2649 (1992) (No. 90-1014) The United States argued that there were no elements of coercion in Rabbi Gutterman's invocation; rather, there were "mere acknowledgements of a belief in God." *Id.* No one was forced to attend the graduation and, if they did attend, were not forced to participate in any religious activity. *Id.* The United States also noted that a nominal amount of public money was spent on the portion of the graduation involving the rabbi. *Id.* Because of all these circumstances, the United States argued that the graduation invocation and benediction did not violate the Establishment Clause. *Id.*

exercises in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one."[137] Far from treating precedent as merely a means for procuring policy objectives, Justice Kennedy is reaffirming the Court's commitment to the First Amendment, thereby placing it above his personal preference for school prayer.

The *Weisman* majority also emphasizes the Supreme Court's autonomy from the majoritarian political system. As in *Casey*, the Court rebuffs the Bush administration's attempt to lead the Court: "Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman* . "[138] In language nearly identical to *Planned Parenthood v. Casey*, the majority emphasizes the need to maintain Court legitimacy as an important polity principle: "To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protection of that tradition for themselves."[139] Justice Souter, in a concurring opinion, emphasizes the value of Court autonomy· "We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes."[140] One could hardly ask for a more clear statement of Court autonomy and the importance of countermajoritarian polity principles to protecting individual rights.

In addition to *Casey*, a number of other cases from this Term show the Court's commitment to polity and rights principles and rejection of its following election returns and personal policy-making. *United States v. Fordice*[141] and *R.A.V v. St. Paul*[142] each show the Court developing polity and rights principles to guide it in the future. In both *Fordice*, and *R.A.V.*, the Court surprised many by reaffirming, even strengthening, key equal protection and First Amendment principles. In *Fordice*, the Court — in a unanimous decision — reaffirmed that public universities and colleges must seek to eliminate *de facto* discriminatory practices if those practices lack clear educational purposes and result from prior *de*

137. *Weisman*, 112 S. Ct. at 2655.
138. *Id.* at 2655 (referring to Lemon v. Kurtzman, 403 U.S. 602 (1971)).
139. *Id.* at 2658.
140. *Id.* at 2671 (Souter, J., concurring).
141. 112 S. Ct. 2727 (1992).
142. 112 S. Ct. 2538 (1992).

jure discrimination.[143] All nine of the justices took note of the important precedents in the field of school desegregation and the increasing importance of university education to minority empowerment.

In *R.A.V.*, the Court confronted another divisive political issue — hate speech.[144] In the first examination of a hate speech statute since *Beauharnais v. Illinois*,[145] all nine justices affirmed the First Amendment and the Court's commitment to preserving First Amendment content neutrality and overbreadth doctrines. Hate speech is a divisive issue within both the academic community and the wider public. In *R.A.V v. St. Paul*, the Court, rather than waiting for leadership from the political branches, reasserts the First Amendment as a rule of law.[146] Additionally, the Court emphasizes the polity principle of a concern for majoritarian laws that restrict free speech. The Court seems to raise its scrutiny of "fighting words" restrictions in response to recent issues of minority-imposed "politically correct" speech regulations.[147] This is not a case of individual justices simply imposing their policy wants, for there can be little question that each justice is personally opposed to hate or bias-motivated speech. Justice Scalia's majority opinion makes this clear: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[148] *Casey*, *Fordice*, *R.A.V.*, and *Weisman* are arguably the most significant Supreme Court decisions of 1992. Together they show that justices have rejected the lead of the dominant political coalition and their personal policy wants, in favor of reaffirming and strengthening key polity and rights principles. The Rehnquist Court, like all Court eras, bases its decisions on polity and rights principles which evolve as the nation evolves. Throughout the changing political

143. *Fordice*, 112 S. Ct. at 2735 ("Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continues to foster segregation.").

144. *R.A.V.*, 112 S. Ct. 2538.

145. 343 U.S. 250, 266-67 (1952) (upholding a hate speech law in Illinois but suggesting agreement with the wisdom of the law or commenting on its efficacy).

146. *R.A.V.*, 112 S. Ct. at 2542.

147. *Id.* at 2549 (noting the possibility that selective proscription of messages relating to race, gender or religious intolerance "create the possibility that the city is seeking to handicap the expression of particular ideas").

148. *Id.* at 2550.

winds the Court shows a concern for *stare decisis*, autonomy, and legitimacy

We can expect from the Rehnquist Court in the future a change in Establishment Clause jurisprudence from a simple reliance on the *Lemon* test, root and branch. We also can expect the Rehnquist Court to maintain Establishment Clause polity principles that were central to the Founders, Establishment Clause precedents, and the *Lemon* test.

VIII. CONCLUSION: POLITY PRINCIPLES WILL REMAIN CENTRAL TO ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Founding Establishment Clause Principles

Neither Professor Paulsen nor Dean Smith focus in their articles on originalist and non-originalist arguments for or against the legitimacy of the coercion test. Nor will I here. However, it is important to note that Smith's and Paulsen's rejection of polity principles as central to Establishment Clause jurisprudence, their resting the Establishment Clause solely on a free exercise-based coercion test, radically undermines, and improperly simplifies, the Founders' objectives in writing the Establishment Clause and distinguishing it from the Free Exercise Clause.

Smith has redefined the values of the Founders to those of only free exercise rights, not polity principles in the Establishment Clause that are to protect American government from religious conflict. Thus, for Smith the unit of concern is who is being coerced. It is a free exercise rights concern. Smith narrows Establishment Clause issues to questions of individual freedom or liberty

Smith's view that "the incidence of coercion (as to religion or nonreligion) is minimized near the accommodationist middle of the first continuum" is only valid if one accepts the assumption that coercion of individuals, and individual rights, is the only, or primary, objective of the Establishment Clause.[149] Smith limits the unit of analysis for Rehnquist Court concerns under the Establishment Clause to a rights principle: that the government should not impose its values on an individual person's freedom of religion, or, for those supporting a wider coercion test, an individual's freedom of conscience.[150] There is no discussion, or concern, by Smith about basing Establishment Clause questions on the polity principles in

149. Smith, *supra* note 2, at 926.
150. *Id.* at 940.

the Establishment Clause, such as that the government should not entangle itself in religion, and that the government limit the political divisiveness caused by making policies which endorse or support religious institutions. Given this individual rights only, not polity-principled, look at the Establishment Clause, Smith views government coercion of individual free exercise of religion as potentially greatest at the endorsement and exclusion poles of his continuum.[151]

In making this point, I am not arguing for or against the premise that the Establishment Clause establishes a wall of separation between government and religion. Nor need I make such an argument. It is sufficient to say, in support of the Founders' placing of polity principles within the Establishment Clause, that they feared that political conflicts over religion would severely damage the governance of the republic. This was a concern of the Founders, in and of itself, separate and distinct from their support of the free exercise of religion. Polity principles in the Establishment Clause were not merely instruments, nor were they to be viewed instrumentally — as Smith, Paulsen, and other supporters of the coercion test do — as means to ensure the free exercise of religion.

If we were to conflate church and State institutional separation polity principles into principles about the direct protection of individual or group rights, as Smith, Paulsen, and supporters of the coercion standard favor with regard to the Establishment Clause, we would radically change the nature of these principles, undermine their foundational legitimacy and moral force, and radically change the Supreme Court's constitutive decisionmaking process in these doctrinal areas.

B. The Instrumentalism of Smith and Paulsen

Unfortunately, in their support of a coercion test and opposition to reliance on both polity and rights principles and a constitutive decisionmaking process in the area of Establishment Clause jurisprudence, both Dean Smith and Professor Paulsen seem to be following an instrumental, outcome-oriented approach. Paulsen requires the Court only to consider the specific *effects* of a law or government action — whether it coerces the free exercise of religion.[152] Paulsen argues for the coercion principle in Establish-

151. *Id.* at 924.

152. Paulsen, *supra* note 2, at 804.

ment Clause jurisprudence because it will limit the secular indoctrination of students in schools and offer no problems with government aid to religion, at a level not above that of secular public and private schools. The coercion test will not place restrictions on government aid to religious schools and thus will not produce outcomes as in *Lemon v. Kurtzman*,[153] *Aguilar v. Felton*[154] and *Grand Rapids School District v. Ball*,[155] which he views as wrongly decided. Also, the coercion test would not allow the Court to invalidate a law because of the religious motives of the persons or government officials who favor it.

Smith argues that the replacement of liberty or freedom of religion with liberty of conscience may do much to protect against the establishment of religion if the class getting benefits is expanded beyond religion.[156] However, Smith reverts to a bottom-line "who gets what when and how" analysis of the move to a protection of liberty of conscience, rather than a principled separation of church and state, polity and rights-based discussion of the Establishment Clause.

In so doing Smith is engaging in a similar level of consequentialism that so many have argued is the problem with *Lynch v. Donnelly*[157] which, for some, has been corrected by the *Weisman* case. Moreover, the fear for Smith is that for the Court to protect all freedom of conscience is not to accommodate religion. He fears Congress will limit religious rights as it limits rights of conscience, what he calls "the attenuation problem."[158] He fears dilution of religious liberty by an expanded freedom of conscience and polity principles.[159] This is based on a (mistaken) view that the role of government is to affirmatively accommodate religion under the Establishment Clause. He does not see the place of the Establishment Clause as ensuring that government not get entangled in religion, a principle, along with free exercise principles, which will protect religion to a greater degree in the long run. Smith's failure to discuss the polity principles within the Establishment Clause undermines a full discussion of how to protect both freedom of religion and freedom of conscience.

153. 403 U.S. 602 (1971).
154. 473 U.S. 402 (1985).
155. 473 U.S. 373 (1985).
156. Smith, *supra* note 2, at 949.
157. 465 U.S. 668 (1984).
158. Smith, *supra* note 2, at 949-50.
159. *Id.* at 950.

Furthermore, Smith's view of religion-free schools as not neutral, as fostering what some have called secular humanism, has within it an assumption that government is to accommodate religion to a greater degree than many of the Founders, and non-originalist *stare decisis*, has allowed in the past. It assumes that religion is to be a part of schools as institutions. At a very general level, no religion in schools is not neutral.

C. Establishment Clause Jurisprudence Without Polity Principles

What Smith and Paulsen like most is that the Court will not be able to apply polity, or institutional, principles in the Establishment Clause and the *Lemon* test, which would prohibit the accommodation of religion when there is a fear of entanglement and fear of political divisiveness between government and religion. As explored above, these Establishment Clause principles are not simply related to the free exercise concerns of believers, non-believers, or members of religious organizations. It is simply misleading and simplistic to assume that polity principles in the Establishment Clause lead to a strict "wall of separation" stance, as is evident in *Mueller v. Allen*.[160]

Also, while it is true that polity principles such as entanglement and political divisiveness allow the Supreme Court some discretion in their application, as we saw in *Lynch v. Donnelly*, for example, polity principles are no more indeterminate than employing a coercion or non-endorsement test. However, without such tests, important principles within the Establishment Clause will be undermined, principles other than a simple concern for free exercise rights. If the Establishment Clause was simply a protection of free exercise rights, there would be no need for it.

The emphasis on individual rights, rather than on free exercise and polity principles in the Establishment Clause, will undermine the full range of protections in the Establishment Clause — freedom from religious conflict, entanglement, political divisiveness, as well as freedom from state violations of individual and group free exercise rights. The primary question should not be solely whether there should be protection of conscience for non-believers, but whether the Establishment Clause is merely concerned with freedom of conscience.

Finally, Dean Smith discusses Michael Perry's eloquent discus-

160. 463 U.S. 388 (1983).

sion of "ecumenical politics," which he describes as a politics of dialogue and tolerance "in which beliefs about human good, including disputed beliefs are central."[161] However, I question whether dialogue will be possible without a reliance on (non-originalist) polity principles in the Establishment Clause. A dialogue built on non-coercion, free exercise rights principles, alone, will undermine principles of institutional separation. Such principles are necessary for the dialogue not to be a product of majority religious or ethical relativist values. The primary question is not whether there should be dialogue on such issues, but whether we will have Establishment Clause principles without polity principles, which will result in government and majority religious or ethical values drowning out the voices and needs of those with minority religious and ethical values. Perry's failure to consider Federalist Number 10[162] fear of majority faction principles in the Establishment Clause undermines my faith in his call for dialogue.[163]

The instrumentalism of supporters of the coercion test who seek government support of religion has similar qualities, as does Perry's call to trust politics to deliberate and decide transcendent values. Neither takes seriously foundational polity and rights principles which question whether we should trust government in matters of religion and conscience. This shortcoming is similar to the non-Euclidian political science, law, and relativist democratic theory of the 1950s.[164] Happily, a majority of the Rehnquist Court justices,

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161. Smith, *supra* note 2, at 953 (quoting MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 43 (1991)).

162. THE FEDERALIST NO. 10 (James Madison) (for example, Madison wrote, "Complaints are everywhere heard that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according the rules of Justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.").

163. *See generally* PERRY, *supra* note 156. See also Ronald C. Kahn, *Pluralism, Civic Republicanism, and Critical Theory*, 64 TUL. L. REV. 1475 (1989) (for the thesis that Michael Perry undermines his own arguments about the counter-majoritarian nature of the Supreme Court, that we cannot trust politics to make moral choices and the important role of the Supreme Court as a forum for defining the aspirational values in the Constitution when he argues that the Supreme Court should practice judicial self-restraint in cases where there is conflict over basic (liberty) values such as in Roe v. Wade, 410 U.S. 113 (1973). *See* MICHAEL PERRY, MORALITY POLITICS & LAW 172-79 (1988)).

164. *See* KAHN, *supra* note 11, at 133-97, 330-79, 382-459, for a discussion of how instrumental approaches to Supreme Court decisionmaking and constitutional theory, that are built on non-Euclidean principles, and thus eschew the importance of foundational polity and rights principles, have led to our misunderstanding the process of doctrinal change in the Warren, Burger and Rehnquist court eras. Instrumental approaches also disregard the role of constitutional theory and the interpretive community in that process.

including Justice Kennedy, has not chosen to take the path advocated by Dean Smith and Professor Paulsen. It has not chosen to accept a coercion test and deny the polity principles in its Establishment Clause jurisprudence, as indicated by the *Lee v. Weisman* case. Nor has it chosen instrumentalism over constitutive decisionmaking, as indicated by *Planned Parenthood v. Casey*. The state of American politics, the Court, religious institutions, and the free exercise rights of the religious and non-religious are better off for the path taken by the Rehnquist Court.

See also Owen M. Fiss, *Objectivity and Interpretation*, 34 YALE L.J. 739, 746-50 (1982) (defining the term "interpretive community" and arguing its importance in the process of doctrinal change).