D. Religion in the Public Schools

EPPERSON v. ARKANSAS

393 U.S. 97 (1968)

MR. JUSTICE FORTAS delivered the opinion of the Court.

This appeal challenges the constitutionality of the "anti-evolution" statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of "fundamentalist" religious fervor of the twenties. The Arkansas statute was an adaptation of the famous Tennessee "monkey law" which that State adopted in 1925. The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated *Scopes* case in 1927.

The Arkansas law makes it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course did not have a section on the Darwinian Theory. Then, for the academic year 1965-1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth "the theory about the origin . . . of man from a lower form of animal."

Susan Epperson was employed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal.

She instituted the present action in the Chancery Court of the State, seeking a declaration that the Arkansas statute is void and enjoining the State and the defendant officials of the Little Rock school system from dismissing her for violation of the statute's provisions. The Chancery Court held that the statute violated the Fourteenth Amendment to the United States Constitution. On appeal, the Supreme Court of Arkansas reversed.

Appeal was duly prosecuted to this Court. Only Arkansas and Mississippi have such "anti-evolution" or "monkey" laws on their books. There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas' Supreme Court. On the other hand, counsel for the State, in oral argument in this Court, candidly stated that Arkansas would interpret the statute "to mean that to make a student aware of the theory . . . just to teach that there was such a theory" would be grounds for dismissal and for prosecution under the statute; and he said "that the Supreme Court of Arkansas' opinion should be interpreted in that manner."

We do not rest our decision upon the asserted vagueness of the statute. It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term "teaching." Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not intervene in conflicts which arise in the daily operation of school systems and which do not directly implicate basic constitutional values. On the other hand, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." As this Court said in *Keyishian* v. *Board of Regents*, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. The test was stated as follows in *Abington School District* v. *Schempp*: "What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state

policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful " to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account. Plainly, the law is contrary to the mandate of the First Amendment.

MR. JUSTICE BLACK, concurring.

I am by no means sure that this case presents a genuinely justiciable case or controversy. Although the statute alleged to be unconstitutional was passed by the voters in 1928, there has never been a single attempt to enforce it. And the pallid, unenthusiastic, even apologetic defense presented by the State indicates that the State would make no attempt to enforce the law should it remain on the books for the next century. Now, nearly 40 years after the law has slumbered on the books as though dead, a teacher alleging fear that the State might arouse from its lethargy and punish her has asked for a declaratory judgment holding the law unconstitutional. But whether this Arkansas teacher is still a teacher we do not know. The textbook adopted for biology classes in Little Rock includes an entire chapter dealing with evolution. There is no evidence that this chapter is not being freely taught in the schools. Unfortunately, the State's languid interest in the case has not prompted it to keep this Court informed concerning facts that might easily justify dismissal of this alleged lawsuit.

Notwithstanding my own doubts as to whether the case presents a justiciable controversy, the Court brushes aside these doubts. But, agreeing to consider this as a genuine case or controversy, I cannot agree to thrust the Federal Government's long arm the least bit further into state school curriculums than decision of this particular case requires.

This statute is too vague for us to strike it down on any ground but that: vagueness. Under this statute as construed, a teacher cannot know whether he is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true. It is an established rule that a statute which leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies him the first essential of due process. Holding the statute too vague to enforce would follow long-standing constitutional precedents. And it would not place this Court in the unenviable position of violating the principle of leaving the States absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command.

The Court, not content to strike down this Arkansas Act on the ground of vagueness, chooses to invalidate it as a violation of the Establishment Clause. I would not decide this

case on such a sweeping ground. Certainly the Darwinian theory, like the Genesis story of the creation of man, is not above challenge. The Darwinian theory has not merely been criticized by religionists but by scientists. The Court makes a serious mistake in bypassing the unconstitutional vagueness of this statute to reach out and decide this troublesome First Amendment question. However wise this Court may be, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I would either strike down the Arkansas Act as too vague to enforce, or remand to the State Supreme Court for clarification of its holding.

MR. JUSTICE STEWART, concurring in the result.

It is one thing for a State to determine that "the subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought.

The Arkansas Supreme Court has said that the statute before us may or may not be such a law. The result is that "a teacher cannot know whether he is forbidden to mention Darwin's theory at all." Since I believe that no State could constitutionally forbid a teacher "to mention Darwin's theory at all," and since Arkansas may, or may not, have done just that, I conclude that the statute before us is so vague as to be invalid under the Fourteenth Amendment.

STONE v. GRAHAM

449 U.S. 39 (1980)

PER CURIAM

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State.[1] Petitioners, claiming that this statute violates the Establishment and Free Exercise Clauses of the First

---

[1] The statute provides in its entirety:

"(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be 16 inches wide by 20 inches high.

"(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'

"(3) The copies required by this Act shall be purchased with voluntary contributions made to the state treasurer for the purposes of this Act."

Amendment, sought an injunction against its enforcement. The state trial court upheld the statute, finding that its "avowed purpose" was "secular and not religious," and that the statute would "neither advance nor inhibit any religion or religious group" nor involve the State excessively in religious matters. The Supreme Court of the Commonwealth of Kentucky affirmed by an equally divided court. We reverse.

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*.

If a statute violates any of these three principles, it must be struck down. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self-serving." Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by

voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State Government" that the Establishment Clause prohibits. Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." We conclude that Ky. Rev. Stat. § 158.178 (1980) violates the first part of the *Lemon* v. *Kurtzman* test, and thus the Establishment Clause of the Constitution.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissent. They would give this case plenary consideration.

JUSTICE STEWART dissents from this summary reversal of the courts of Kentucky, which applied wholly correct constitutional criteria in reaching their decisions.

JUSTICE REHNQUIST, dissenting.

With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," and that "[the] pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." This even though, as the trial court found, "[the] General Assembly thought the statute had a secular legislative purpose and specifically said so." The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due. The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional.

Abington School District v. *Schempp*, 374 U.S. 203 (1963), repeatedly cited by the Court, is not to the contrary. No statutory findings of secular purpose supported the challenged enactments in that case. In one of the two cases considered in *Abington School District* the trial court had determined that the challenged exercises were intended by the State to be religious exercises. A contrary finding is presented here. In the other case no specific finding had been made, and "the religious character of the exercise was admitted by the State."[1]

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text." It is equally undeniable, however, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the

[1] The Court noted that even if the State's purpose were not strictly religious, "it is sought to be accomplished through readings, without comment, from the Bible." Here of course there was no compelled reading, and there was comment accompanying the text of the Commandments, mandated by statute and focusing on their secular significance.

document's secular import.[2]

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that "religion has been closely identified with our history and government," and that "[the] history of man is inseparable from the history of religion," *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum* v. *Board of Education*, 333 U.S. 203, 235-236 (1948), merit quotation at length:

"Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach appreciation of the arts if we are to forbid exposure to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity -- both Catholic and Protestant -- and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

WIDMAR v. VINCENT

454 U.S. 263 (1981)

JUSTICE POWELL delivered the opinion of the court.

This case presents the question whether a state university, which makes its facilities generally available for registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.

I

It is the stated policy of the University of Missouri at Kansas City to encourage the activities of student organizations. The University officially recognizes over 100 student

---

[2] The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.

groups. It routinely provides University facilities for the meetings of registered organizations.

From 1973 until 1977 a registered religious group named Cornerstone regularly received permission to conduct its meetings in University facilities.[1] In 1977, the University informed the group that it could no longer meet in University buildings. The exclusion was based on a regulation that prohibits the use of University buildings "for purposes of religious worship or religious teaching." Members of Cornerstone brought suit to challenge the regulation.

II

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

At the same time, however, our cases have recognized that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." A university differs from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its facilities. We have not held, for example, that a campus must make all its facilities equally available to students and nonstudents, or that a university must grant access to all its grounds or buildings.

Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.[2] In order to justify discriminatory exclusion from a public forum based on the religious content of a group's

---

[1] Cornerstone is an organization of evangelical Christian students. Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences.

[2] The dissent argues that "religious worship" is not speech protected by the "free speech" guarantee. If "religious worship" were protected "speech," the dissent reasons, "the Religion Clauses would be emptied of independent meaning in circumstances in which religious practice took the form of speech." This is a novel argument. The dissent seems to attempt a distinction between religious speech explicitly protected by our cases and religious "worship." There are at least three difficulties with this distinction. First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching, and reading" -- all apparently forms of "speech" -- and become unprotected "worship." Second, even if the distinction drew an arguably principled line, it is doubtful that it would lie within the judicial competence to administer. Finally, the dissent fails to establish the *relevance* of the distinction. It gives no reason why the Establishment Clause would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted.

intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

III

In this case the University claims a compelling interest in maintaining strict separation of church and State. The University argues that it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause. We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an "equal access" policy would be incompatible with Establishment Clause cases. Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test. *Lemon*.

In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose[3] and would avoid entanglement with religion.[4] But the District Court concluded, and the University argues here, that allowing religious groups to share the limited public forum would have the "primary effect" of advancing religion.

The University's argument misconceives the nature of this case. The question is not whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech.[5] In this context we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.

We are not oblivious to an open forum's likely effects. It is possible -- perhaps even

---

[3] It is the avowed purpose of UMKC to provide a forum in which students can exchange ideas. The University argues that use of the forum for religious speech would undermine this secular aim. But by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there.

Because this case involves a forum already made available to student groups, it differs from cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. In those cases the school may appear to sponsor the views of the speaker.

[4] We agree with the Court of Appeals that the University would risk greater entanglement by attempting to enforce its exclusion.

[5] This case is different from cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause. Here, the University's forum is already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. Respondents' claim also implicates First Amendment rights of speech and association, and it is on the bases of speech and association rights that we decide the case.

foreseeable -- that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases. Two factors are especially relevant.

First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.[6]

Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

IV

Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Finally, we affirm the continuing validity of cases that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.

The basis for our decision is narrow. Having created a forum open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable standards.

JUSTICE STEVENS, concurring in the judgment.

Every university must "make academic judgments as to how best to allocate scarce resources." The Court appears to hold, however, that those judgments must "serve a compelling state interest" whenever they are based on the content of speech. In my opinion, the use of the terms "compelling state interest" and "public forum" to analyze the question

---

[6] University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion. See *Tilton* v. *Richardson*.

presented in this case may needlessly undermine the academic freedom of public universities.

In this case I agree with the Court that the University has not established a sufficient justification for its refusal to allow Cornerstone to engage in religious worship on the campus. The primary reason advanced for the discriminatory treatment is the University's fear of violating the Establishment Clause. The Court properly concludes that the University's fear is groundless. Accordingly, although I do not endorse the Court's reasoning, I concur in its judgment.

JUSTICE WHITE, dissenting.

In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for policies that may incidentally burden religion. The majority's position will inevitably lead to contradictions and tensions between the Establishment and Free Exercise Clauses.

A large part of respondents' argument, accepted by the majority, is founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment. Not only is it protected, they argue, but religious worship *qua* speech is not different from any other variety of protected speech. I believe that this proposition is plainly wrong. Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.

Although the majority describes this argument as "novel," I believe it to be clearly supported by our previous cases. Just last Term, the Court found that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall. *Stone* v. *Graham*, 449 U.S. 39 (1980). That case necessarily presumed that the State could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must, treat other -- secular -- messages under the First Amendment's protection of speech. Similarly, the Court's decisions prohibiting prayer in the public schools rest on a content-based distinction between varieties of speech: as a speech act, apart from its content, a prayer is indistinguishable from a biology lesson.

If the majority were right that no distinction may be drawn between verbal acts of worship and other verbal acts, these cases would have to be reconsidered. Although I agree that the line may be difficult to draw in many cases, surely the majority cannot seriously suggest that no line may ever be drawn. If that were the case, the majority would have to uphold the University's right to offer a class entitled "Sunday Mass." Under the majority's view, such a class would be -- as a matter of constitutional principle -- indistinguishable from a class entitled "The History of the Catholic Church."[1]

---

[1] Counsel for respondents was more forthright in recognizing the extraordinary breadth of his argument than is the majority. Counsel explicitly stated that once the distinction between speech and worship is collapsed a university that generally provides student groups access to its facilities would be constitutionally required to allow its facilities to be used as a church for the purpose of holding "regular church services." Similarly, counsel for respondents recognized that respondents' submission would require the University to make available its buildings to the

There may be instances in which a State's attempt to disentangle itself from religious worship would intrude upon secular speech about religion. In such a case, the State's action would be subject to challenge under the Free Speech Clause. This is not such a case. This case involves religious worship only. I would not hold as the majority does that if a university permits students and others to use its property for secular purposes, it must also furnish facilities to religious groups for the purposes of worship and the practice of their religion.

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS v. MERGENS

496 U.S. 226 (1990)

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C, in which CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE BLACKMUN, JUSTICE SCALIA, and JUSTICE KENNEDY joined, and an opinion with respect to Part III, in which CHIEF JUSTICE REHNQUIST, JUSTICE WHITE and JUSTICE BLACKMUN joined.

This case requires us to decide whether the Equal Access Act, 20 U.S.C. §§ 4071-4074, prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment.

I

Respondents are current and former students at Westside High School, a public secondary school in Omaha, Nebraska. Students at Westside are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis.

Students wishing to form a club present their request to a school official who determines whether the proposed club's goals are consistent with school board policies and with the school district's "Mission and Goals" -- a broadly worded "blueprint" that expresses the district's commitment to teaching academic, physical, civic, and personal skills and values.

In January 1985, Bridget Mergens met with Westside's principal, Dr. Findley, and requested permission to form a Christian club. The club's purpose would have been to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious

---

Catholic Church and other denominations for the purpose of holding religious services, if University facilities were made available to nonstudent groups. In other words, the University could not avoid the conversion of one of its buildings into a church, as long as the religious group meets the same neutral requirements of entry as are imposed on other groups.

affiliation. Findley denied the request, as did superintendent Hanson. The school officials explained that a religious club would violate the Establishment Clause.

II

In *Widmar v. Vincent*, 454 U.S. 263 (1981), we invalidated a state university regulation that prohibited student use of school facilities "'for purposes of religious worship or religious teaching.'" In doing so, we held that an "equal access" policy would not violate the Establishment Clause. We noted, however, that "university students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." The Act's obligation to grant equal access to student groups is therefore triggered if Westside maintains a "limited open forum" -- i. e., if it permits one or more "noncurriculum related student groups" to meet on campus before or after classes.

We think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech.

We think it clear that Westside's existing student groups include one or more "noncurriculum related student groups." The record therefore supports a finding that Westside has maintained a limited open forum under the Act. We hold that Westside's denial of respondents' request to form a Christian club denies them "equal access" under the Act.

III

Petitioners contend that even if Westside has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must

nevertheless stand because the Act violates the Establishment Clause of the First Amendment. Specifically, petitioners maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

We disagree. In *Widmar*, we applied the three-part *Lemon* test to hold that an "equal access" policy, at the university level, does not violate the Establishment Clause. We concluded that although incidental benefits accrued to religious groups who used university facilities, this result did not amount to an establishment of religion. First, we stated that a university's forum does not "confer any imprimatur of state approval on religious sects or practices." Indeed, the message is one of neutrality rather than endorsement. Second, we noted that "the [University's] provision of benefits to [a] broad . . . spectrum of groups" -- both nonreligious and religious speakers -- was "an important index of secular effect."

We think the logic of *Widmar* applies with equal force to the Equal Access Act. As an initial matter, the Act's prohibition of discrimination on the basis of "political, philosophical, or other" speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test. Congress' avowed purpose -- to prevent discrimination against religious and other types of speech -- is undeniably secular.

Petitioners' principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state's compulsory attendance laws bring the students together, an objective observer in the position of a secondary school student will perceive official school support for such religious meetings.

We disagree. First, there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Second, the Act expressly limits participation by school officials at meetings of student religious groups and any such meetings must be held during "noninstructional time." The Act therefore avoids the problems of "the students' emulation of teachers as role models" and "mandatory attendance requirements," To be sure, the possibility of student peer pressure remains, but there is little risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. To the extent a school makes clear that recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will understand that the school's recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Third, the broad spectrum of officially recognized student clubs, and the fact that Westside students are free to organize additional student clubs, counteract any possible message of official endorsement of or preference for religion or a particular religious belief.

Petitioners' final argument is that by complying with the Act's requirement, the school

risks excessive entanglement between government and religion. Under the Act, however, faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control, or regularly attend activities of student groups. Although the Act permits "the assignment of a teacher, administrator, or other school employee to the meeting for custodial purposes," such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

The Court's interpretation of the statutory term "non-curriculum related groups" is proper and correct, in my view. I further agree that the Act does not violate the Establishment Clause, but my view of the analytic premise that controls the establishment question differs from that employed by the plurality.

The accommodation of religion mandated by the Act is a neutral one, and in the context of this case it suffices to inquire whether the Act violates either one of two principles. The first is that the government cannot "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" Any incidental benefits that accompany official recognition of a religious club under the criteria set forth in the § 4071(c) do not lead to the establishment of religion under this standard. The second principle controlling the case now before us, in my view, is that the government cannot coerce any student to participate in a religious activity. The Act is consistent with this standard as well.

The plurality uses a different test, one which asks whether school officials, by complying with the Act, have endorsed religion. It is true that when government gives impermissible assistance to a religion it can be said to have "endorsed" religion; but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. Its literal application may result in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preference.

I should think it inevitable that a public high school "endorses" a religious club, in a common-sense use of the term, if the club happens to be one of many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting. But no constitutional violation occurs if the school's action is based upon a recognition of the fact that membership in a religious club is one of many permissible ways for a student to further his or her own personal enrichment. The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw. No such coercion has been shown to exist as a necessary result of this statute, either on its face or on the facts of this case.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the majority that "noncurriculum" must be construed broadly to "prohibit

schools from discriminating on the basis of the content of a student group's speech." The Act's low threshold for triggering equal access, however, raises serious Establishment Clause concerns where secondary schools with fora that differ substantially from the forum in *Widmar* are required to grant access to student religious groups. Indeed, as applied in the present case, the Act mandates a religious group's access to a forum that is dedicated to promoting fundamental values and citizenship as defined by the school. The Establishment Clause does not forbid the operation of the Act in such circumstances, but it does require schools to change their relationship to their fora so as to disassociate themselves effectively from religious clubs' speech. I write separately to emphasize the steps Westside must take to avoid appearing to endorse the Christian Club's goals. The plurality's Establishment Clause analysis pays inadequate attention to the differences between this case and *Widmar* and dismisses too lightly the distinctive pressures created by Westside's highly structured environment. The plurality fails to recognize that the wide-open and independent character of the student forum in *Widmar* differs substantially from the forum at Westside.

As a matter of school policy, Westside encourages student participation in clubs based on a broad conception of its educational mission. The school's message with respect to its existing clubs is not one of toleration but one of endorsement. But although a school may permissibly encourage its students to become well-rounded as student-athletes, student-musicians, and student-tutors, the Constitution forbids schools to encourage students to become well-rounded as student-worshippers. Neutrality toward religion, as required by the Constitution, is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well.

The crucial question is how the Act affects each school. If a school already houses numerous ideological organizations, then the addition of a religion club will most likely not violate the Establishment Clause because the risk that students will erroneously attribute the views of the religion club to the school is minimal. But if the religion club is the sole advocacy-oriented group in the forum, or one of a very limited number, and the school continues to promote its student-club program as instrumental to citizenship, then the school's failure to disassociate itself from the religious activity will reasonably be understood as an endorsement of that activity.

The comprehensiveness of the access afforded by the Act further highlights the Establishment Clause dangers posed by the Act's application to fora such as Westside's. The Court holds that "official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." Students would be alerted to the meetings of the religion club over the public address system; they would see religion club material posted on the official school bulletin board and club notices in the school newspaper, they would be recruited to join the religion club at the school-sponsored Club Fair. If a school has a variety of ideological clubs, I agree with the plurality that a student is likely to understand that "a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." When a school has a religion club but no other political or ideological organizations, however, that fine distinction may be lost.

Moreover, in the absence of a truly robust forum that includes the participation of more

than one advocacy-oriented group, the presence of a religious club could provide a fertile ground for peer pressure, especially if the club commanded support from a substantial portion of the student body. Indeed, it is precisely in a school without such a forum that intolerance for different religious and other views would be most dangerous and that a student who does not share the religious beliefs of his classmates would perceive "that religion or a particular religious belief is favored or preferred."

Given these substantial risks posed by the inclusion of the proposed Christian Club within Westside's present forum, Westside must redefine its relationship to its club program. Westside thus must do more than merely prohibit faculty members from actively participating in the Christian Club's meetings. It must fully disassociate itself from the Club's religious speech and avoid appearing to sponsor or endorse the Club's goals.

JUSTICE STEVENS, dissenting.

The forum at Westside is considerably different from that which existed at the University of Missouri. Over 100 officially recognized student groups routinely participated in that forum. They included groups whose activities not only were unrelated to any specific courses, but also were of a kind that a state university could not properly sponsor or endorse. Thus, for example, they included such political organizations as the Young Socialist Alliance, the Women's Union, and the Young Democrats. The University permitted use of its facilities for speakers advocating transcendental meditation and humanism. Since the University had allowed such organizations and speakers the use of campus facilities, we concluded that the University could not discriminate against a religious group on the basis of the content of its speech.

The Court's opinion in *Widmar* left open the question whether its holding would apply to a public high school that had established a similar public forum. That question has now been answered in the affirmative by this Court. I agree with that answer. Before the question was answered judicially, Congress decided to answer it legislatively. As the Court of Appeals correctly recognized, the Act codified the decision in *Widmar*, "extending its holding to secondary public schools." What the Court of Appeals failed to recognize, however, is the critical difference between the university forum in *Widmar* and the high school forum involved in this case. None of the clubs at the high school is even arguably controversial or partisan.

I believe that the distinctions between Westside's program and the University of Missouri's program suggest what is the best understanding of the Act: an extracurricular student organization is "noncurriculum related" if it has as its purpose the advocacy of partisan theological, political, or ethical views. A school that admits at least one such club has apparently made the judgment that students are better off if the student community is permitted to, and perhaps even encouraged to, compete along ideological lines.

Accordingly, as I would construe the Act, a high school could properly sponsor a French club, a chess club, or a scuba diving club simply because their activities are fully consistent with the school's curricular mission. It would not matter whether formal courses in any of those subjects were being offered as long as faculty encouragement of student participation in

such groups would be consistent with both the school's obligation of neutrality and its legitimate pedagogical concerns. Conversely, if a high school decides to allow political groups to use its facilities, it plainly cannot discriminate among controversial groups because it agrees with the positions of some and disagrees with the ideas advocated by others.

In this case, the district judge reviewed each of the clubs in the high school program and found that they are all "tied to the educational function of the institution." He correctly concluded that this club system "differs dramatically from those found to create an open forum policy in *Widmar*." I agree with his conclusion that, under a proper interpretation of the Act, this dramatic difference requires a different result.

My construction of the Act makes it unnecessary to reach the Establishment Clause question that the Court decides. It is nevertheless appropriate to point out that the question is much more difficult than the Court assumes. We have always treated with special sensitivity the Establishment Clause problems that result when religious observances are moved into the public schools. As the majority recognizes, student-initiated religious groups may exert a considerable degree of pressure even without official school sponsorship. "The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

LAMB'S CHAPEL v. CENTER MORICHES SCHOOL DISTRICT

508 U.S. 384 (1993)

JUSTICE WHITE delivered the opinion of the Court.

Section 414 of the New York Education Law authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes. Among the permitted uses is the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and open to the general public." The list of permitted uses does not include meetings for religious purposes.

Pursuant to § 414's empowerment of local school districts, the Board of Center Moriches Union Free School District (District) has issued rules and regulations with respect to the use of school property when not in use for school purposes. The rules allow only 2 of the 10 purposes authorized by § 414: social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with § 414 (Rule 8). Rule 7, however, provides that "the school premises shall not be used by any group for religious purposes."

The issue in this case is whether it violates the Free Speech Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film dealing with family and child-rearing issues faced by parents today.

The District, as a respondent, would save its judgment below on the ground that to permit

its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggested in *Widmar v. Vincent* that the interest of the State in avoiding an Establishment Clause violation "may be [a] compelling" one justifying an abridgment of free speech otherwise protected by the First Amendment; but the Court went on to hold that permitting use of University property for religious purposes under the open access policy involved there would not be incompatible with the Court's Establishment Clause cases.

We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar*, permitting District property to be used to exhibit the film involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon*.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I join the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment free-speech rights. I also agree with the Court that allowing Lamb's Chapel to use school facilities poses "no realistic danger" of a violation of the Establishment Clause, but I cannot accept most of its reasoning in this regard. The Court explains that the showing of petitioners' film on school property after school hours would not cause the community to "think that the District was endorsing religion or any particular creed," and further notes that access to school property would not violate the three-part test articulated in *Lemon*.

As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman* conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

I agree with the constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced. I will decline to apply *Lemon* -- whether it validates or invalidates the government action in question -- and therefore cannot join the opinion of the Court today.

I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general. What a strange notion, that a Constitution which itself gives "religion in general" preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. That was not the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good.

WALLACE, GOVERNOR OF ALABAMA v. JAFFREE

472 U.S. 38 (1985)

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools "for meditation";[1] (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16-1-20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."[3]

---

[1] "At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in." Appellees have abandoned any claim that § 16-1-20 is unconstitutional.

[2] "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[3] "Any teacher in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead willing students in the following prayer to God:

"Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen."

At the preliminary-injunction stage of this case, the District Court distinguished § 16-1-20 from the other two statutes. It then held that there was "nothing wrong" with § 16-1-20,[4] but that §§ 16-1-20.1 and 16-1-20.2 were both invalid because the sole purpose of both was "an effort to encourage a religious activity." After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.

The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both § 16-1-20.1 and § 16-1-20.2, and held them both unconstitutional. We have already affirmed the holding with respect to § 16-1-20.2. Moreover, appellees have not questioned the holding that § 16-1-20 is valid. Thus, the narrow question for decision is whether § 16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment.

I

Appellee Ishmael Jaffree is a resident of Mobile County, Alabama. On May 28, 1982, he filed a complaint on behalf of three of his minor children; two of them were second-grade students and the third was then in kindergarten. The complaint alleged that the appellees brought the action "seeking principally a declaratory judgment and an injunction restraining the Defendants from allowing religious prayer services in the Mobile County Public Schools in violation of the First Amendment." The complaint further alleged that defendant teachers had "on a daily basis" led their classes in saying certain prayers in unison; that the minor children were exposed to ostracism from their peer group if they did not participate; and that Ishmael Jaffree had repeatedly but unsuccessfully requested that the devotional services be stopped. The original complaint made no reference to any Alabama statute. On June 4, 1982, appellees filed an amended complaint. In that amendment the appellees challenged the constitutionality of three Alabama statutes: §§ 16-1-20, 16-1-20.1, and 16-1-20.2.

The District Court held an evidentiary hearing on appellees' motion for a preliminary injunction. At that hearing, State Senator Donald G. Holmes testified that he was the "prime sponsor" of the bill that was enacted in 1981 as § 16-1-20.1. He explained that the bill was an "effort to return voluntary prayer to our public schools." Senator Holmes unequivocally testified that he had "no other purpose in mind." After the hearing, the District Court entered a preliminary injunction. The court held that appellees were likely to prevail on the merits because the enactment of §§ 16-1-20.1 and 16-1-20.2 did not reflect a clearly secular purpose.

II

Our unanimous affirmance of the Court of Appeals' judgment concerning § 16-1-20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion.

---

[4] The court stated that it did not find any potential infirmity in § 16-1-20 because "it is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness."

III

When the Court has been called upon to construe the Establishment Clause, it has examined the criteria in *Lemon* v. *Kurtzman*. It is the first of these three criteria that is most plainly implicated by this case. No consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."[5] In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16-1-20.1 was not motivated by any clearly secular purpose -- indeed, the statute had *no* secular purpose.

IV

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools.[6] Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: "No, I did not have no other purpose in mind."[7] The State did not present evidence of *any* secular purpose.[8]

---

[5] *Lynch* v. *Donnelly*, 465 U.S. at 690 (O'CONNOR, J., concurring) ("The purpose prong of *Lemon* asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether the practice in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid").

[6] The statement indicated, in pertinent part:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. *I believe this effort to return voluntary prayer* to our public schools . . . . hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard *on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber*."

[7] The District Court and the Court of Appeals agreed that the purpose of § 16-1-20.1 was "an effort on the part of the State of Alabama to encourage a religious activity." The evidence presented to the District Court elaborated on the express admission of the Governor of Alabama (then Fob James) that the enactment of § 16-1-20.1 was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity."

[8] Appellant Governor George C. Wallace now argues that § 16-1-20.1 "is best understood as a permissible accommodation of religion" and that viewed even in terms of the *Lemon* test,

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16-1-20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences between § 16-1-20.1 and its 1978 predecessor, § 16-1-20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

There are only three textual differences between § 16-1-20.1 and § 16-1-20: (1) the earlier statute applies only to grades one through six, whereas § 16-1-20.1 applies to all grades; (2) the earlier statute uses the word "shall" whereas § 16-1-20.1 uses the word "may"; (3) the earlier statute refers only to "meditation" whereas § 16-1-20.1 refers to "meditation or voluntary prayer." The first difference is of no relevance in this litigation because the minor appellees were in kindergarten or second grade during the 1981-1982 academic year. The second difference would also have no impact on this litigation because the mandatory language of § 16-1-20 continued to apply to grades one through six. Thus, the only significant textual difference is the addition of the words "or voluntary prayer."

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.

We must, therefore, conclude that the Alabama Legislature intended to change existing law and that it was motivated by the same purpose that the Governor's answer to the second amended complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The legislature enacted § 16-1-20.1, despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

---

the "statute conforms to acceptable constitutional criteria." These arguments seem to be based on the theory that the free exercise of religion of some of the State's citizens was burdened before the statute was enacted. In this case, it is undisputed that at the time of the enactment of § 16-1-20.1 there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion." The well-supported concurrent findings of the District Court and the Court of Appeals -- that § 16-1-20.1 was intended to convey a message of state approval of prayer activities in the public schools -- make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that § 16-1-20.1 violates the First Amendment.

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16-1-20.1 violates the Establishment Clause. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes. I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court's opinion as well.

I write separately to respond to criticism of the *Lemon* test. *Lemon* identifies standards that have proved useful in analyzing case after case. It is the only coherent test a majority of the Court has ever adopted. *Lemon* has not been overruled or modified. Yet, continued criticism of it could encourage other courts to decide Establishment Clause cases on an ad hoc basis.

The first inquiry under *Lemon* is whether the challenged statute has a "secular legislative purpose." We have not interpreted the first prong of *Lemon* as requiring that a statute have "exclusively secular" objectives. If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated.

The record before us, however, makes clear that Alabama's purpose was solely religious in character. Senator Donald Holmes, the sponsor of the bill that became Alabama Code § 16-1-20.1, freely acknowledged that the purpose of this statute was "to return voluntary prayer" to the public schools. I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose. But, as noted in the Court's opinion, the religious purpose of § 16-1-20.1 is manifested in other evidence, including the sequence and history of the three Alabama statutes. I also consider it of critical importance that neither the District Court nor the Court of Appeals found a secular purpose. When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.

I would vote to uphold the Alabama statute if it also had a clear secular purpose. Nothing in the record before us, however, identifies a clear secular purpose, and the State also has failed to identify any nonreligious reason for the statute's enactment. Under these circumstances, the Court is required by our precedents to hold that the statute fails the first prong of the *Lemon* test and therefore violates the Establishment Clause.

Although we do not reach the other two prongs of the *Lemon* test, I note that the "effect" of a straightforward moment-of-silence statute is unlikely to "[advance] or [inhibit] religion. "Nor would such a statute "foster 'an excessive government entanglement with religion.'"

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16-1-20 which provides a moment of silence in appellees' schools each day. The parties concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16-1-20.1, which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the courts below and the history of its enactment, § 16-1-20.1 violates the Establishment Clause. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and sponsor voluntary prayer in the public schools. I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why neither history nor the Free Exercise Clause validates the Alabama law struck down today.

I

As these cases once again demonstrate, "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." It once appeared that the Court had developed a workable standard. Despite its initial promise, the *Lemon* test has proved problematic. JUSTICE REHNQUIST today suggests that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a "state" or "national" one.

Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. Our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems." Last Term, I proposed a refinement of the *Lemon* test with this goal in mind. *Lynch* v. *Donnelly*, 465 U.S. at 687-689 (concurring opinion).

The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political

community." Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[when] the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." At issue today is whether state moment of silence statutes in general, and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.

A

Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms. A few statutes provide that the moment of silence is for the purpose of meditation alone. The typical statute, however, calls for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect on the activities of the day. Federal trial courts have divided on the constitutionality of these laws. Relying on this Court's decisions disapproving vocal prayer and Bible reading in the public schools, the courts that have struck down the moment of silence statutes conclude that their purpose and effect are to encourage prayer in public schools.

A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

By mandating a moment of silence, a State does not necessarily endorse any activity

during the period. Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

Before reviewing Alabama's moment of silence law to determine whether it endorses prayer, some general observations on the proper scope of the inquiry are in order. First, the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent. It is particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion "was and is the law's reason for existence." *Epperson* v. *Arkansas*, 393 U.S. 97, 108 (1968). Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

JUSTICE REHNQUIST suggests that this sort of deferential inquiry into legislative purpose "means little," because "it only requires the legislature to express any secular purpose and omit all sectarian references." It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the inquiry into the effect of an enactment would help decide close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Second, the effect of a moment of silence law is not entirely a question of fact. The relevant issue is whether an objective observer, acquainted with the text, legislative history,

and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. A moment of silence law that is clearly drafted and implemented to permit prayer, meditation, and reflection, without endorsing one alternative over others, should pass this test.

B

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect. Alabama Code § 16-1-20.1 does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

In finding that the purpose of § 16-1-20.1 is to endorse voluntary prayer during a moment of silence, the Court relies on testimony elicited from State Senator Donald G. Holmes during a preliminary injunction hearing. I would give little, if any, weight to this sort of evidence of legislative intent. Nevertheless, the text of the statute in light of its official legislative history leaves little doubt that the purpose of this statute corresponds to the purpose expressed by Senator Holmes at the preliminary injunction hearing.

First, it is notable that Alabama already had a moment of silence statute before it enacted § 16-1-20.1. Appellees do not challenge this statute -- indeed, they concede its validity. The only significant addition made by § 16-1-20.1 is to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence. Any doubt as to the legislative purpose of that addition is removed by the official legislative history. The sole purpose reflected in the official history is "to return voluntary prayer to our public schools." Nor does anything in the legislative history contradict an intent to encourage children to choose prayer over other alternatives during the moment of silence. Given this legislative history, it is not surprising that the State conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity, and that both the District Court and the Court of Appeals concluded that the law's purpose was to encourage religious activity. In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended § 16-1-20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence. While it is therefore unnecessary also to determine the effect of the statute, it also seems likely that the message conveyed to objective observers is approval of the child who selects prayer over other alternatives during a moment of silence.

Alabama Code § 16-1-20.1 endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise. For that reason, I concur in the judgment

II

In his dissenting opinion, JUSTICE REHNQUIST reviews the text and history of the First Amendment Religion Clauses. His opinion suggests that a long line of this Court's decisions are inconsistent with the intent of the drafters of the Bill of Rights. He urges the Court to correct the historical inaccuracies in its past decisions by embracing a far more restricted interpretation of the Establishment Clause, an interpretation that presumably would permit

vocal group prayer in public schools.

The United States suggests a less sweeping modification of Establishment Clause principles. In the Federal Government's view, a state-sponsored moment of silence is merely an "accommodation" of the desire of some public school children to practice their religion by praying silently. Such an accommodation is contemplated by the First Amendment's guarantee that the Government will not prohibit the free exercise of religion. Because the moment of silence implicates free exercise values, the United States suggests that the *Lemon*-mandated inquiry into purpose and effect should be modified.

There is an element of truth and much helpful analysis in each of these suggestions. Particularly when we are interpreting the Constitution, "a page of history is worth a volume of logic." I continue to believe that "fidelity to *constitutional* limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was adopted are now constitutionally impermissible." As Justice Holmes once observed, "[if] a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

JUSTICE REHNQUIST does not assert, however, that the drafters of the First Amendment expressed a preference for prayer in public schools, or that the practice of prayer in public schools enjoyed uninterrupted government endorsement from the time of enactment of the Bill of Rights to the present era. The simple truth is that free public education was virtually nonexistent in the late 18th century. Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools. Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold.

When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. The primary issue raised by JUSTICE REHNQUIST's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools. I think not. At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here.

The element of truth in the United States' arguments lies in the suggestion that Establishment Clause analysis must comport with the Free Exercise Clause. Our cases have interpreted the Free Exercise Clause to compel the government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion. Even where the Free Exercise Clause does not compel the government to grant

an exemption, the government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause. The challenge is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate free exercise. On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights.

It is obvious that either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. It is difficult to square any notion of "complete neutrality" with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion.

The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute courts should assume that the "objective observer," is acquainted with the Free Exercise Clause and the values it promotes.

While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16-1-20.1. No law prevents a student from praying silently in public schools. Moreover, state law already provided a moment of silence to these appellees irrespective of § 16-1-20.1. I conclude that the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute.

III

The Court does not hold that the Establishment Clause precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer. This line may be a fine one, but our

precedents and the principles of religious liberty require that we draw it.

CHIEF JUSTICE BURGER, dissenting.

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence." To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. Today's decision recalls the observations of Justice Goldberg: "[Untutored] devotion to the concept of neutrality can lead to a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama Legislature. Rather than determining legislative purpose from the face of the statute,[1] the opinions rely on three factors in concluding that the Legislature had a "wholly religious" purpose for enacting the statute: (i) statements of the statute's sponsor, (ii) admissions in Governor James' answer to the second amended complaint, and (iii) the difference between § 16-1-20.1 and its predecessor statute.

Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon were made *after* the legislature had passed the statute. There is not a shred of evidence that the legislature as a whole shared the sponsor's motive. The sole relevance of the sponsor's statements, therefore, is that they reflect the subjective motives of a single legislator. No case in the history of this Court supports the disconcerting idea that postenactment statements by individual legislators are relevant in determining the constitutionality of legislation.

The Court also relies on the admissions of Governor James' answer. The Court neglects to mention that the answer filed by the State Board and Superintendent of Education did not make the same admissions that the Governor's answer made. The Court cannot know whether, if these cases had been tried, those state officials would have offered evidence to contravene appellees' allegations concerning legislative purpose. Thus, it is completely inappropriate to accord any relevance to the admissions in the Governor's answer.

The several preceding opinions conclude that the principal difference between § 16-1-20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in § 16-1-20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic -- if it can be called that -- would lead the Court

---

[1] The foregoing opinions likewise completely ignore the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: "To permit a period of silence to be observed *for the purpose* of meditation *or* voluntary prayer at the commencement of the first class of each day in all public schools."

to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not *add* parents of parochial school students to an existing program providing reimbursement for parents of public school students. That would be the consequence of their method of focusing on the difference between § 16-1-20.1 and its predecessor statute rather than examining § 16-1-20.1 as a whole. Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in § 16-1-20.1 is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not *forbidden* in the public school building.[2]

(c) The Court's extended treatment of the "test" of *Lemon* v. *Kurtzman* suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." "In each [Establishment Clause] case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

(d) The notion that the Alabama statute is a step toward creating an established church borders on the ridiculous. The statute does not threaten religious liberty; it furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." The innocuous statute that the Court strikes down does not even rise to the level of "mere shadow." JUSTICE O'CONNOR paradoxically acknowledges: "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."[5] The mountains have labored and brought forth a mouse.[3]

---

[2] The several opinions suggest that other similar statutes may survive today's decision. See POWELL, J., concurring; O'CONNOR, J., concurring in judgment. If this is true, these opinions become even less comprehensible, given that the Court holds this statute invalid when there could hardly be less evidence of "impermissible" purpose than was shown in these cases.

[3] Horace, Epistles, bk. III (Ars Poetica), line 139.

JUSTICE WHITE, dissenting.

For the most part agreeing with the opinion of THE CHIEF JUSTICE, I dissent from the Court's judgment. Because I do, it is apparent that in my view the First Amendment does not proscribe either (1) statutes authorizing or requiring a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence for meditation or prayer. As I read the opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

I appreciate JUSTICE REHNQUIST's explication of the history of the Religion Clauses. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly the Establishment Clause. Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents.

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947), summarized its exegesis of Establishment Clause doctrine thus: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States,* [98 U.S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian, James Madison, was undoubtedly the most important architect of the Amendments which became the Bill of Rights. His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter-day commentators have ascribed to him. His explanation on the floor of the meaning of his language -- "that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk.

It seems indisputable from these glimpses of Madison's thinking, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson* -- while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty -- is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would become the Bill of Rights.

The actions of the First Congress, which reenacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights. The Northwest Ordinance provided that "[religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to nonsectarian schools.

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." Boudinot's resolution was carried in the affirmative on September 25, 1789. Within two weeks of this action by the House, George Washington responded to the Joint Resolution. Washington, John Adams, and James Madison all issued Thanksgiving Proclamations; Thomas Jefferson did not.

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. It was not until 1897 that Congress decided to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form.

Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever. . . ."

Joseph Story, a Member of this Court from 1811 to 1845, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States discussed the meaning of the Establishment Clause this way:

"Probably at the time of the adoption of the Constitution and the [First Amendment], the

general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

"The real object of the [First] [Amendment] was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ."

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[metaphors] in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Avenue R. Co*., 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926).

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to *Everson*'s wall through the three-part test of *Lemon* v. Kurtzman, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. *Lemon* cited *Board of Education* v. *Allen* as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proved mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute

may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so.

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld.

The entanglement prong of the *Lemon* test came from *Walz*. We have not always followed *Walz'* inquiry into entanglement, however. One of the difficulties with the entanglement prong is that it creates an "insoluable paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. This type of self-defeating result is certainly not required to ensure that States do not establish religions.

The entanglement test also ignores the myriad administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, depending upon how each of the three factors applies to a state action.

Although the test initially provided helpful assistance, we soon began describing the test as only a "guideline," and lately we have described it as "no more than [a] useful [signpost]." We have noted that the *Lemon* test is "not easily applied." If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. Today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon v. Kurtzman*." We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. The

Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute because the State wished to "characterize prayer as a favored practice." It would come as a shock to those who drafted the Bill of Rights to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer." History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer.

EDWARDS, GOVERNOR OF LOUISIANA v. AGUILLARD

482 U.S. 578 (1987)

JUSTICE BRENNAN delivered the opinion of the Court. JUSTICE O'CONNOR joins all but Part II of this opinion.

The question for decision is whether Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act (Creationism Act) is facially invalid as violative of the Establishment Clause.

I

The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." No school is required to teach evolution or creation science. If either is taught, however, the other must also be taught. The theories of evolution and creation science are statutorily defined as "the scientific evidences for [creation or evolution] and inferences from those scientific evidences."

II

The Court has been vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Therefore, in employing the *Lemon* test, we must do so mindful of the concerns that arise in the context of public elementary and

secondary schools. We now turn to the evaluation of the Act under the *Lemon* test.

III

Lemon's first prong focuses on the purpose that animated adoption of the Act. "The purpose prong asks whether government's actual purpose is to endorse or disapprove of religion." A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. If the law was enacted for the purpose of endorsing religion, "no consideration of the second or third criteria [of *Lemon*] is necessary." In this case, appellants have identified no clear secular purpose for the Act.

True, the Act's stated purpose is to protect academic freedom. This phrase might, in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will. The Court of Appeals, however, correctly concluded that the Act was not designed to further that goal.[1] Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

A

While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice."

It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated: "My preference would be that neither [creationism nor evolution] be taught." Such a ban on teaching does not promote -- indeed, it undermines -- the provision of a comprehensive scientific education.

It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any scientific theory. The Act provides schoolteachers with no new authority. Thus the stated purpose is not furthered by it.

---

[1] As the Court of Appeals explained, the Act "requires, presumably upon risk of *sanction* or *dismissal* for failure to comply, the teaching of creation-science whenever evolution is taught. Although states may prescribe public school curriculum concerning science instruction under ordinary circumstances, the compulsion inherent in the Balanced Treatment Act is, on its face, inconsistent with the idea of academic freedom as it is universally understood." The Act actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation science, even if teachers determine that such curriculum results in less effective and comprehensive science instruction.

The Alabama statute held unconstitutional in *Wallace* v. *Jaffree* is analogous. In *Wallace*, the State characterized its new law as one designed to provide a 1-minute period for meditation. We rejected that stated purpose as insufficient because a previously adopted Alabama law already provided for such a 1-minute period. Thus, in this case, as in *Wallace*, "appellants have not identified any secular purpose that was not fully served by [existing state law] before the enactment of [the statute in question]."

Furthermore, the goal of basic "fairness" is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution.[2] While requiring that curriculum guides be developed for creation science, the Act says nothing of comparable guides for evolution. Similarly, resource services are supplied for creation science but not for evolution. Only "creation scientists" can serve on the panel that supplies the resource services. The Act forbids school boards to discriminate against anyone who "chooses to be a creation-scientist" or to teach "creationism," but fails to protect those who choose to teach evolution or any other noncreation science theory, or who refuse to teach creation science.

If the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting "evolution by counterbalancing its teaching at every turn with the teaching of creationism."

B

Stone v. *Graham* invalidated the State's requirement that the Ten Commandments be posted in public classrooms. "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." As a result, the contention that the law was designed to provide instruction on a "fundamental legal code" was "not sufficient to avoid conflict with the First Amendment." Similarly *Abington School Dist*. v. *Schempp* held unconstitutional a statute "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison," despite the proffer of such secular purposes as the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."

As in *Stone* and *Abington*, we need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link

---

[2] The Creationism Act's provisions appear among other provisions prescribing the courses of study in Louisiana's public schools. These other provisions prescribe courses of study in such topics as driver training, civics, the Constitution, and free enterprise. None of these other provisions mandates "equal time" for opposing opinions within a specific area of learning.

between the teachings of certain religious denominations and the teaching of evolution. It was this link that concerned the Court in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The Court determined that "there can be no doubt that the motivation for the [Arkansas] law was the same [as other anti-evolution statutes]: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." The Court found that there can be no legitimate state interest in protecting particular religions from scientific views "distasteful to them," and concluded "that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

These same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act. Senator Keith's leading expert on creation science, Edward Boudreaux, testified at the legislative hearings that the theory of creation science included belief in the existence of a supernatural creator. Senator Keith also cited testimony from other experts to support the creation-science view that "a creator [was] responsible for the universe and everything in it." The legislative history therefore reveals that the term "creation science," as contemplated by the legislature that adopted this Act, embodies the religious belief that a supernatural creator was responsible for the creation of humankind.

It is not happenstance that the legislature required the teaching of a theory that coincided with this religious view. The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety. The sponsor of the Creationism Act, Senator Keith, explained that his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs. The senator repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with religious beliefs antithetical to his own.

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in *Epperson*, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator. The Creationism Act is designed *either* to promote the theory of creation science by requiring that creation science be taught whenever evolution is taught *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, "forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma." Because the primary purpose of the Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.

We do not imply that a legislature could never require that scientific critiques of

prevailing scientific theories be taught. Indeed, the Court acknowledged in *Stone* that its decision did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization. In a similar way, teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

The Louisiana Creationism Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring.

I

A

"The starting point in every case involving construction of a statute is the language itself." The Balanced Treatment for Creation-Science and Evolution-Science Act (Act or Balanced Treatment Act), La. Rev. Stat. Ann. § 17:286.1 *et seq*. (West 1982), provides in part:

"Public schools within [the] state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact."

"Balanced treatment" means "providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom." "Creation-science" is defined as "the scientific evidences for creation and inferences from those scientific evidences." "Evolution-science" means "the scientific evidences for evolution and inferences from those scientific evidences."

Although the Act requires the teaching of the scientific evidences of both creation and evolution whenever either is taught, it does not define either term. The "doctrine or theory of creation" is commonly defined as "holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing." "Evolution" is defined as "the theory that the various types of animals and plants have their origin in other preexisting types, the distinguishable differences being due to modifications in successive generations." Thus, the Balanced Treatment Act mandates that public schools present the scientific evidence to support a theory of divine creation whenever they present the scientific evidence to support the theory of evolution. "Concepts concerning God or a supreme being of some sort are manifestly religious . . . . These concepts do not shed that religiosity merely because they are

presented as a philosophy or as a science." From the face of the statute, a purpose to advance a religious belief is apparent.

A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate. The Act contains a statement of purpose: to "protec[t] academic freedom." This statement is puzzling. "Academic freedom" does not encompass the right of a legislature to structure the public school curriculum in order to advance a particular religious belief. Nevertheless, I read this statement in the Act as rendering the purpose of the statute at least ambiguous. Accordingly, I proceed to review the legislative history of the Act.

B

In June 1980, Senator Bill Keith introduced Senate Bill 956 in the Louisiana Legislature. The legislature then held hearings on the bill that became the Balanced Treatment Act. The principal creation scientist to testify in support of the Act was Dr. Edward Boudreaux. He did not elaborate on the nature of creation science except to indicate that the "scientific evidences" of the theory are "the objective information of science [that] point[s] to conditions of a creator." He further testified that the recognized creation scientists in the United States are affiliated with either or both the Institute for Creation Research and the Creation Research Society. Information on both of these organizations is part of the legislative history, and a review of their goals and activities sheds light on the nature of creation science as it was presented to, and understood by, the Louisiana Legislature.

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. The Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give account." A goal of the Institute is "a revival of belief in special creation as the true explanation of the origin of the world." Therefore, the Institute currently is working on the "development of new methods for teaching scientific creationism in public schools." The Creation Research Society (CRS) is located in Ann Arbor, Michigan. A member must subscribe to the following statement of belief: "The Bible is the written word of God, and because it is inspired throughout, all of its assertions are historically and scientifically true." To study creation science at the CRS, a member must accept "that the account of origins in Genesis is a factual presentation of simple historical truth."

C

When, as here, "both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one." My examination of the language and the legislative history of the Balanced Treatment Act confirms that the intent of the Louisiana Legislature was to promote a particular religious belief.

Here, it is clear that religious belief is the Balanced Treatment Act's "reason for existence." The tenets of creation science parallel the Genesis story of creation, and this is a religious belief. "No legislative recitation of a supposed secular purpose can blind us to that fact." The statements of purpose of the sources of creation science make clear that their purpose is to promote a religious belief. I find no persuasive evidence in the legislative history that the legislature's purpose was any different. The fact that the Louisiana Legislature purported to add information to the school curriculum rather than detract from it as in

Epperson does not affect my analysis. Both legislatures acted with the unconstitutional purpose of structuring the public school curriculum to make it compatible with a particular religious belief: the "divine creation of man."

That the statute is limited to the scientific evidences supporting the theory does not render its purpose secular. Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief. The language of the statute and its legislative history convince me that the Legislature exercised its discretion for this purpose.

II

Even though I find Louisiana's Act unconstitutional, I adhere to the view "that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools." A decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught "'happens to coincide with the tenets of some or all religions.'" In the context of a challenge under the Establishment Clause, interference with the decisions of these authorities is warranted only when the purpose for their decisions is clearly religious.

As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government. Courses in comparative religion are constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. In addition, it is worth noting that the Establishment Clause does not prohibit *per se* the educational use of religious documents in public school education. Although this Court has recognized that the Bible is "an instrument of religion," it also has made clear that the Bible "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief.

III

In sum, I find that the language and the legislative history of the Balanced Treatment Act unquestionably demonstrate that its purpose is to advance a particular religious belief. Although the discretion of state and local authorities over public school curricula is broad, "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." Accordingly, I concur in the opinion of the Court and its judgment that the Balanced Treatment Act violates the Establishment Clause of the Constitution.

JUSTICE WHITE, concurring in the judgment.

As it comes to us, this is not a difficult case. Based on the historical setting and plain language of the Act both courts construed the statutory words "creation science" to refer to a

religious belief, which the Act required to be taught if evolution was taught. In other words, the teaching of evolution was conditioned on the teaching of a religious belief. Both courts concluded that the state legislature's primary purpose was to advance religion and that the statute was therefore unconstitutional under the Establishment Clause.

We usually defer to courts of appeals on the meaning of a state statute, especially when a district court has the same view. Here, the District Judge, relying on the terms of the Act, discerned its purpose to be the furtherance of a religious belief, and the Court of Appeals agreed. Of those four judges, two are Louisianians. I would accept this view of the statute. Even if as an original matter I might have arrived at a different conclusion, I cannot say that the two courts below are so plainly wrong that they should be reversed.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

Even if I agreed with the questionable premise that legislation can be invalidated under the Establishment Clause on the basis of its motivation alone, without regard to its effects, I would still find no justification for today's decision. The Louisiana legislators who passed the Balanced Treatment Act were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with great care. After seven hearings and several months of study, they approved the Act overwhelmingly and specifically articulated the secular purpose they meant it to serve. Although the record contains abundant evidence of the sincerity of that purpose, the Court today holds, essentially on the basis of "its visceral knowledge regarding what *must* have motivated the legislators," that the members of the Louisiana Legislature knowingly lied about it. I dissent.

I

The parties are sharply divided over what creation science consists of. Appellants insist that it is a collection of educationally valuable scientific data that has been censored from classrooms by an embarrassed scientific establishment. Appellees insist it is not science at all but thinly veiled religious doctrine. Both interpretations of the intended meaning of that phrase find considerable support in the legislative history.

At least at this stage in the litigation, it is plain to me that we must accept appellants' view of what the statute means. To begin with, the statute itself *defines* "creation-science" as "the *scientific evidences* for creation and inferences from those *scientific evidences*." The only evidence in the record of the meaning of "creation science" is found in five affidavits filed by appellants. In those affidavits, two scientists, a philosopher, a theologian, and an educator swear that it is essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing. These experts insist that creation science is a strictly scientific concept that can be presented without religious reference. At this point, then, we must assume that the Balanced Treatment Act does *not* require the presentation of religious doctrine.

Nothing in today's opinion is plainly to the contrary, but what the statute means and what it requires are of rather little concern to the Court. The Court finds it necessary to consider only the motives of the legislators who supported the Balanced Treatment Act. After examining the statute, its legislative history, and its historical and social context, the Court

holds that the Louisiana Legislature acted without "a secular legislative purpose." As I explain below, I doubt whether that "purpose" requirement of *Lemon* is a proper interpretation of the Constitution; but even if it were, I could not agree with the Court's assessment that the requirement was not satisfied here.

This Court has said little about the first component of the *Lemon* test. Almost invariably, we have effortlessly discovered a secular purpose. In fact, only once before deciding *Lemon*, and twice since, have we invalidated a law for lack of a secular purpose. See *Wallace* v. *Jaffree*; *Stone* v. *Graham*; *Epperson v. Arkansas*.

Nevertheless, a few principles have emerged from our cases, principles which should, but to an unfortunately large extent do not, guide the Court's application of *Lemon* today. First of all, "legislative purpose" means the "actual" motives of those responsible for the challenged action. Thus, if those legislators who supported the Balanced Treatment Act *in fact* acted with a "sincere" secular purpose, the Act survives the first component of the *Lemon* test, regardless of whether that purpose is likely to be achieved by the provisions they enacted.

Our cases have also confirmed that when the *Lemon* Court referred to "a secular . . . purpose," it meant "*a* secular purpose." Invalidation under the purpose prong is appropriate when "there [is] *no question* that the statute or activity was motivated *wholly* by religious considerations." In all three cases in which we struck down laws under the Establishment Clause for lack of a secular purpose, we found that the legislature's sole motive was to promote religion. Thus, the majority's invalidation of the Balanced Treatment Act is defensible only if the record indicates that the Louisiana Legislature had *no* secular purpose.

It is important to stress that the purpose forbidden by *Lemon* is the purpose to "advance religion." Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.

Similarly, we will not presume that a law's purpose is to advance religion merely because it "'happens to coincide or harmonize with the tenets of some or all religions,'" or because it benefits religion, even substantially. Thus, the fact that creation science coincides with the beliefs of certain religions does not itself justify invalidation of the Act.

One final observation: Although the Court's opinion gives no hint of it, in the past we have repeatedly affirmed "our reluctance to attribute unconstitutional motives to the States." We "presume that legislatures act in a constitutional manner." This is particularly true where the legislature has specifically considered the question of a law's constitutionality.

With the foregoing in mind, I turn to the purposes underlying adoption of the Act.

II

We have relatively little information upon which to judge the motives of those who supported the Act. About the only direct evidence is the statute itself and transcripts of the

seven committee hearings at which it was considered. We have no committee reports, no floor debates, no remarks inserted into the legislative history, no statement from the Governor, and no postenactment statements or testimony from the bill's sponsor or any other legislators. Nevertheless, there is ample evidence that the majority is wrong in holding that the Balanced Treatment Act is without secular purpose.

At the outset, it is important to note that the Balanced Treatment Act did not fly through the Louisiana Legislature on wings of fundamentalist religious fervor -- which would be unlikely, in any event, since only a small minority of the State's citizens belong to fundamentalist religious denominations. The Act had its genesis (so to speak) in legislation introduced by Senator Bill Keith in June 1980.

The legislators understood that Senator Keith's bill involved a "unique" subject, and they were repeatedly made aware of its potential constitutional problems. The legislators eventually voted overwhelmingly in favor of the Balanced Treatment Act. The legislators specifically designated the protection of "academic freedom" as the purpose of the Act. We cannot accurately assess whether this purpose is a "sham" until we first examine the evidence presented to the legislature far more carefully than the Court has done.

Before summarizing the testimony of Senator Keith and his supporters, I wish to make clear that I by no means intend to endorse its accuracy. But my views (and the views of this Court) about creation science and evolution are (or should be) beside the point. Our task is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed. The vast majority of them voted to approve a bill which explicitly stated a secular purpose; what is crucial is not their *wisdom* in believing that purpose would be achieved by the bill, but their *sincerity* in believing it would be.

Most of the testimony in support of Senator Keith's bill came from the Senator himself and from scientists and educators he presented, many of whom enjoyed academic credentials that may have been regarded as quite impressive by members of the Louisiana Legislature. To a substantial extent, their testimony was devoted to lengthy, and, to the layman, seemingly expert scientific expositions on the origin of life. These scientific lectures touched upon biology, paleontology, genetics, astronomy, astrophysics, probability analysis, and biochemistry. The witnesses repeatedly assured committee members that "hundreds and hundreds" of highly respected, internationally renowned scientists believed in creation science and would support their testimony.

Senator Keith and his witnesses testified essentially as set forth in the following numbered paragraphs:

(1) There are two and only two scientific explanations for the beginning of life -- evolution and creation science. Both are bona fide "sciences." Both posit a theory of the origin of life and subject that theory to empirical testing. Evolution posits that life arose out of inanimate chemical compounds and has gradually evolved over millions of years. Creation science posits that all life forms now on earth appeared suddenly and relatively recently and have changed little.

(2) The body of scientific evidence supporting creation science is as strong as that supporting evolution. In fact, it may be stronger. Evolution is not a scientific "fact," since it

cannot be observed in a laboratory. Rather, evolution is merely a scientific theory or "guess." It is a very bad guess at that. The scientific problems with evolution are so serious that it could accurately be termed a "myth."

(3) Creation science is educationally valuable. Students exposed to it better understand the current state of scientific evidence about the origin of life. Those students even have a better understanding of evolution. Creation science can and should be presented to children without any religious content.

(4) Although creation science is educationally valuable and strictly scientific, it is now being censored from or misrepresented in the public schools. Evolution, in turn, is misrepresented as an absolute truth. Teachers have been brainwashed by an entrenched scientific establishment composed almost exclusively of scientists to whom evolution is like a "religion."

(5) The censorship of creation science has at least two harmful effects. First, it deprives students of knowledge of one of the two scientific explanations for the origin of life and leads them to believe that evolution is proven fact; thus, they are wrongly taught that science has proved their religious beliefs false. Second, it violates the Establishment Clause. Secular humanism is a religion. Belief in evolution is a central tenet of that religion. Thus, by censoring creation science and instructing students that evolution is fact, public school teachers are *now* advancing religion in violation of the Establishment Clause.

Senator Keith repeatedly and vehemently denied that his purpose was to advance a particular religious doctrine. We have no way of knowing how many legislators believed the testimony of Senator Keith and his witnesses. But in the absence of evidence to the contrary, we have to assume that many of them did. Given that assumption, the Court today plainly errs in holding that the Louisiana Legislature passed the Act for exclusively religious purposes.

Even with nothing more than this legislative history to go on, I think it would be extraordinary to invalidate the Balanced Treatment Act for lack of a valid secular purpose. Striking down a law approved by the democratically elected representatives of the people is no minor matter. Even if the legislative history were silent or ambiguous about the existence of a secular purpose -- and here it is not -- the statute should survive *Lemon*'s purpose test. But even more validation than mere legislative history is present here. The Louisiana Legislature explicitly set forth its secular purpose ("protecting academic freedom") in the very text of the Act. We have in the past repeatedly relied upon or deferred to such expressions.

Senator Keith unquestionably understood "academic freedom" to mean "freedom from indoctrination." If one adopts the obviously intended meaning of the statutory term "academic freedom," there is no basis whatever for concluding that the purpose is a "sham." To the contrary, the Act pursues that purpose plainly and consistently. It requires that, whenever the subject of origins is covered, evolution be "taught as a theory, rather than as proven scientific fact" and that scientific evidence inconsistent with the theory of evolution (viz., "creation science") be taught as well. It treats the teaching of creation the same way. It *forbids* teachers to present creation science "as proven scientific fact," and *bans* the teaching of creation science unless the theory is "discredit[ed] '. . . at every turn'" with the teaching of evolution. It surpasses understanding how the Court can see in this a purpose "to restructure the science

curriculum to conform with a particular religious viewpoint," "to provide a persuasive advantage to a particular religious doctrine," "to promote the theory of creation science which embodies a particular religious tenet," and "to endorse a particular religious doctrine."

The Act's reference to "creation" is not convincing evidence of religious purpose. The Act defines creation science as "*scientific evidenc[e]*," and Senator Keith and his witnesses repeatedly stressed that the subject can and should be presented without religious content. We have no basis on the record to conclude that creation science need be anything other than a collection of scientific data supporting the theory that life abruptly appeared on earth.

The Court cites three provisions of the Act which, it argues, demonstrate a "discriminatory preference for the teaching of creation science" and no interest in "academic freedom." First, the Act prohibits discrimination only against creation scientists and those who teach creation science. Second, the Act requires local school boards to develop and provide to science teachers "a curriculum guide on presentation of creation-science." Finally, the Act requires the Governor to designate seven creation scientists who shall, upon request, assist local school boards in developing the curriculum guides. But none of these provisions casts doubt upon the sincerity of the legislators' articulated purpose of "academic freedom." The Louisiana legislators had been told repeatedly that creation scientists were scorned by most educators and scientists, who themselves had an almost religious faith in evolution. It is hardly surprising that the legislators protected from discrimination only those teachers whom they thought were *suffering* from discrimination. The two provisions respecting the development of curriculum guides are also consistent with "academic freedom" as the Louisiana Legislature understood the term. Witnesses had informed the legislators that the topic had been censored from or badly misrepresented in elementary and secondary school texts. In light of the unavailability of works on creation science suitable for classroom use and the existence of ample materials on evolution, it was reasonable to conclude that science teachers attempting to implement the Act would need a curriculum guide on creation science, but not on evolution, and that those charged with developing the guide would need an easily accessible group of creation scientists. Thus, the provisions of the Act of so much concern to the Court *support* the conclusion that the legislature acted to advance "academic freedom."

The legislative history gives ample evidence of the sincerity of the Balanced Treatment Act's articulated purpose. Witness after witness urged the legislators to support the Act so that students would not be "indoctrinated" but would instead be free to decide for themselves, based upon a fair presentation of the scientific evidence, about the origin of life. Senator Keith expressed similar views.

In sum, we have no adequate basis for disbelieving the secular purpose set forth in the Act itself, or for concluding that it is a sham. I am astonished by the Court's unprecedented readiness to reach such a conclusion, which I can only attribute to an intellectual predisposition created by the facts and the legend of *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363 (1927) -- an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression. In this case, however, it seems to me the Court's position is the repressive one. The people of Louisiana are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was

entitled to present whatever scientific evidence there was for it.

Because I believe that the Balanced Treatment Act had a secular purpose, which is all the first component of the *Lemon* test requires, I would reverse the judgment of the Court of Appeals and remand for further consideration.

III

I have to this point assumed the validity of the *Lemon* "purpose" test. In fact, however, I think the pessimistic evaluation that THE CHIEF JUSTICE made of the totality of *Lemon* is particularly applicable to the "purpose" prong: it is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results . . . ." *Wallace* v. *Jaffree*, 472 U.S., at 112 (REHNQUIST, J., dissenting).

Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. Discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Putting that problem aside, however, where ought we to look for the individual legislator's purpose? We cannot of course assume that every member present agreed with the motivation expressed in a particular legislator's preenactment floor or committee statement. Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read? Should we consider postenactment floor statements? Or postenactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining? All of these sources, of course, are manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted.

Having achieved, through these simple means, an assessment of what individual legislators intended, we must still confront the question how *many* of them must have the invalidating intent. If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it?

Because there are no good answers to these questions, this Court has recognized that determining the subjective intent of legislators is a perilous enterprise. Given the many hazards involved, the first prong of *Lemon* is defensible, I think, only if the text of the Establishment Clause demands it. That is surely not the case.

In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it "sacrifices clarity and predictability for flexibility." I think it time that we sacrifice some "flexibility" for "clarity and predictability." Abandoning *Lemon*'s purpose test -- a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and has wonderfully flexible consequences -- would be a good place to start.

LEE v. WEISMAN

505 U.S. 577 (1992)

JUSTICE KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment.

I

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a ceremony in June 1989. She was 14 years old. For many years it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many of the principals elected to include prayers. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "prayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet and advised him the invocation and benediction should be nonsectarian.

Rabbi Gutterman's prayers were as follows:

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

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN"

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN"

The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom at middle school graduations. We are not so constrained with reference to high schools, however. High school graduations are such an integral part of American cultural life that we can with confidence describe their customary features, confirmed by the record. In the Providence school system, most high school graduation ceremonies are conducted away from the school, while most middle school ceremonies are held on school premises. The parties stipulate that attendance at graduation ceremonies is voluntary. The graduating students enter as a group in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families. We assume the clergy's participation in any high school graduation exercise would be about what it was at Deborah's middle school ceremony. There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers. Even on the assumption that there was a respectful moment of silence both before and after the prayers, the rabbi's two presentations must not have extended much beyond a minute each. We do not know whether he remained on stage during the whole ceremony, or whether the students received diplomas on stage, or if he helped to congratulate them.

The school board argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents who consider that due respect and acknowledgment for divine guidance ought to be expressed at an event as important as a graduation. We assume this to be so in addressing the difficult case before us.

II

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their

attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

The controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation to reconsider our decision in *Lemon v. Kurtzman*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so. The State's involvement in the school prayers challenged today violates these central principles. That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The potential for divisiveness over the choice of a particular member of the clergy is apparent. The potential for divisiveness is of particular relevance here because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel v. Vitale*, and that is what the school officials attempted to do.

Petitioners argue that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. If common ground can be defined which permits once conflicting faiths to express shared conviction, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. *Engel v. Vitale*. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these. Against this background, students may consider it an odd measure of justice to be subjected during their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, 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. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in *Engel v. Vitale* and *School Dist. of Abington* recognize that prayer exercises in public schools carry a particular risk of indirect coercion. What to most believers may seem

nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not place primary and secondary school children in this position. Research in psychology supports the assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.

There was a stipulation in the District Court that attendance at graduation and promotional

ceremonies is voluntary. Petitioners and the United States, as *amicus*, made this a center point of the case, arguing that the option of not attending the graduation excuses any coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our culture high school graduation is one of life's most significant occasions. A rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting. Just as in *Engel v. Vitale*, and *School Dist. of Abington v. Schempp* where we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783. At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents

of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. This is different from *Marsh* and suffices to make the religious exercise a First Amendment violation. Our decisions in *Engel* and *Schempp* require us to distinguish the public school context.

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. But, by any reading of our cases, the conformity required in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the student had no real alternative to avoid.

Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring.

I

There can be "no doubt" that the "invocation of God's blessings" delivered at Nathan Bishop Middle School "is a religious activity." In the words of *Engel*, the rabbi's prayer "is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." The question then is whether the government has "placed its official stamp of approval" on the prayer. As the Court ably demonstrates, when the government "composes official prayers," selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised, and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion. As our prior decisions teach us, it is this that the Constitution prohibits.

II

I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents. The Court holds that the graduation prayer is unconstitutional because the State "in effect required participation in a religious exercise." Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.

But it is not enough that the government restrain from compelling religious practices: It

must not engage in them either. The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion. The Establishment Clause proscribes public schools from "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or preferred," even if the schools do not actually "impose pressure upon a student to participate in a religious activity."

Our decisions have gone beyond prohibiting coercion because the Court has recognized that "the fullest possible scope of religious liberty" entails more than freedom from coercion. The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community -- both essential to safeguarding religious liberty. "Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate."

We have recognized that "religion flourishes in greater purity, without than with the aid of Government." When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "tainted . . . with a corrosive secularism." The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation. Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to "flourish according to the zeal of its adherents and the appeal of its dogma."

It is these understandings and fears that underlie our Establishment Clause jurisprudence. We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. 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. I remain convinced that our jurisprudence is not misguided, and that it requires the decision reached by the Court today.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring.

I join the whole of the Court's opinion, and fully agree that prayers at public school graduation ceremonies indirectly coerce religious observance. I write separately nonetheless on two issues of Establishment Clause analysis that underlie my independent resolution of this case: whether the Clause applies to governmental practices that do not favor one religion or denomination over others, and whether state coercion of religious conformity is a necessary element of an Establishment Clause violation.

I

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that "aid

one religion . . . or prefer one religion over another," but also those that "aid all religions." *Everson v. Board of Ed. of Ewing*. Today we reaffirm that principle, holding that the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be. In barring the State from sponsoring generically theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart.

A

Since *Everson*, we have consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others. Thus, in *Engel v. Vitale*, we held that the public schools may not subject their students to readings of any prayer, however "denominationally neutral." More recently, in *Wallace v. Jaffree*, we held that an Alabama moment-of-silence statute passed for the sole purpose of "returning voluntary prayer to public schools" violated the Establishment Clause even though it did not encourage students to pray to any particular deity. We said that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." Such is the settled law. Here, as elsewhere, we should stick to it absent some compelling reason to discard it.

B

Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion. The challengers argue that, as originally understood by the Framers, "the Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*.

When James Madison arrived at the First Congress with a series of proposals to amend the Constitution, one of the provisions read that "the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." Madison's language did not last long. It was sent to a Select Committee of the House which changed it to read that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." Thence the proposal went to the Committee of the Whole, which adopted an alternative proposed by Samuel Livermore of New Hampshire: "Congress shall make no laws touching religion, or infringing the rights of conscience." Livermore's proposal would have forbidden laws having anything to do with religion and was thus not only far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it. The House rewrote the amendment once more before sending it to the Senate, this time adopting language derived from a proposal by Fisher Ames of Massachusetts: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

The sequence of the Senate's treatment of this House proposal, and the House's response,

confirm that the Framers meant the Establishment Clause's prohibition to encompass nonpreferential aid to religion. In September 1789, the Senate considered a number of provisions that would have permitted such aid, and adopted one of them. First, it briefly entertained this language: "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." After rejecting amendments to that proposal, the Senate dropped it altogether and chose a provision identical to the House's proposal, but without the clause protecting the "rights of conscience." With no record of the Senate debates, we cannot know what prompted these changes, but six days later, the Senate adopted its narrowest language yet: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." The Senate sent this proposal to the House along with its versions of the other constitutional amendments proposed.

Though it accepted much of the Senate's work on the Bill of Rights, the House rejected the Senate's version of the Establishment Clause and called for a joint conference committee, to which the Senate agreed. The House conferees ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or specific "articles of faith." The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.

What we thus know of the Framers' experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters." We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment. Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

C

While these considerations are, for me, sufficient to reject the nonpreferentialist position, one further concern animates my judgment. In many contexts, including this one, non-preferentialism requires some distinction between "sectarian" religious practices and those that would be ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary.

This case is nicely in point. Since the nonpreferentiality of a prayer must be judged by its text, Rabbi Gutterman drew his exhortation "'to do justly, to love mercy, to walk humbly'" straight from the King James version of Micah, ch. 6, v. 8. And even if Micah's thought is sufficiently generic for most believers, it still embodies a straightforwardly theistic premise, and so does the rabbi's prayer. Many Americans who consider themselves religious are not theistic; some, like several of the Framers, are deists who would question Rabbi Gutterman's

plea for divine advancement of the country's political and moral good. Thus, a nonpreferentialist who would condemn subjecting public school graduates to the Anglican liturgy would still need to explain why the government's preference for theistic over nontheistic religion is constitutional. Nor does it solve the problem to say that the State should promote a "diversity" of religious views; that position would necessarily compel the government and, inevitably, the courts to make inappropriate judgments about the number of religions the State should sponsor and the frequency with which it should sponsor each.

II

Petitioners rest most of their argument on a theory that the Establishment Clause does not forbid the state to sponsor affirmations of religious belief that coerce neither support for religion nor participation in religious observance. I appreciate the force of some of the arguments supporting a "coercion" analysis of the Clause. 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 permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course.

A

Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement. For example, in *Wallace v. Jaffree*, we struck down a state law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but because the manner of its enactment "conveyed a message of state approval of prayer activities in the public schools." Our precedents may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.

B

The constitutional language forbidding laws "respecting an establishment of religion" is not pellucid. But virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense. This much follows from the Framers' explicit rejection of simpler provisions prohibiting either the establishment of a religion or laws "establishing religion" in favor of the broader ban on laws "respecting an establishment of religion."

While some argue that the Framers added the word "respecting" simply to foreclose federal interference with state establishments of religion, the language sweeps more broadly than that. In Madison's words, the Clause in its final form forbids "everything like" a national religious establishment, and, after incorporation, it forbids "everything like" a state religious establishment. The sweep is broad enough that Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional "establishments."

Laws that coerce nonadherents to "support or participate in any religion or its exercise" would virtually by definition violate their right to religious free exercise. Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity. Our

cases presuppose as much; as we said in *School Dist. of Abington*, "the distinction between the two clauses is apparent -- a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." While one may argue that the Framers meant the Establishment Clause simply to ornament the First Amendment, that must be a reading of last resort. Without compelling evidence to the contrary, we should presume that the Framers meant the Clause to stand for something more.

C

Petitioners argue from the political setting in which the Establishment Clause was framed, and from the Framers' own political practices following ratification, that government may constitutionally endorse religion so long as it does not coerce religious conformity. The setting and the practices warrant canvassing, but while they yield some evidence for petitioners' argument, they do not reveal the degree of consensus in early constitutional thought that would raise a threat to *stare decisis* by challenging the presumption that the Establishment Clause adds something to the Free Exercise Clause that follows it.

The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments, but their special antipathy to religious coercion did not exhaust their hostility to the features and incidents of establishment. Indeed, Jefferson and Madison opposed any political appropriation of religion.

Petitioners contend that because the early Presidents included religious messages in their inaugural and Thanksgiving Day addresses, the Framers could not have meant the Establishment Clause to forbid noncoercive state endorsement of religion. The argument ignores the fact, however, that Americans today find such proclamations less controversial than did the founding generation, whose published thoughts on the matter belie petitioners' claim. President Jefferson, for example, steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses.

During his first three years in office, James Madison also refused to call for days of thanksgiving and prayer, though later, amid the political turmoil of the War of 1812, he did so on four separate occasions. Madison's failure to keep pace with his principles in the face of congressional pressure cannot erase the principles. That he expressed doubt about the constitutionality of religious proclamations, however, suggests a brand of separationism stronger even than that embodied in our traditional jurisprudence.

To be sure, the leaders of the young Republic engaged in some of the practices that separationists like Jefferson and Madison criticized. The First Congress did hire institutional chaplains, and Presidents Washington and Adams unapologetically marked days of "'public thanksgiving and prayer.'" Yet in the face of the separationist dissent, those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.

While we may be unable to know for certain what the Framers meant by the Clause, we do know that, around the time of its ratification, a respectable body of opinion supported a considerably broader reading than petitioners urge upon us. This consistency with the textual considerations is enough to preclude fundamentally reexamining our settled law, and I am

accordingly left with the task of considering whether the state practice at issue here violates our traditional understanding of the Clause's proscriptions.

III

While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence.

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion. Concern for the position of religious individuals in the modern regulatory State cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief. By these lights one easily sees that, in sponsoring the graduation prayers at issue here, the State has crossed the line from permissible accommodation to unconstitutional establishment.

Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony. They may even organize a privately sponsored baccalaureate if they desire the company of like-minded students. Because they accordingly have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion.[1]

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from Presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However "ceremonial" their messages may be, they are flatly unconstitutional.

---

[1] If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. But that is not our case. Nor is this a case where the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria. Finally, this is not a case in which government officials invoke spiritual inspiration for their own benefit without directing any religious message at the citizens they lead.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, dissenting.

In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court -- with nary a mention that it is doing so – lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion. Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.

I

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, but since the Court is so oblivious to our history it appears necessary to provide another brief account.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, George Washington deliberately made a prayer a part of his first official act as President. Such supplications have been a characteristic feature of inaugural addresses ever since. Our national celebration of Thanksgiving likewise dates back to President Washington. This tradition of Thanksgiving Proclamations -- with their religious theme of prayerful gratitude to God -- has been adhered to by almost every President. The other two branches of the Federal Government also have a long-established practice of prayer at public events.

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises. By one account, the first public high school graduation ceremony took place in Connecticut in July 1868 when "15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers." As the Court obliquely acknowledges in describing the "customary features" of high school graduations, the invocation and benediction have long been recognized to be "as traditional as any other parts of the [school] graduation program and are widely established."

II

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to "require scrutiny more commonly associated with interior decorators than with the judiciary." But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few

citations of "research in psychology" cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

The Court identifies two "dominant facts" that it says dictate its ruling that invocations and benedictions at public school graduation ceremonies violate the Establishment Clause. Neither of them is in any relevant sense true.

A

The Court declares that students' "attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory." According to the Court, students at graduation who want "to avoid the fact or appearance of participation" in the invocation and benediction are *psychologically* obligated by "public pressure, as well as peer pressure, . . . to stand as a group or, at least, maintain respectful silence" during those prayers. This assertion -- *the very linchpin of the Court's opinion* -- is almost as intriguing for what it does not say as for what it says. It does not say that students are psychologically coerced to bow their heads, place their hands in a Durer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. It claims only that students are psychologically coerced "to stand . . . *or*, at least, maintain respectful silence." Both halves of this disjunctive merit particular attention.

To begin with the latter: The Court's notion that a student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined -- or would somehow be perceived as having joined -- in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain the free will to sit, there is absolutely no basis for the Court's decision. It is fanciful enough to say that "a reasonable dissenter," standing head erect in a class of bowed heads, "could believe that the group exercise signified her own participation or approval of it." It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the worst, that the nonparticipating graduate is "subtly coerced" to stand! Even that half of the disjunctive does not establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that "in our culture standing can signify adherence to a view or respect for the views of others." But if it is a permissible inference that one who is standing is doing so out of respect for the prayers of others, then how can it possibly be said that a "reasonable dissenter could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot.

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943). Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include

the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools? Logically, that ought to be the next project for the Court's bulldozer.

B

The other "dominant fact" identified by the Court is that "state officials direct the performance of a formal religious exercise" at school graduation ceremonies. "Directing the performance of a formal religious exercise" has a sound of liturgy to it, summoning up images of the principal directing acolytes where to carry the cross, or showing the rabbi where to unroll the Torah. But all the record shows is that principals of the Providence public schools have invited clergy to deliver invocations and benedictions at graduations; and that Principal Lee invited Rabbi Gutterman, provided him a two-page pamphlet, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayer for civic occasions, and advised him that his prayers at graduation should be nonsectarian. How these facts can fairly be transformed into the charges that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer," that school officials "monitor prayer," and attempted to "'compose official prayers,'" is difficult to fathom.

III

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term "establishment" had acquired an additional meaning -- "financial support of religion generally, by public taxation" -- that reflected the development of "general or multiple" establishments, not limited to a single church. But that would still be an establishment coerced *by force of law*. And I will further concede that our constitutional tradition has ruled out of order government-sponsored endorsement of religion -- even when no legal coercion is present, and indeed even when no ersatz, "peer-pressure" psycho-coercion is present -- where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ). But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or

Abraham Lincoln himself.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty -- a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that "speech is not coercive; the listener may do as he likes."

There is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline. To characterize the "subtle coercive pressures" allegedly present here as the "practical" equivalent of legal sanctions is . . . well, let me just say it is not a "delicate and fact-sensitive" analysis.

The Court relies on our "school prayer" cases. But whatever the merit of those cases, they do not support, much less compel, the Court's psycho-journey. In the first place, *Engel* and *Schempp* do not constitute an exception to the rule that public ceremonies may include prayer; rather, they simply do not fall within the scope of the rule (for the obvious reason that school instruction is not a public ceremony). Second, school prayer occurs within a framework in which legal coercion to attend school provides the ultimate backdrop. The question whether the opt-out procedure in *Engel* sufficed to dispel the coercion resulting from the mandatory attendance requirement is quite different from the question whether forbidden coercion exists in an environment *utterly devoid of legal compulsion*. And finally, our school prayer cases turn in part on the fact that the classroom is inherently an instructional setting, and daily prayer there -- where parents are not present to counter "the students' emulation of teachers as role models and the children's susceptibility to peer pressure"-- might be thought to raise special concerns regarding state interference with the liberty of parents to direct the religious upbringing of their children. Voluntary prayer at graduation -- a one-time ceremony at which parents, friends, and relatives are present -- can hardly be thought to raise the same concerns.

IV

Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that conflict with our constitutional traditions. Foremost among these has been the so-called *Lemon* test. The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double disability of having no roots in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to

the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration -- no, an affection -- for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman was inoculated from religious bigotry in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever the minimal inconvenience of standing or sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

For the foregoing reasons, I dissent.

ROSENBERGER v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA

515 U.S. 819 (1995)

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Virginia authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

I

An understanding of the case requires a somewhat detailed description of the program the University created to support extracurricular student activities on its campus. Before a student group is eligible to submit bills from its outside contractors for payment by the fund described below, it must become a "Contracted Independent Organization" (CIO). CIO status is available to any group the majority of whose members are students, whose managing officers are full-time students, and that complies with certain procedural requirements. A CIO must file its constitution with the University; must pledge not to discriminate in its membership; and must include in dealings with third parties and in all written materials a disclaimer, stating that the CIO is independent of the University. CIOs enjoy access to University facilities.

All CIOs may operate at the University, but some are also entitled to apply for funds from the Student Activities Fund (SAF). The purpose of the SAF is to support a broad range of extracurricular student activities that "are related to the educational purpose of the University." The SAF receives its money from a mandatory fee of $ 14 per semester assessed to each full-time student. The Student Council has the initial authority to disburse the funds, but its actions are subject to review by a faculty body.

Some, but not all, CIOs may submit disbursement requests to the SAF. The Guidelines recognize 11 categories of student groups that may seek payment to third-party contractors because they "are related to the educational purpose of the University of Virginia." One of these is "student news, information, opinion, entertainment, or academic communications media groups." The Guidelines also specify, however, that the costs of certain activities of CIOs that are otherwise eligible for funding will not be reimbursed by the SAF. The student activities that are excluded from SAF support are religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University's tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses. A "religious activity" is defined as any activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."

If an organization seeks SAF support, it must submit its bills to the Student Council, which pays the organization's creditors upon determining that the expenses are appropriate. No direct payments are made to the student groups. During the 1990-1991 academic year, 343 student groups qualified as CIOs. One hundred thirty-five of them applied for support from the SAF, and 118 received funding. Fifteen of the groups were funded as "student news, information, opinion, entertainment, or academic communications media groups."

Petitioners' organization, Wide Awake Productions (WAP), qualified as a CIO. Formed by petitioner Ronald Rosenberger and other undergraduates in 1990, WAP was established "to publish a magazine of philosophical and religious expression," "to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints," and "to provide a unifying focus for Christians of multicultural backgrounds." WAP publishes Wide Awake: A Christian Perspective at the University of Virginia. The editors committed the paper to a two-fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. By June 1992, WAP had distributed about 5,000 copies of Wide Awake to University students, free of charge.

WAP had acquired CIO status soon after it was organized. Had it been a "religious organization," WAP would not have been accorded CIO status. As defined by the Guidelines, a "religious organization" is "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." At no stage in this controversy has the University

contended that WAP is such an organization.

After being given CIO status, WAP requested the SAF to pay its printer $ 5,862 for the costs of printing its newspaper. The Student Council denied WAP's request on the ground that Wide Awake was a "religious activity."

II

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable. The most recent and most apposite case is our decision in *Lamb's Chapel.* We conclude that here, as in *Lamb's Chapel,* viewpoint discrimination is the proper way to interpret the objections to Wide Awake. By the terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. The prohibited perspective, not the general subject, resulted in the refusal to make third-party payments.

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong.

The University tries to escape the consequences of our holding in *Lamb's Chapel* by urging that this case involves the provision of funds rather than access to facilities. Were the reasoning of *Lamb's Chapel* to apply to funding decisions as well as to those involving access

to facilities, it is urged, its holding "would constitutionaliz[e] the ubiquitous content-based decisions that colleges routinely make in the allocation of public funds."

To this end the University relies on our assurance in *Widmar v. Vincent.* There we stated: "Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources." The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

It does not follow, however, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

The distinction between the University's own favored message and the private speech of students is evident in the case before us. The University has taken steps to ensure the distinction in the agreement each CIO must sign. The University declares that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.

The University urges that, from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not. The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different. It would have been incumbent on the State, of course, to allocate the scarce resources on some acceptable neutral principle; but nothing in our decision indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible.

The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP effects a sweeping restriction on student thought and inquiry. Were the prohibition applied vigor, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes. And if the regulation covers, as the University says it does, student journalistic efforts that promote a belief that there is no deity, then undergraduates named Karl Marx, Bertrand Russell, and Jean-Paul Sartre would likewise have some of their major essays excluded from student publications. If any manifestation of beliefs in first principles disqualifies the writing, it is indeed difficult to name renowned thinkers whose writings would be accepted, save perhaps for articles disclaiming all connection to their ultimate philosophy. Plato could contrive perhaps to submit an acceptable essay on making pasta or peanut butter cookies, provided he did not point out their (necessary) imperfections.

Based on the principles we have discussed, we hold that the regulation invoked to deny SAF support to these petitioners is a denial of their right of free speech. It remains to be considered whether the violation is excused by the necessity of complying with the

Constitution's prohibition against state establishment of religion. We turn to that question.

III

A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. The governmental program here is neutral toward religion. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. But the $ 14 paid each semester by the students is not a general tax designed to raise revenue for the University. The SAF cannot be used for unlimited purposes, much less the illegitimate purpose of supporting one religion. Our decision, then, cannot be read as addressing an expenditure from a general tax fund. Here, the disbursements from the fund go to private contractors for the cost of printing that which is protected under the Speech Clause of the First Amendment. This is a far cry from a general public assessment designed to provide financial support for a church.

Government neutrality is apparent in the State's overall scheme in a further meaningful respect. The program respects the critical difference "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." In this case, "the government has not fostered or encouraged" any mistaken impression that the student newspapers speak for the University. The University has taken pains to disassociate itself from the private speech.

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. The error is not in identifying the principle, but in believing that it controls this case. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. No public funds flow directly to WAP's coffers.

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. This is so even where the upkeep, maintenance, and repair of the facilities attributed to those uses is paid from a student activities fund to which students are required to contribute. The government usually acts by spending money. Even the provision of a meeting room, as in *Mergens* and *Widmar*, involved governmental expenditure, if only in the form of electricity and heating or cooling costs. The error made by the Court of Appeals, as well as by the

dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient. If the expenditure of governmental funds is prohibited whenever those funds pay for a service that is, pursuant to a religion-neutral program, used by a group for sectarian purposes, then *Widmar*, *Mergens*, and *Lamb's Chapel* would have to be overruled. Given our holdings in these cases, it follows that a public university may maintain its own computer facility and give student groups access to that facility, including the use of the printers, on a religion neutral, say first-come-first-served, basis. If a religious student organization obtained access on that religion-neutral basis and used a computer to compose or a printer or copy machine to print speech with a religious content or viewpoint, the State's action in providing the group with access would no more violate the Establishment Clause than would giving those groups access to an assembly hall. There is no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs. Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life.

By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use, and has a clear record of costs. It would be formalistic for us to say that the University must forfeit these advantages and provide the services itself in order to comply with the Establishment Clause. It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not a danger here, based on the considerations we have advanced and for the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law, and it is not a religious organization as used in the University's own regulations.

Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question--speech otherwise protected by the Constitution--contain too great a religious content. As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

JUSTICE O'CONNOR, concurring.

This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. Not to finance Wide Awake, according to petitioners, violates the principle of neutrality by sending a message of hostility toward religion. To finance Wide Awake, argues the University, violates the prohibition on direct state funding of religious activities.

When two bedrock principles so conflict, understandably neither can provide the definitive answer. Resolution instead depends on the hard task of judging--sifting through the details and determining whether the program offends the Establishment Clause. Such

judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.

First, the student organizations, at the University's insistence, remain strictly independent of the University. The University's agreement with the CIOs requires that student organizations include in every letter, contract, publication, or other written materials the following disclaimer: "Although this organization has members who are University of Virginia students, the organization is independent of the corporation which is the University and which is not responsible for the organization's contracts, acts or omissions." Any reader of Wide Awake would be on notice of the publication's independence from the University.

Second, financial assistance is distributed in a manner that ensures its use only for permissible purposes. A student organization seeking assistance must submit disbursement requests; if approved, the funds are paid directly to the third-party vendor and do not pass through the organization's coffers. This safeguard ensures that the funds are used only to further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective. This feature also makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities), and unlike a block grant to religious organizations.

Third, assistance is provided to the religious publication in a context that makes improbable any perception of government endorsement of the religious message. Wide Awake does not exist in a vacuum. It competes with 15 other magazines and newspapers for advertising and readership. The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. This is not the harder case where religious speech threatens to dominate the forum.

The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. Subject to these comments, I join the opinion of the Court.

JUSTICE THOMAS, concurring.

I agree with the Court's opinion, but I write separately to express my disagreement with the historical analysis put forward by the dissent. Although the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs.

Even assuming that the Virginia debate on the so-called "Assessment Controversy" was indicative of the principles embodied in the Establishment Clause, this incident hardly compels the dissent's conclusion that government must actively discriminate against religion. The dissent's historical discussion glosses over the fundamental characteristic of the Virginia assessment bill that sparked the controversy: The assessment was to be imposed for the support of clergy in the performance of their function of teaching religion.

James Madison's Memorial and Remonstrance Against Religious Assessments

(hereinafter Madison's Remonstrance) must be understood in this context. Contrary to the dissent's suggestion, Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs. Nor did Madison embrace the argument that forms the linchpin of the dissent: that monetary subsidies are constitutionally different from other neutral benefits programs. Instead, Madison's comments are more consistent with the neutrality principle that the dissent inexplicably discards. According to Madison, the assessment violated the "equality" principle not because it allowed religious groups to participate in a generally available government program, but because the bill singled out religious entities for special benefits.

The funding provided by the Virginia assessment was to be extended only to Christian sects, and the Remonstrance seized on this defect. Madison saw the principle of nonestablishment as barring governmental preferences for *particular* religious faiths. Moreover, even if more extreme notions of the separation of church and state can be attributed to Madison, the views of one man do not establish the original understanding of the First Amendment.

But resolution of this debate is not necessary to decide this case. Under any understanding of the Assessment Controversy, the history cited by the dissent cannot support the conclusion that the Establishment Clause "categorically condemn[s] state programs directly aiding religious activity" when that aid is part of a neutral program available to a wide array of beneficiaries. Even if Madison believed that the principle of nonestablishment of religion precluded government financial support for religion *per se* (in the sense of government benefits specifically targeting religion), there is no indication that at the time of the framing he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies.

Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government *facilities* but requires discrimination in access to government *funds.* The dissent purports to locate the prohibition against "direct public funding" at the "heart" of the Establishment Clause, but this conclusion fails to confront historical examples of funding that date back to the time of the founding. To take but one famous example, both Houses of the First Congress elected chaplains, and that Congress enacted legislation providing for an annual salary of $ 500 to be paid out of the Treasury.

Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. Under the dissent's view, however, the University of Virginia may provide neutral access to the University's own printing press, but it may not provide the same service when the press is owned by a third party. Not surprisingly, the dissent offers no logical justification for this conclusion, and none is evident in the text or original meaning of the First Amendment.

If the Establishment Clause is offended when religious adherents benefit from neutral programs such as the Student Activities Fund, it must also be offended when they receive the

same benefits in the form of in-kind subsidies. The constitutional demands of the Establishment Clause may be judged against either a baseline of "neutrality" or a baseline of "no aid to religion," but the appropriate baseline surely cannot depend on the *form* of aid. The contrary rule would jettison centuries of practice respecting the right of religious adherents to participate on neutral terms in a wide variety of government-funded programs.

Thus, history provides an answer for the constitutional question posed by this case, but it is not the one given by the dissent. The dissent identifies no evidence that the Framers intended to disable religious entities from participating on neutral terms in evenhanded government programs. The evidence that does exist points in the opposite direction and provides ample support for today's decision.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Speech Clauses, and by viewing the funds in question as beyond the reach of the Establishment Clause's funding restrictions. Because there is no warrant for distinguishing among public funding sources for purposes of applying the prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause.

I

The central question in this case is whether a grant from the Student Activities Fund to pay Wide Awake's printing expenses would violate the Establishment Clause. Although the Court does not dwell on the details of Wide Awake's message, it recognizes something sufficiently religious in the publication to demand Establishment Clause scrutiny. Although the Court places great stress on the eligibility of secular as well as religious activities for grants from the Student Activities Fund, it recognizes that evenhanded availability is not by itself enough to satisfy constitutional requirements for aid that results in a benefit to religion. Something more is necessary to justify any religious aid. Some Members of the Court, at least, may think the funding permissible on a view that it is indirect, since the money goes to Wide Awake's printer. The Court's principal reliance, however, is on an argument that providing religion with economically valuable services is permissible on the theory that services are economically indistinguishable from religious access to governmental speech forums. But this reasoning would commit the Court to approving direct religious aid beyond anything justifiable for the sake of access to speaking forums. The Court implicitly recognizes this in its further attempt to circumvent the clear bar to direct governmental aid to religion. Different Members of the Court seek to avoid this bar in different ways. The opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous conclusion that the Student Activities Fee is not a tax. I do not read JUSTICE O'CONNOR's opinion as sharing that assumption; she places this Student Activities Fund in a category of student funding enterprises from which religious activities in public

universities may benefit, so long as there is no endorsement of religion. The resulting decision is in unmistakable tension with the accepted law that the Court continues to avow.

A

Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause. Evidence on the subject antedates even the Bill of Rights itself, as may be seen in the writings of Madison, whose authority on questions about the meaning of the Establishment Clause is well settled. Four years before the First Congress proposed the First Amendment, Madison gave his opinion on the legitimacy of using public funds for religious purposes, in the Memorial and Remonstrance, which framed the debate upon which the Religion Clauses stand: "Who does not see that ... the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

Madison wrote against a background in which nearly every Colony had exacted a tax for church support, the practice having become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. Madison's Remonstrance captured the colonists' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." Their sentiment, as expressed by Madison in Virginia, led not only to the defeat of Virginia's tax assessment bill, but also directly to passage of the Virginia Bill for Establishing Religious Freedom, written by Thomas Jefferson. We have "previously recognized that the provisions of the First Amendment had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

The principle against direct funding is patently violated by the use of today's student activity fee. Like taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it, and the use of any part of it for the direct support of religious activity thus strikes at the heart of the prohibition on establishment.

The Court, accordingly, has never before upheld direct state funding of the sort of proselytizing published in Wide Awake and, in fact, has categorically condemned state programs directly aiding religious activity. Even when the Court has upheld aid to an institution performing both secular and sectarian functions, it has always made a searching enquiry to ensure that the institution kept the secular activities separate from its sectarian ones, with any direct aid flowing only to the former and never the latter.

B

Why does the Court not apply this clear law to these clear facts and conclude, as I do, that the funding scheme here is a clear constitutional violation? The answer is that the Court focuses on a subsidiary body of law, which it correctly states but ultimately misapplies. That subsidiary body of law accounts for the Court's substantial attention to the fact that the University's funding scheme is "neutral," in the formal sense that it makes funds available on an evenhanded basis to secular and sectarian applicants alike. While this is indeed true and relevant under our cases, it does not alone satisfy the requirements of the Establishment Clause, as the Court recognizes when it says that evenhandedness is only a "significant

factor," not a dispositive one. This recognition reflects the Court's appreciation of two general rules: that whenever affirmative government aid ultimately benefits religion, the Establishment Clause requires some justification beyond evenhandedness on the government's part; and that direct public funding of core sectarian activities, even if accomplished pursuant to an evenhanded program, would be entirely inconsistent with the Establishment Clause.

At the heart of the Establishment Clause stands the prohibition against direct public funding, but that prohibition does not answer the questions that occur at the margins of the Clause's application. Would it be wrong to put out fires in burning churches, wrong to pay the bus fares of students on the way to parochial schools, wrong to allow a grantee of special education funds to spend them at a religious college? These are the questions that call for drawing lines, and it is in drawing them that evenhandedness becomes important. The question whether such benefits are provided on an evenhanded basis has been relevant, for the question addresses one aspect of the issue whether a law either "advances [or] inhibits religion," In the doubtful cases (those not involving direct public funding), where there is initially room for argument about a law's effect, evenhandedness serves to weed out those laws that impermissibly advance religion by channelling aid to it exclusively. Evenhandedness is therefore a prerequisite to further enquiry into the constitutionality of a doubtful law, but evenhandedness does not guarantee success under Establishment Clause scrutiny.

Three cases permitting indirect aid to religion, *Mueller v. Allen*, *Witters v. Washington Dept. of Servs. for Blind*, and *Zobrest v. Catalina Foothills School Dist.* are among the latest of those to illustrate this relevance of evenhandedness. Each case involved a program in which benefits given to individuals on a religion-neutral basis ultimately were used by the individuals to support religious institutions. In each, the fact that aid was distributed generally and on a neutral basis was a necessary condition for upholding the program at issue. But the significance of evenhandedness stopped there. We did not hold that satisfying the condition was sufficient, or dispositive. Even more importantly, we never held that evenhandedness might be sufficient to render direct aid to religion constitutional. Quite the contrary. Critical to our decisions in these cases was the fact that the aid was indirect; it reached religious institutions "only as a result of the genuinely independent and private choices of aid recipients. In noting and relying on this particular feature of each of the programs at issue, we in fact reaffirmed the core prohibition on direct funding of religious activities.

Evenhandedness as one element of a permissibly attenuated benefit is, of course, a far cry from evenhandedness as a sufficient condition of constitutionality for direct financial support of religious proselytization, and our cases have unsurprisingly repudiated any such attempt to cut the Establishment Clause down to a mere prohibition against unequal direct aid. And nowhere has the Court's adherence to the preeminence of the no-direct-funding principle over the principle of evenhandedness been as clear as in *Bowen v. Kendrick.*

With respect to the claim that the program was unconstitutional as applied, we remanded the case to the District Court. We told the District Court, on remand, to "consider ... whether in particular cases AFLA aid has been used to fund 'specifically religious activities in an otherwise substantially secular setting.'" We suggested that application of the Act would be

unconstitutional if it turned out that aid recipients were using materials "that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." At no point in our opinion did we suggest that distribution on an evenhanded basis could have justified the use of federal funds for religious activities, a position that would have made no sense after we had pegged the Act's facial constitutionality to our conclusion that advancement of religion was not inevitable.

Bowen was no sport; its pedigree was the line of *Everson*, *Allen*, *Tilton*, and *Roemer*. Each of these cases involved a general aid program that provided benefits to a broad array of secular and sectarian institutions on an evenhanded basis, but in none of them was that fact dispositive. Instead, the central enquiry in each of these general aid cases, as in *Bowen*, was whether secular activities could be separated from the sectarian ones sufficiently to ensure that aid would flow to the secular alone. *Witters*, *Mueller*, and *Zobrest* explicitly distinguished the indirect aid in issue from contrasting examples in the line of cases striking down direct aid, and each thereby expressly preserved the core constitutional principle that direct aid to religion is impermissible.

C

Since conformity with the marginal or limiting principle of evenhandedness is insufficient of itself to demonstrate the constitutionality of providing a government benefit that reaches religion, the Court must identify some further element in the funding scheme that does demonstrate its permissibility. The Court's chosen element appears to be the fact that under the funds are sent to the printer chosen by Wide Awake, rather than to Wide Awake itself.

If the Court's suggestion is that this feature of the funding program brings this case into line with *Witters*, *Mueller*, and *Zobrest*, the Court has misread those cases, which turned on the fact that the choice to benefit religion was made by a nonreligious third party standing between the government and a religious institution. Here there is no third-party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion to put state money to religious use. The printer, of course, has no option to take the money and use it to print a secular journal instead of Wide Awake. It only gets the money because of its contract to print a message of religious evangelism at the direction of Wide Awake, and it will receive payment only for doing precisely that. The formalism of distinguishing between payment to Wide Awake so it can pay an approved bill and payment of the approved bill itself cannot be the basis of a decision of constitutional law. If this indeed were a critical distinction, the Constitution would permit a State to pay all the bills of any religious institution; in fact, the State could simply hand out credit cards to religious institutions and honor the monthly statements (so long as someone could devise an evenhanded umbrella to cover the whole scheme). *Witters* and the other cases cannot be distinguished out of existence this way.

It is more probable, however, that the Court's reference to the printer goes to a different attempt to justify the payment. On this purported justification, the payment to the printer is significant only as the last step in an argument resting on the assumption that a public university may give a religious group the use of any of its equipment or facilities so long as

secular groups are likewise eligible.

The argument is as unsound as it is simple, and the first of its troubles emerges from an examination of the cases relied upon to support it. The common factual thread running through *Widmar, Mergens,* and *Lamb's Chapel* is that a governmental institution created a limited forum, but sought to exclude speakers with religious messages. Each case drew ultimately on unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum. It was the preservation of free speech on the model of the street corner that supplied the justification going beyond the requirement of evenhandedness.

The Court's claim of support from these forum-access cases is ruled out by the very scope of their holdings. They rest on the recognition that all speakers are entitled to use the street corner and on the analogy between the public street corner and open classroom space. Thus, the Court found it significant that the classroom speakers would engage in traditional speech activities in these forums, too, even though the rooms (like street corners) require some incidental state spending to maintain them. The analogy breaks down entirely, however, if the cases are read more broadly to cover more than forums for literal speaking. There is no traditional street corner printing provided by the government, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in violation of the principle barring direct aid.

It must, indeed, be a recognition of just this point that leads the Court to take a third tack. The opinion of the Court concludes that the activity fee is not a tax, and then proceeds to find the aid permissible on the legal assumption that the bar against direct aid applies only to aid derived from tax revenue. I have already indicated why it is fanciful to treat the fee as anything but a tax. The novelty of the assumption that the direct aid bar only extends to aid derived from taxation, however, requires some response.

Although it was a taxation scheme that moved Madison to write, the Court has never held that government resources obtained without taxation could be used for direct religious support. Allowing nontax funds to be spent on religion would fly in the face of clear principle. Since the corrupting effect of government support does not turn on whether the Government's own money comes from taxation or gift or the sale of public lands, the Establishment Clause could hardly relax its vigilance simply because tax revenue was not implicated.

D

The Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause.

II

Given the dispositive effect of the Establishment Clause's bar to funding the magazine, there should be no need to decide whether in the absence of this bar the University would violate the Free Speech Clause by limiting funding as it has done. But the Court's speech analysis may have independent application, and its flaws should not pass unremarked.

Viewpoint discrimination occurs when government allows one message while prohibiting

the messages of those who can reasonably be expected to respond. It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only "in" but "about" a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists. The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. They simply deny funding for hortatory speech that "primarily promotes or manifests" any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Guidelines are thus substantially different from the access restriction considered in *Lamb's Chapel*. *Lamb's Chapel* addressed a regulation prohibiting the after-hours use of school premises "by any group for religious purposes." "Religious" was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a nonreligious or expressly anti-religious point of view.

With this understanding, it was unremarkable that in *Lamb's Chapel* we unanimously determined that the access restriction impermissibly distinguished between speakers on the basis of viewpoint. Equally obvious is the distinction between that case and this one, where the regulation is being applied to deny funding to those engaged in promoting or opposing religious conversion and religious observances. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

To put the point another way, the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that religious and antireligious speech, grouped together, always provides an opposing viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents.

Santa Fe Independent School District v. Doe

530 U.S. 290 (2000)

Justice STEVENS delivered the opinion of the Court (joined by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer).

Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified, the football prayer policy was invalid.

I

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order. With respect to the impending graduation, the order provided that "non-denominational prayer" could be presented by a senior student or students selected by the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the prayer is non-proselytizing."

In response to that portion of the order, the District adopted a series of policies over several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret

ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies.

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." In a second vote the class elected two seniors to deliver the invocation and benediction.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian and nonproselytising," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytising," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games .... The students chose to allow a student to say a prayer at football games." A week later, in a separate election, they selected a student "to deliver the prayer at varsity football games."

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations."[1] It is the validity of that policy that is before us.[2]

---

[1] Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

[2] It provides:

"STUDENT ACTIVITIES: PRE-GAME CEREMONIES AT FOOTBALL GAMES

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The District Court did enter an order precluding enforcement of the first, open-ended policy. Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals agreed with the Does.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), that court held that student-led prayer that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school graduations and that school-encouraged prayer was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402 (5th Cir. 1995), it had described a high school graduation as "a significant, once in-a-lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary."

We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student- initiated prayer at football games violates the Establishment Clause." We conclude that it does.

II

In *Lee v. Weisman*, 505 U.S. 577 (1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by *Lee*.

In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

These invocations are authorized by a government policy and take place on government

---

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing."

property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' ... by the student body generally." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message.

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

This student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.[3] Because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections," the District's elections are insufficient safeguards of diverse student speech.

In *Lee*, the school district made the related argument that its policy of endorsing only "civic or nonsectarian" prayer was acceptable because it minimized the intrusion on the audience as a whole. We rejected that claim by explaining that such a majoritarian policy "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." Similarly, while Santa Fe's majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is " 'one of neutrality' " or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the

---

[3] If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a random statement by a private individual. The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen."

pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position." 505 U.S. at 590.

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place only because the school "board has chosen to permit students to deliver a brief invocation and/or message." The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." The decision whether to deliver a message is first made by majority vote of the student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."

In addition to involving the school in the selection of the speaker, the policy invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate. Indeed, the only type of message that is expressly endorsed in the text is an "invocation"--a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elections make it clear that the students understood that the central question before them was whether prayer should be a part of the pregame ceremony. We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions to mark those occasions' significance. But such religious activity in public schools must comport with the First Amendment.

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will include many who display the school colors and insignia on their T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." An objective Santa Fe High School student will unquestionably perceive the pregame prayer as stamped with her school's seal of approval.

The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one."

According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste[r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school. And it is unclear what type of message would be both "solemnizing" and yet non-religious.

Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice."

School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." The delivery of such a message--over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer--is not properly characterized as "private" speech.

III

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to participate in religious observances. Its

argument has two parts: first, that there is no government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was "whether a student would deliver prayer at varsity football games," and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. The two student elections authorized by the policy, coupled with the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee*, 505 U.S. at 587.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." We stressed in *Lee* the obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." High school home football games are traditional gatherings of a school community. Undoubtedly, the games are not important to some students. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students.

Even if we regard every high school student's decision to attend a home football game as

purely voluntary, we are nevertheless persuaded that a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. The constitutional command will not permit the District "to exact religious conformity from a student as the price" of joining her classmates at a varsity football game.

IV

Finally, the District argues that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.

The District argues that the facial challenge must fail because "Santa Fe's Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

The text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message-- that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Our discussion in the previous sections, demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly--that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. No further injury is required for the policy to fail a facial challenge.

To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum." Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life.

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. The fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." Therefore, the question is not whether the district's policy may be applied in violation of the Establishment Clause, but whether it inevitably will be.

The Court, venturing into the realm of prophesy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. To do so, it applies the most rigid version of the oft- criticized test of *Lemon v. Kurtzman*.

Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face. First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion." To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause. But it is possible that the students might vote not to have a pregame speaker. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." The Court so holds despite the fact that any speech that may occur as a result of the election process here would be private speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power to the students to vote for such offices violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Where a governmental body "expresses a plausible secular purpose," "courts should generally defer to that stated intent." The Court grants no deference to the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly.

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district's history of Establishment Clause violations and the context in which the policy was written. But the context--attempted compliance with a District Court order--actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The school district went further than required by the District Court order and eventually settled on a policy that gave the student speaker a choice to deliver either an invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy

cannot be viewed as having a sectarian purpose.

The Court relies on *Lee v. Weisman*. In *Lee*, we concluded that the speech at issue was "directed and controlled" by a school official. In other words, at issue was government speech. Here, by contrast, the potential speech, if the policy had been allowed to proceed, would be a message or invocation selected by a student. That is, it would be private speech. The "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement.

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria--like good public speaking skills or social popularity--and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy would likely pass constitutional muster.

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." Even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case.

GOOD NEWS CLUB v. MILFORD CENTRAL SCHOOL

533 U.S. 98 (2001)

JUSTICE THOMAS delivered the opinion of the Court.

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.

I

The State of New York authorizes local school boards to adopt regulations governing the use of their school facilities. In particular, N. Y. Educ. Law § 414 enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School enacted a community use policy adopting seven of § 414's purposes for which its building could be used after school. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." Second, the school is available for "social, civic and recreational

meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public."

Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly afterschool meetings in the school cafeteria. The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use was "the equivalent of religious worship." According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

"The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization."

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study."

In March 1997, petitioners, the Good News Club, Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action against Milford. The Club alleged that Milford's denial of its application violated its free speech rights under the First Amendment.

II

Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum. When the State establishes a limited public forum, the State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint and the restriction must be "reasonable in light of the purpose served by the forum."

III

Applying this test, we first address whether the exclusion constituted viewpoint

discrimination. We are guided in our analysis by two of our prior opinions, *Lamb's Chapel* and *Rosenberger*. Concluding that Milford's exclusion of the Good News Club is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum.

Milford has opened its limited public forum to activities that serve a variety of purposes, including events "pertaining to the welfare of the community." Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development of character and morals from a religious perspective." For example, this policy would allow someone to use Aesop's Fables to teach children moral values. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth." In short, any group that "promotes the moral and character development of children" is eligible to use the school building.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature -- "the equivalent of religious instruction itself" -- it excluded the Club from use of its facilities.

Applying *Lamb's Chapel*, we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum. Like the church in *Lamb's Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint. The exclusion, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. In *Rosenberger*, a student organization at the University of Virginia was denied funding for printing expenses because its publication, Wide Awake, offered a Christian viewpoint. Because the university "selected for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. Given the obvious religious content of Wide Awake, we cannot say that the Club's activities are any more "religious" or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger*.

Despite our holdings in *Lamb's Chapel* and *Rosenberger*, the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature warranted treating the Club's activities as different from the other activities permitted by the school. The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other viewpoints do not. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,'" the exclusion did not constitute viewpoint discrimination.

We disagree that something that is "quintessentially religious" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination.

IV

Milford argues that, even if its restriction constitutes viewpoint discrimination, its restriction was required to avoid violating the Establishment Clause. We disagree.

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar.* The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel,* the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent. As in *Widmar,* Milford made its forum available to other organizations. The Club's activities are materially indistiguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and *Widmar* by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities take place on school grounds, even though they occur during nonschool hours. This argument is unpersuasive.

First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club.

Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the Good News Club meetings. Because the children cannot attend without their parents'

permission, they cannot be coerced into engaging in the Good News Club's religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford's permitting the Club's activities would violate the Establishment Clause, the facts of this case simply do not support Milford's conclusion. There is no evidence that young children are permitted to loiter outside classrooms after the school day has ended. Surely even young children are aware of events for which their parents must sign permission forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12. In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen than elementary school children who occupy the school after hours. For that matter, members of the public writ large are permitted in the school after hours pursuant to the community use policy. Any bystander could be aware of the school's use policy and its exclusion of the Good News Club, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement.

We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the Good News Club's activities on school premises, and therefore we can find no reason to depart from our holdings in *Lamb's Chapel* and *Widmar*. Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause.

V

When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.

JUSTICE SCALIA, concurring.

I

First, I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure and perceptions of endorsement "to the extent" that the law makes such factors relevant, is consistent with the belief (which I hold) that in this case that extent is zero. As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even been considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected. What is at play here is not coercion, but the compulsion of ideas -- and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

As to endorsement, I have previously written that "religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count."

II

Second, since we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included it (the forum was opened to any "use pertaining to the welfare of the community,"), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum -- "because it's religious" will not do, -- respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. But I agree, in any event, that respondent did discriminate on the basis of viewpoint.

As I understand it, the point of disagreement between the Court and the dissenters with regard to petitioner's Free Speech Clause claim regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. The Club, for example, urges children "who already believe in the Lord Jesus as their Savior" to "stop and ask God for the strength and the 'want' ... to obey Him," and it invites children who "don't know Jesus as Savior" to "trust the Lord Jesus to be [their] Savior from sin." The dissenters say that the presence of such additional speech, because it is purely religious, transforms the Club's meetings into something different in kind from other, nonreligious activities that teach moral and character development. Therefore, the argument goes, excluding the Club is not viewpoint discrimination. I disagree.

Respondent has opened its facilities to any "use pertaining to the welfare of the community, provided that such use shall be nonexclusive and shall be opened to the general public." Shaping the moral and character development of children certainly "pertains to the welfare of the community." When the Club attempted to teach Biblical-based moral values,

however, it was excluded because its activities "did not involve merely a religious perspective on the secular subject of morality" and because "it [was] clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint."

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives by giving *reasons* why that is a good idea -- because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered -- because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based -- that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination.

The dissenters emphasize that the religious speech used by the Club as the foundation for its views on morals and character is not just any type of religious speech -- although they cannot agree exactly what type of religious speech it is. In JUSTICE STEVENS' view, it is speech "aimed principally at proselytizing or inculcating belief in a particular religious faith." This does not distinguish the Club's activities from those of the other groups using respondent's forum. Those groups may seek to inculcate children with their beliefs, and they may furthermore "recruit others to join their respective groups." The Club must therefore have liberty to do the same, even if its actions may prove (shudder!) divisive.

JUSTICE SOUTER, while agreeing that the Club's religious speech "may be characterized as proselytizing," thinks that it is even more clearly excludable because it is essentially "an evangelical service of worship." But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no "*relevance*" to the constitutional issue. *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6 (1981)*;* see also *Murdock v. Pennsylvania*, 319 U.S. at 109. Those holdings are surely proved correct today by the dissenters' inability to agree into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. I will not endorse an approach that suffers such a wondrous diversity of flaws.

JUSTICE BREYER, concurring in part.

I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. As this Court previously has indicated, a child's perception that the school has endorsed a particular religion or religion in

general may also prove critically important. Today's opinion does not purport to change that legal principle.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the Good News Club's activities, could reasonably perceive the school's permission for the club to use its facilities as an endorsement of religion. The time of day, the age of the children, the nature of the meetings, and other circumstances are relevant in helping to determine whether, in fact, the Club "so dominates" the "forum" that, in the children's minds, "a formal policy of equal access is transformed into a demonstration of approval."

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. The specific legal action that brought this case to the Court of Appeals was the District Court's decision to grant Milford Central School's motion for summary judgment. We now hold that the school was not entitled to summary judgment. Our holding must mean that, *viewing the disputed facts favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed "genuine issues" of "material fact," particularly about how a reasonable child participant would understand the school's role.

JUSTICE STEVENS, dissenting.

The Milford Central School has invited the public to use its facilities for educational and recreational purposes, but not for "religious purposes." Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. The film in *Lamb's Chapel* illustrates this category. Second, there is religious speech that amounts to worship, or its equivalent. Our decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), concerned such speech. Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.

A public entity may not generally exclude even religious worship from an open public forum. Similarly, a public entity that creates a limited public forum may not exclude a speaker simply because she approaches those topics from a religious point of view.

But, while a public entity may not censor speech about an authorized topic based on the point of view expressed by the speaker, it has broad discretion to "preserve the property under its control for the use to which it is lawfully dedicated." Accordingly, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." The novel question that this case presents concerns the constitutionality of a public school's attempt to limit the scope of a public forum it has created. More specifically, the question is whether a school can, consistently with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.

Distinguishing speech from a religious viewpoint, on the one hand, from religious

proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize after school discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups -- for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan -- to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission.

School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship.

The particular limitation of the forum at issue in this case is one that prohibits the use of the school's facilities for "religious purposes." It is clear that, by "religious purposes," the school district did not intend to exclude all speech from a religious point of view. Instead, it sought only to exclude religious speech whose principal goal is to "promote the gospel." In other words, the school sought to allow the first type of religious speech while excluding the second and third types. As long as this is done in an even handed manner, I see no constitutional violation in such an effort. The line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school, particularly an elementary school, must be permitted to draw them.

This case is undoubtedly close. Nonetheless, regardless of whether the Good News Club's activities amount to "worship," it does seem clear, based on the facts in the record, that the school district correctly classified those activities as falling within the third category of religious speech and therefore beyond the scope of the school's limited public forum. In short, I am persuaded that the school district could (and did) permissibly exclude from its limited public forum proselytizing religious speech that does not rise to the level of actual worship.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "the Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him .... If you have received the Lord Jesus as your Savior from sin, you belong to God's special group -- His family." The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "emphasize that this verse is from the Bible, God's Word" and is "important -- and true -- because God said it." The lesson further exhorts the teacher to "be sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglecting this responsibility."

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson. During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to "'stop and ask God for the strength and the "want" to obey Him.'" They are instructed that

"if you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will -- we will pray with you separately, individually .... And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him."

During the invitation, the teacher "invites" the "unsaved" children "'to trust the Lord Jesus to be your Savior from sin,'" and "'receive [him] as your Savior from sin.'" The children are then instructed that

"if you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life."

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. The majority avoids this reality only by the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

I also respectfully dissent from the majority's refusal to remand on all other issues, insisting instead on acting as a court of first instance in reviewing Milford's claim that it would violate the Establishment Clause to grant Good News's application. Whereas the District Court and Court of Appeals resolved this case entirely on the ground that Milford's actions did not offend the First Amendment's Speech Clause, the majority now sees fit to rule on the application of the Establishment Clause, in derogation of this Court's role as a court of review. Of course, I am in no better position than the majority to perform an Establishment Clause analysis in the first instance. I can, however, speak to the doubtful underpinnings of the majority's conclusion.

This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment. Milford's actions would offend the Establishment Clause if they carried the message of endorsing religion, as viewed by a reasonable observer. The majority concludes that such an endorsement effect is out of the question in Milford's case, because the context here is "materially indistinguishable" from the facts in *Lamb's Chapel* and *Widmar*. In fact, the majority is in no position to say that, for the principal grounds on which we based our holdings in those cases

are absent here.

What we know about this case looks very little like *Widmar* or *Lamb's Chapel*. The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six.[1] The Establishment Clause cases have consistently recognized the particular impressionability of schoolchildren. We have held the difference between college students and grade school pupils to be a "distinction [that] warrants a difference in constitutional results."

Nor is Milford's limited forum anything like the sites for wide-ranging intellectual exchange that were home to the challenged activities in *Widmar* and *Lamb's Chapel*. In *Widmar*, the nature of the university campus and the sheer number of activities offered precluded the reasonable college observer from seeing government endorsement in any one of them, and so did the time and variety of community use in the *Lamb's Chapel* case.

The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children. The club is open solely to elementary students (not the entire community, as in *Lamb's Chapel*), only four outside groups have been identified as meeting in the school, and Good News is the only one whose instruction follows immediately on the conclusion of the school day. Although school is out at 2:56 p.m., Good News requested use of the school beginning at 2:30, so that instruction could begin promptly at 3:00, at which time children who are compelled by law to attend school surely remain in the building. Good News's religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until "the room is clear," and "people are out of the room," before starting proceedings in the classroom located next to the regular third- and fourth-grade rooms. In fact, the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a church, 8 or 10 children attended; after the school became the site, the number went up three-fold.

Even on the summary judgment record, we can say this: there is a good case that Good News's exercises blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority's conclusion, and while the consolation may be that nothing really gets resolved when the judicial process is so truncated, that is not much to recommend today's result.

---

[1] It is correct that parents are required to give permission for their children to attend Good News's classes, and correct that those parents would likely not be confused as to the sponsorship of Good News's classes. But the proper focus in assessing effects includes the elementary school pupils who are invited to meetings, who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the "challenge" and "invitation."

ELK GROVE UNIFIED SCHOOL DISTRICT v. NEWDOW

542 U.S. 1 (2004)

Justice Stevens delivered the opinion of the Court.

Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in a group recitation of the Pledge of Allegiance. Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words "under God," he views the School District's policy as a religious indoctrination of his child that violates the First Amendment. A divided panel of the Court of Appeals for the Ninth Circuit agreed with Newdow. In light of the importance of that decision, we granted certiorari. We conclude that Newdow lacks standing and reverse.

I

"The very purpose of a national flag is to serve as a symbol of our country," and of its proud traditions "of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations." As its history illustrates, the Pledge of Allegiance evolved as a public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

The Pledge of Allegiance was initially conceived more than a century ago. As part of the nationwide interest in commemorating the 400th anniversary of Christopher Columbus' discovery of America, a national magazine for youth proposed in 1892 that pupils recite the following affirmation: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." In the 1920's, the National Flag Conferences replaced the phrase "my Flag" with "the flag of the United States of America."

In 1942, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." This resolution confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words "under God." The House Report observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." The resulting text is the Pledge as we know it today: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

II

Under California law, "every public elementary school" must begin each day with "appropriate patriotic exercises." The statute provides that "the Pledge of Allegiance shall satisfy" this requirement. The School District has implemented the law by requiring that "[e]ach elementary school class recite the pledge of allegiance once each day." The School District permits students who object on religious grounds to abstain from the recitation.

In March 2000, Newdow filed suit. At the time of filing, Newdow's daughter was

enrolled in kindergarten in the Elk Grove Unified School District and participated in the daily recitation of the Pledge. The complaint explains that Newdow is an atheist who was ordained more than 20 years ago in a ministry that "espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology." The complaint seeks a declaration that the 1954 Act's addition of the words "under God" violated the Establishment and Free Exercise Clauses, as well as an injunction against the School District's policy requiring daily recitation of the Pledge. It alleges that Newdow has standing to sue on his own behalf and on behalf of his daughter as "next friend." The District Court dismissed the complaint. The Court of Appeals reversed.

In its first opinion the appeals court unanimously held that Newdow has standing "as a parent." On the merits, the court held that both the 1954 Act and the School District's policy violate the Establishment Clause.

After the Court of Appeals' initial opinion, Sandra Banning, the mother of Newdow's daughter, filed a motion to dismiss the complaint. She declared that although she and Newdow shared "physical custody" of their daughter, a state-court order granted her "exclusive legal custody," "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare. Banning further stated that her daughter is a Christian who has no objection either to reciting or hearing others recite the Pledge. Banning expressed the belief that her daughter would be harmed if the litigation were to proceed, because others might incorrectly perceive the child as sharing her father's atheist views. Banning accordingly concluded that it was not in the child's interest to be a party to Newdow's lawsuit.

In a second published opinion, the Court of Appeals reconsidered Newdow's standing in light of Banning's motion. The court noted that Newdow no longer claimed to represent his daughter, but unanimously concluded that "the grant of sole legal custody to Banning" did not deprive Newdow, "as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child." The court held that under California law Newdow retains the right to expose his child to his particular religious views even if those views contradict the mother's, and that Banning's objections as sole legal custodian do not defeat Newdow's right to seek redress for an alleged injury to his own parental interests.

We granted the School District's petition for a writ of certiorari to consider two questions: (1) whether Newdow has standing as a noncustodial parent to challenge the School District's policy, and (2) if so, whether the policy offends the First Amendment.

III

Our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." Although we have not exhaustively defined the prudential standing doctrine, one of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. We have recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving "elements of the domestic

relationship," even when divorce, alimony, or child custody is not strictly at issue.

The extent of the standing problem raised by the domestic relations issues in this case was not apparent until Banning filed her motion for leave to dismiss the complaint. At that time, the child's custody was governed by a February 6, 2002 order of the California Superior Court. That order provided that Banning had "'*sole* legal custody to make decisions relating to the health, education and welfare of'" her daughter. The order stated that the two parents should "'consult with one another on substantial decisions relating to'" the child's "'psychological and educational needs,'" but it authorized Banning to "'exercise legal control'" if the parents could not reach "'mutual agreement.'"

That family court order was the controlling document at the time of the Court of Appeals' standing decision. After the Court of Appeals ruled, however, the Superior Court held another conference regarding the child's custody. At a hearing on September 11, 2003, the Superior Court announced that the parents have "joint legal custody," but that Banning "makes the final decisions if the two . . . disagree."

Newdow contends that despite Banning's final authority, he retains "an unrestricted right to inculcate in his daughter--free from governmental interference--the atheistic beliefs he finds persuasive." The difficulty with that argument is that Newdow's rights cannot be viewed in isolation. This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

The interests of the affected persons in this case are in many respects antagonistic. Of course, legal disharmony in family relations is not uncommon. What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. The interests of this parent and this child are not parallel and, indeed, are potentially in conflict.

Newdow's parental status is defined by California's domestic relations law. Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located. In this case, the Court of Appeals, which possesses greater familiarity with California law, concluded that state law vests in Newdow a cognizable right to influence his daughter's religious upbringing. The court based its ruling on two state appellate cases holding that "a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed."

Nothing that either Banning or the School Board has done, however, impairs Newdow's right to instruct his daughter in his religious views. Instead, Newdow wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. A next friend surely could exercise such a right, but the Superior Court's order has deprived Newdow of that status.

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than resolve a weighty question of constitutional law. There is a vast difference between Newdow's right to communicate with his child and his claimed right to shield his daughter from influences to which she is exposed in school. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.

Justice Scalia took no part in the consideration or decision of this case.

Chief Justice Rehnquist, with whom Justice O'Connor joins, and with whom Justice Thomas joins as to Part I, concurring in the judgment.

The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling. On the merits, I conclude that the School District policy that requires teachers to lead willing students in reciting the Pledge of Allegiance does not violate the Establishment Clause.

I

The Court does not dispute that respondent Newdow satisfies the requisites of Article III standing. The Court concludes that respondent lacks prudential standing, under its new standing principle, to bring his suit in federal court.

We have, in the past, judicially self-imposed clear limits on the exercise of federal jurisdiction. In contrast, here is the Court's new prudential standing principle: "[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." The Court loosely bases this novel prudential standing limitation on the domestic relations exception to diversity-of-citizenship jurisdiction, the abstention doctrine, and criticisms of the Court of Appeals' construction of California law, coupled with the prudential standing prohibition on a litigant's raising another person's legal rights.

The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U.S.C. § 1332, which "divests the federal courts of power to issue divorce, alimony, and child custody decrees." This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree. Instead it involves a substantial federal question about the constitutionality of the School District's conducting the pledge ceremony, which is the source of our jurisdiction. Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent.

The correct characterization of respondent's interest rests on the interpretation of state law. As the Court recognizes, we have a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." In contrast to the

Court, I would defer to the Court of Appeals' interpretation of California law.

The Court does not take issue with the fact that, under California law, respondent retains a right to influence his daughter's religious upbringing and to expose her to his views. But it relies on Banning's view of the merits of this case to diminish respondent's interest, stating that the respondent "wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree." As recognized by the Court of Appeals, respondent wishes to enjoin the School District from endorsing a form of religion inconsistent with his own views because he has a right to expose his daughter to those views without the State's placing its *imprimatur* on a particular religion. Under the Court of Appeals' construction of California law, Banning's "veto power" does not override respondent's right to challenge the pledge ceremony.

The Court concludes that the California cases "do not stand for the proposition that [respondent] has a right to dictate to others what they may or may not say to his child respecting religion." Surely, respondent may not tell Banning what she may say to their child respecting religion. Just as surely, respondent cannot name his daughter as a party to a lawsuit against Banning's wishes. But his claim is different: Respondent asserts that the School District's pledge ceremony infringes his right under California law to expose his daughter to his religious views. While she is intimately associated with the source of respondent's standing (the father-daughter relationship), the daughter *is not the source* of respondent's standing; instead it is their relationship that provides respondent his standing, which is clear once respondent's interest is properly described. The prudential prohibition on third-party standing provide no basis for denying respondent standing.

Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket--good for this day only--our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations.

II

Congress amended the Pledge to include the phrase "under God" in 1954. The amendment's sponsor said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism. Following the decision of the Court of Appeals in this case, Congress passed legislation that made extensive findings about the historic role of religion in the political development of the Nation and reaffirmed the text of the Pledge. To the millions of people who regularly recite the Pledge, "under God" might mean several different things: that God has guided the destiny of the United States or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

The phrase "under God" in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.

At George Washington's first inauguration on April 30, 1789, he

> "stepped toward the iron rail, where he was to receive the oath of office. The diminutive secretary of the Senate, Samuel Otis, squeezed between the President and Chancellor Livingston and raised up the crimson cushion with a Bible on it. Washington put his right hand on the Bible, opened to Psalm 121:1: 'I raise my eyes toward the hills. Whence shall my help come.' The Chancellor proceeded with the oath: 'Do you solemnly swear that you will faithfully execute the office of President of the United States and will to the best of your ability preserve, protect and defend the Constitution of the United States?' The President responded, 'I solemnly swear,' and repeated the oath, adding, 'So help me God.' He then bent forward and kissed the Bible before him."

Later the same year, after encouragement from Congress, Washington issued his first Thanksgiving proclamation, which began:

> "Whereas it is the duty of all Nations to acknowledge the problems of Almighty God, to obey His will, to be grateful for his benefits, and humbly to implore his protection and favor--and whereas both Houses of Congress have by their joint Committee requested me 'to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.'"

Almost all succeeding Presidents have issued similar Thanksgiving proclamations.

Later Presidents, at critical times in the Nation's history, have likewise invoked the name of God. Abraham Lincoln, concluding his masterful Gettysburg Address used the very phrase "under God." Lincoln's equally well known second inaugural address makes repeated references to God. President Franklin Delano Roosevelt, taking the office of the Presidency in the depths of the Great Depression, concluded his first inaugural address with these words: "In this dedication of a nation, we humbly ask the blessing of God. May He protect each and every one of us! May He guide me in the days to come!"

The motto "In God We Trust" first appeared on the country's coins during the Civil War. Federal Reserve notes were so inscribed during the decade of the 1960's. Meanwhile, in 1956, Congress declared that the motto of the United States would be "In God We Trust." Our Court Marshal's opening proclamation concludes with the words "'God save the United States and this honorable Court.'" The language goes back at least as far as 1827.

All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."

California law requires public elementary schools to "conduc[t] . . . appropriate patriotic exercises" at the beginning of the school day, and notes that the "giving of the Pledge of

Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." The School District complies with this requirement by instructing that "[e]ach elementary school class recite the [P]ledge of [A]llegiance to the [F]lag once each day." Students who object on religious (or other) grounds may abstain from the recitation.

Notwithstanding the voluntary nature of the District policy, the Court of Appeals held that the policy violates the Establishment Clause because it "impermissibly coerces a religious act." To reach this result, the court relied primarily on our decision in *Lee* v. *Weisman*.

I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag. There may be others who disagree, not with the phrase "under God," but with the phrase "with liberty and justice for all." But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate. Only if it can be said that the phrase "under God" somehow tends to the establishment of a religion can respondent's claim succeed, where one based on objections to "with liberty and justice for all" fails. The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of a religion.

When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies. Here we have three levels of popular government collaborating to produce the Elk Grove ceremony. The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause.

Justice O'Connor, concurring in the judgment.

I join the concurrence of the Chief Justice in full. Like him, I would conclude that the respondent does have standing. Like the Chief Justice, I believe that petitioner school district's policy does not offend the Establishment Clause. I write separately to explain the principles that guide my own analysis of the constitutionality of that policy.

As I have said before, the Establishment Clause "cannot easily be reduced to a single test. When a court confronts a challenge to government-sponsored speech or displays, I continue to believe that the endorsement test "captures the essential command of the Establishment

Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" In that context, I repeatedly have applied the endorsement test, and I would do so again here.

In order to decide whether endorsement has occurred, a reviewing court must keep in mind two crucial principles. First, because the endorsement test seeks "to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community," it assumes the viewpoint of a reasonable observer. Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. Second, because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.

The Court has permitted government, in some instances, to refer to or commemorate religion in public life. While the Court's explicit rationales have varied, my own has been consistent; I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life are the inevitable consequence of our Nation's origins. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.

Religious references can serve other valuable purposes in public life as well. For centuries, we have marked important occasions with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion.

There are no *de minimis* violations of the Constitution--no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto, religious references in traditional patriotic songs, and the words with which this Court opens its sessions. These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

This case requires us to determine whether the appearance of the phrase "under God" in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does.

The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes. That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous. By contrast, novel or uncommon references to religion can more easily be perceived as government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins. As a result, in examining whether a given practice constitutes an instance of ceremonial deism, its "history and ubiquity" will be of great importance.

Fifty years have passed since the words "under God" were added, a span of time that is not inconsiderable. In that time, the Pledge has become, alongside the singing of the Star-Spangled Banner, our most routine ceremonial act of patriotism; countless schoolchildren recite it daily, and their religious heterogeneity reflects that of the Nation as a whole. As a result, the Pledge and the context in which it is employed are familiar and nearly inseparable in the public mind. No reasonable observer could have been surprised to learn that petitioner school district has a policy of leading its students in daily recitation of the Pledge.

It cannot be doubted that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice is not something to be lightly cast aside." *Walz*. And the history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy. In the 50 years that the Pledge has been recited by millions of children, this was, at the time of its filing, only the third reported case of which I am aware to challenge it as an impermissible establishment of religion. The citizens of this Nation have been neither timid nor unimaginative in challenging government practices as forbidden "establishments" of religion. See, *e.g.*, *Altman* v. *Bedford Central School Dist.*, 245 F.3d 49 (2d Cir.2001) (challenging reading of a story of the Hindu deity Ganesha in a fourth-grade classroom); *Fleischfresser* v *Directors of School Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (challenge to school supplemental reading program that included works of fantasy involving witches, goblins, and Halloween). Given the vigor and creativity of such challenges, I find it telling that so little ire has been directed at the Pledge.

"[O]ne of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Engel* v. *Vitale*. Because of this principle, only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism. We have upheld only one such prayer against Establishment Clause challenge, and it was supported by an extremely long and unambiguous history. *Marsh* v. *Chambers*. Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the secular purposes of solemnizing an event and recognizing a shared religious history.

Of course, any statement *can* be imbued by a speaker or listener with the qualities of prayer. But the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase "under God," constitutes an instance of worship.

I know of no religion that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority. A reasonable observer would note that petitioner school district's policy of Pledge recitation appears under the heading of "Patriotic Observances." Petitioner school district also employs teachers, not chaplains or religious instructors, to lead its students' exercise; this serves as a further indication that it does not treat the Pledge as a prayer.

It is true that some of the legislators who voted to add the phrase "under God" to the Pledge may have done so in an attempt to attach to it an overtly religious message. But their intentions cannot, on their own, decide our inquiry. First of all, those legislators also had permissible secular objectives in mind. Second--and more critically--the *subsequent* history of the Pledge shows that its original secular character was not transformed by its amendment. Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to "one Nation under God" in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." No religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another.

The Pledge complies with this requirement. It does not refer to a nation "under Jesus" or "under Vishnu," but instead acknowledges religion in a general way: a simple reference to a generic "God." Of course, some religions--Buddhism, for instance--are not based upon a belief in a separate Supreme Being. But one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief. The phrase "under God," added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.

A final factor that makes the Pledge an instance of ceremonial deism is its highly circumscribed reference to God. In most of the cases in which we have struck down government speech or displays under the Establishment Clause, the offending religious content has been much more pervasive. Of course, a ceremony cannot avoid Establishment Clause scrutiny simply by avoiding an explicit mention of God. But the brevity of a reference to religion or to God in a ceremonial exercise can be important for several reasons. First, it tends to confirm that the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way. Second, it makes it easier for those participants who wish to "opt out" to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another.

The reference to "God" in the Pledge qualifies as a minimal reference to religion;

respondent's challenge focuses on only two of the Pledge's 31 words. Moreover, the presence of those words is not absolutely essential to the Pledge. As a result, students who wish to avoid saying the words "under God" still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge.

I have framed my inquiry as a specific application of the endorsement test by examining whether the ceremony would convey a message to a reasonable observer that those who do not adhere to its literal message are political outsiders. But consideration of these factors would lead me to the same result even if I were to apply the "coercion" test featured in several opinions of this Court. *Santa Fe Independent School Dist.* v. *Doe*; *Lee* v. *Weisman*.

The coercion test provides that, "at a minimum government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test. This is not to say, however, that government could *overtly* coerce a person to participate in an act of ceremonial deism. Leaders in this Nation cannot force us to proclaim our allegiance to *any* creed, whether it be religious, philosophic, or political. That principle found eloquent expression in a case involving the Pledge itself, even before it contained the words to which respondent now objects. See *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.). The compulsion of which Justice Jackson was concerned, however, was of the direct sort--the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree.

Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.

Justice Thomas, concurring in the judgment.

We granted certiorari in this case to decide whether the School District's Pledge policy violates the Constitution. The answer to that question is: "no." But in a testament to the condition of our Establishment Clause jurisprudence, the Court of Appeals reached the opposite conclusion based on a persuasive reading of *Lee* v. *Weisman*, 505 U.S. 577 (1992). In my view, *Lee* adopted an expansive definition of "coercion" that cannot be defended. The difficulties with our Establishment Clause cases, however, run far deeper than *Lee*.

I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision which resists incorporation. Moreover, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would cover little more than the Free Exercise Clause.

I

In *Lee*, the Court held that invocations and benedictions could not be given at public

secondary school graduations. Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.

Moreover, this case is more troubling than *Lee* with respect to both kinds of "coercion." First, although students may feel "peer pressure" to attend their graduations, the pressure here is far less subtle: Students are actually compelled (that is, by law) to attend school.

Analysis of the second form of "coercion" identified in *Lee* is somewhat more complicated. It is true that since this Court decided *West Virginia Bd. of Ed.* v. *Barnette*, States cannot compel students to pledge their allegiance. Formally, then, dissenters can refuse to pledge. But as *Lee* indicated: "adolescents are often susceptible to pressure from their peers towards conformity." On *Lee*'s reasoning, *Barnette*'s protection is illusory, for government officials can allow children to recite the Pledge and let peer pressure take its natural course. Further, even if we assume that sitting in respectful silence could be *mistaken* for assent to or participation in a graduation prayer, dissenting students graduating from high school are not "coerced" to pray. At most, they are "coerced" into possibly appearing to assent to the prayer. The "coercion" here, however, results in unwilling children actually pledging their allegiance.

The Chief Justice would distinguish *Lee* by asserting "that the phrase 'under God' in the Pledge [does not] conver[t] its recital into a 'religious exercise' of the sort described in *Lee*." In *Barnette*, the Court addressed a state law that compelled students to salute and pledge allegiance to the flag. The Court described this as "compulsion of students to declare a belief." Under *Barnette*, pledging allegiance is "to declare a belief " that now includes that this is "one Nation under God." It is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a "formal religious exercise" akin to prayer, it must present the same or similar constitutional problems.

I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided. *Lee* depended on a notion of "coercion" that has no basis in law or reason. The kind of coercion implicated by the Religion Clauses is that accomplished "*by force of law and threat of penalty*." Peer pressure, unpleasant as it may be, is not coercion. But rejection of *Lee*-style "coercion" does not suffice to settle this case. Although children are not coerced to pledge, they are legally coerced to attend school. Because what is at issue is state action, the question becomes whether the Pledge policy implicates a religious liberty right protected by the Fourteenth Amendment.

II

I accept that the Free Exercise Clause applies against the States through the Fourteenth Amendment. But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. It makes little sense to incorporate the Establishment Clause. In any case, I do not believe that the Pledge policy infringes any religious liberty right that would arise from incorporation of the Clause. Because the Pledge policy also does not infringe any free-exercise rights, I conclude that it is constitutional.

The Establishment Clause probably prohibits Congress from establishing a national religion. Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments. Nothing in the text of the Clause suggests that it reaches any further. The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion. This textual analysis is consistent with the prevailing view that the Constitution left religion to the States. History also supports this understanding: At the founding, at least six States had established religions.

Quite simply, the Establishment Clause is best understood as a federalism provision--it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand. The best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Federal Government, to be free from coercive federal establishments. Incorporation of this individual right, the argument goes, makes sense.

But even assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. It is more likely that States and only States were the direct beneficiaries. Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect--*state* establishments of religion. Nevertheless, the potential right against federal establishments is the only candidate for incorporation.

I would welcome the opportunity to consider more fully whether and how the Establishment Clause applies against the States. One observation suffices for now: As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected--state practices that pertain to "an establishment of religion." We must therefore determine whether the Pledge policy pertains to an "establishment of religion."

The traditional "establishments of religion" to which the Establishment Clause is addressed necessarily involve actual legal coercion. It is also conceivable that a government could "establish" a religion by imbuing it with governmental authority, or by "delegat[ing] its civic authority to a group chosen according to a religious criterion." A religious organization that carries some measure of the authority of the State begins to look like a traditional "religious establishment," at least when that authority can be used coercively.

I find much to commend the view that the Establishment Clause "bar[s] governmental preferences for *particular* religious faiths." But the position I suggest today is consistent with this. Legal compulsion is an inherent component of "preferences" in this context.

Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution.