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Rethinking Government Neutrality towards Religion under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight

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Traditional establishment clause analysis forbids any government actions whose purpose or effect is to advance or inhibit religion. In Lynch v. Donnelly Justice O'Connor recast the "advance or inhibit" test to focus on government "endorsement or disapproval." Professor Loewy emphasizes that this refined test prohibits the government from sending a message of either inferiority or superiority to those who adhere to particular religious beliefs. In light of Justice O'Connor's newly formulated test, Professor Loewy re-evaluates past United States Supreme Court decisions and current common practices in our society: the Supreme Court's opening invocation, school prayer, the inclusion of the phrase "under God" in the flag salute, and the convening of student religious groups in public schools. Professor Loewy concludes that government neutrality towards religion, which the establishment clause mandates, can be achieved best by a serious application of the endorsement/disapproval test.

If ever a series of decisions needed rethinking, it is those in which government has arguably breached its obligation of neutrality by sponsoring or demeaning religion.\(^1\) Although current establishment clause doctrine forbids any government actions whose purpose or effect is to advance or inhibit religion,\(^2\) it

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\(^{2}\) Cases challenging financial support for religion, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971), and sovereign involvement in religious activity, e.g., Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), are beyond the scope of this Essay. Free exercise cases involving claims that those holding certain religious beliefs are entitled to treatment different from that accorded the rest of society, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972), are also beyond the scope of the Essay.
specifically approves actions that accommodate religion. Under this doctrine, Kentucky's posting of the Ten Commandments on its schoolhouse walls and Alabama's moment of silent meditation or prayer statute have been condemned as forbidden advancements of religion, but New York City's program of released time from public schools for religious study and Pawtucket, Rhode Island's, public display of a creche at Christmas time have been commended as permissible, if not laudatory, accommodations. Until recently, however, the calculus for distinguishing advancements from accommodations and for recognizing inhibitions has been extraordinarily imprecise.

Less than two years ago in a concurring opinion, Justice O'Connor recast the "advance or inhibit" test in terms of "endorsement or disapproval." She argued that government must avoid endorsement or disapproval of religion because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Adhering to the on-again off-again test of Lemon v. Kurtzman, her recast test provides that

   If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause. Id. at 42. For a discussion of Stone, see infra notes 42-43 and accompanying text.
5. Wallace v. Jaffree, 105 S. Ct. 2479 (1985). "The addition of 'or voluntary prayer' [to the existing statute] 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." Id. at 2492 (discussed infra at notes 98-119 and accompanying text).
6. Zorach v. Clauson, 343 U.S. 306 (1952). The Court explained the program as follows:
   New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.
   Id. at 308.
7. In upholding this practice the Court said: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." Id. at 313-14.
9. Id. at 1366 (O'Connor, J., concurring).
The purpose prong of the Lemon test asks whether the government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.11

In the short time since Justice O'Connor developed this insight, it has been endorsed by the United States Supreme Court in Wallace v. Jaffree12 and by some of our most thoughtful commentators.13

Besides giving a more precise focus to the purpose and effect prongs of the Lemon test, O'Connor's insight emphasizes that government cannot convey a message that anyone is inferior or superior because of his or her religion. The principal thesis of this Essay is that this prohibition is thoroughly consistent with our constitutional heritage but that its serious implementation will require rethinking some of our most firmly entrenched practices. Unfortunately, neither Justice O'Connor nor the Supreme Court as an institution has shown a proclivity to take this prohibition that seriously.

Even apart from the religion clauses, a society designed to accommodate cultural diversity cannot afford to place "a badge of inferiority"14 on some of its citizens. Were it not for this principle, many forms of segregation might be unobjectionable. We refuse to tolerate segregated railroad cars15 and courtroom seating16 because of the discomfort of the message, not the seats.17 Indeed, if the Court in Plessy v. Ferguson18 had fairly applied Justice O'Connor's insight to segregated railroad cars, it is difficult to imagine that it would not have found that the challenged restriction had both the purpose and effect of disapproving of blacks and endorsing whites, sending precisely the insider/outside message that Justice O'Connor condemned.19 Her insight, of course, is not designed to rectify the harm done by Plessy. To the extent that the harm of segregation can be rectified by the endorsement/disapproval principle, it has been. Indeed, as a society, we have become quite sensitive to the constitutional impropriety of sending objectionable messages to blacks,20 women,21 and sometimes illegitimates.22 As will shortly become apparent, however, we have not always been so

17. Some forms of segregation, such as segregated education, are intolerable because of the tangible as well as psychological harm they cause. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954). The forms of segregation posited in the text, however, are offensive principally because of the accompanying message of inferiority.
18. 163 U.S. 537 (1896).
19. See Tribe, supra note 13, at 162.
22. Compare Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating a limitation on an illegiti-
sensitive to religious minorities.

I. GENERAL APPLICABILITY

To ascertain the untapped potential of the endorsement/disapproval test, it is useful to analyze how it would apply to actual and potential cases. The best two cases with which to begin the analysis are Torcaso v. Watkins,23 in which the Court invalidated a Maryland constitutional requirement that certain public officials declare a belief in God, and McDaniel v. Paty,24 in which the Court invalidated a Tennessee constitutional requirement that certain public officials not be "ministers of the Gospel or priests of any denomination whatsoever."25 These bookend paradigms perfectly illustrate government's use of an individual's relationship to God to gauge his or her secular status in the community. Torcaso was ineligible for his secular office because he had too little involvement with God; McDaniel, because he had too much. Under the endorsement/disapproval standard, both requirements are clearly unconstitutional; they impose second-class citizenship on individuals because of their relationship or absence of relationship to God.

The Supreme Court's opinion in Torcaso substantially comports with the endorsement/disapproval approach. In invalidating the Maryland provision, the Court held that "[n]either [a state nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."26 With this forthright pronouncement, the Court refused to tolerate the endorsement of theism and concomitant disapproval of nontheism inherent in the Maryland constitutional provision.

In McDaniel three of the eight Justices who participated in the case (Justices Brennan, Marshall, and Stewart) would have held that the decision was controlled by Torcaso.27 Chief Justice Burger, however, speaking for a four Justice plurality (including Justices Powell, Rehnquist, and Stevens), ruled Torcaso inapplicable because McDaniel's "ministerial status [was] defined in terms of conduct and activity rather than in terms of belief";28 he was a minister—he did not merely believe in the ministry. The plurality then found it necessary to balance McDaniel's free exercise of religion claim against Tennessee's contention that antiestablishment principles justified separating church leaders from state councils to avoid potential conflicts of interest. This contention was rejected only because Tennessee failed to demonstrate that a clergyman would exercise

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25. TENN. CONST. art. IX, § 1. For the complete text of this provision, see infra note 32.
27. McDaniel, 435 U.S. at 632 (Brennan, J., concurring; joined by Marshall, J.); id. at 642 (Stewart, J., concurring).
28. Id. at 627.
political power in the interest of one sect to the detriment of others. The plurality did not decide whether proof that clergymen tend to “be less careful of anti-establishment interests” than other legislators would have been sufficient to uphold Tennessee’s anticlergy provision. The Tennessee Supreme Court had held that the mere potential for conflicts of interest justified the challenged constitutional provision.

Although the plurality’s possible, and the Tennessee Supreme Court’s actual, willingness to uphold the Tennessee provision on establishment clause grounds is counter to the endorsement/disapproval standard herein advocated, it is not without precedential basis. In one very real sense, the Tennessee provision adds cement to the metaphorical wall of separation between church and state, which has been a part of our jurisprudence for nearly forty years. Whether the Tennessee Constitution is viewed as an attempt to protect the state from a conflict of interest or the church from diversion of its spiritual leaders, it certainly separates church from state. The fallacy of this analysis, of course, is that our “wall” is not so literal. Our churches are not separate from our government in the sense that the Vatican is a separate government from that of Italy.

Justice Rehnquist has recently suggested the the “wall” metaphor should be rejected as historically unsound and practically unworkable. Although his historical analysis is unpersuasive and his alternative suggestion—that the estab-

29. Id. at 629.
30. The Tennessee Supreme Court stated:
[M]inisters and priests could be expected, if and when serving in the Legislature, to do everything within their professional and spiritual powers of persuasion to further the aims of religion by sponsoring, advocating and voting for legislation that could or might violate both the free exercise and establishment clauses of the First Amendment; that without regard to the degree of success they might achieve, such activity would constitute a divisive force sufficient to constitute a significant violation of the Doctrine of Separation of church and state.
31. The Supreme Court first used the metaphor in Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).
32. The constitutional provision reads in full:
Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the legislature.
TENN. CONST. art. IX, § 1; McDaniel, 435 U.S. at 621 n.1.
33. See, e.g., Holy See, in WORLD CHRISTIAN ENCYCLOPEDIA 351 (D. Barrett ed. 1982).
35. Although Justice Rehnquist’s sources, e.g., T. COOLEY, CONSTITUTIONAL LIMITATIONS 470-71 (1868); R. CORD, SEPARATION OF CHURCH AND STATE 61-82 (1982); 2 J. STORY, COMMEN-
TARIES ON THE CONSTITUTION OF THE UNITED STATES 630-32 (5th ed. 1891), are no less authori-
tative than those relied on by Justice Rutledge in his dissent from Everson v. Board of Educ., 330 U.S. 1, 28 (1946), which reached the contrary conclusion, e.g., I. BRANT, JAMES MADISON: THE VIRGINIA REVOLUTIONIST (1941); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902); H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910); W. SWEET, THE STORY OF RELIGION IN AMERICA (rev. ed. 1939), they are no more authoritative either. Moreover, there is great force in Justice Brennan’s assertion that a too specific search for the framers’ intent is both misdirected and futile. Justice Brennan’s reminder of Chief Justice Marshall’s wise aphorism that “it is a Constitution we are expounding” is especially appropriate in view of the pluralistic nation we have become. Although the Court should not ignore an overwhelmingly clear historical mandate, it should be apparent that in light of the contrariety of historical views, no such
lishment clause merely prohibits discrimination among sects—is unacceptable, there is much merit to abandoning the metaphor. If taken literally, as it was by the Tennessee Supreme Court, the metaphor can endorse hostility towards religion. Although the United States Supreme Court, which has consistently advocated neutrality rather than hostility, does not appear to take the “wall” that seriously, it is difficult to assess the significance the Court does attach to the metaphor. Because the “wall” is amorphous at best and misleading at worst, it should not purport to be the basis of analysis. Principles such as “endorsement,” “disapproval,” and “nonentanglement” can stand on their own without being tied to this unhelpful metaphor.

II. ENDORSEMENT

Unimpeded by the “wall,” let us continue to assess the impact of seriously implementing the endorsement/disapproval standard by examining a clearly correct decision, Abington School District v. Schempp (the school prayer case), which invalidated statutes designed to inform students that the Bible and the Lord’s Prayer contained government-approved messages. Although the statute contained an excusal provision that permitted students to be excused from prayers or Bible reading, this provision did not substantially ameliorate the impact of the statute’s message on nonbelievers. For comparison, imagine a recently integrated high school class beginning each day by reciting: “We are thankful for white supremacy.” Under an excusal provision, black students could either call attention to themselves by leaving, or remain, suffer through the indignity, and hope nobody noticed their discomfort at the message of disapproval. This was precisely the choice facing the Schempp children, who had to listen to the Bible or call attention to themselves by leaving the room.

mandate exists. A final factor in assessing the weight to be given to this conflicting history is the willingness of lawyers and judges to use only that history which supports their particular constitutional philosophy. Rarely, if ever, has an opinion said: “Were I to follow sound notions of constitutional policy I would reach one result. Unfortunately, history compels the contrary conclusion.” Rather, history is almost always used as the handmaiden of the advocate whose constitutional philosophy needs to be buttressed. See, e.g., Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Cr. Rev. 119. 36. See, e.g., Gillette v. United States, 401 U.S. 437, 450 (1971) (“The metaphor of a ‘wall’ or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis . . . .”).

37. See supra note 11 and accompanying text.


39. The Court reiterated Mr. Schempp’s trial testimony:

Edward Schempp, the children’s father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be “labeled as ‘odd balls’” before their teachers and classmates every school day; that children, like Roger’s and Donna’s classmates, were liable “to lump all particular religious differences or religious objections [together] as ‘atheism’” and that today the word “atheism” is often connected with “atheistic communism,” and has “very bad” connotations, such as “un-American” or “anti-Red,” with overtones of possible immorality. Mr. Schempp pointed out that due to the event of the morning exercises following in rapid succession, the Bible reading, the Lord’s Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and
Schempp was based on an earlier case, *Engel v. Vitale*, in which the Court had invalidated the New York Board of Regents' composed prayer for school children: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Subsequently, the Court invalidated a Kentucky statute requiring the posting of the Ten Commandments in each public classroom in the state. In each of these cases, endorsement of believers and disapproval of nonbelievers came across loud and clear.

If the Supreme Court is going to order Kentucky to remove the Ten Commandments from its classroom walls, by what right can it issue that order from a bench directly under a sculpture of the very same Ten Commandments? The answer is not, as is sometimes suggested, that children are more impressionable than the mature adults who visit the Supreme Court. Even mature adults are entitled to be free from the disapproval engendered by having other people's beliefs stamped "U.S. Government approved." Rather, the difference lies in the Supreme Court's sculpture being merely one of a large number of sculptures of ancient laws and lawgivers, including among many others Draco, Napoleon, Charlemagne, and Mohammed. Surely no reasonable person could view the presence of all these sculptures as an endorsement of any one philosophy. Kentucky, on the other hand, by posting only the Ten Commandments, specifically endorsed the message contained therein.

Can the Supreme Court constitutionally open its sessions with "God save the United States and this Honorable Court" on the basis that no reasonable person could view the phrase as an endorsement of any particular religion or on any other basis? In my view, it cannot. The constitutional wrong perpetrated by this invocation is identical to that of the New York Regent's prayer: it endorses theism. The clear message to theists (in Justice O'Connor's terms) is that "they are insiders, favored members of the political community." Nontheists, on the other hand, are given the "outsider" message. To illustrate, posit a nontheist (either litigant or visitor) in the gallery of the Supreme Court. How is such a person to react to the invocation? Consider how you would react to one or more of the following hypothetical invocations: "Christ save the United States and this Honorable Court"; "The Pope bless the United States and this Honorable Court"; "Allah save the United States and this Honorable Court"; "Satan save the United States and this Honorable Court." Avoiding such messages is especially important for our courts, which are dedicated to both the appearance and actuality of "equal justice under law."

In some countries, of course, such endorsements should be expected. A

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Donna were excused from Bible reading they would have to stand in the hall outside their "homeroom" and that this carried with it the imputation of punishment for bad conduct. *Schempp*, 374 U.S. at 208 n.3 (quoting from trial court decision, 201 F. Supp. at 818).

41. *Id.* at 422.
non-Jew in Israel, a non-Shiite in Iran, or a theist in the Soviet Union could not successfully complain about a court opening its session with a paean to Judaism, the Ayatollah, or atheism, respectively. That, however, is the difference between a religious or antireligious country and a country such as ours, in which religious belief is supposed to be irrelevant to a person's status in the political community. Indeed, the Supreme Court's invocation is directly descended from that of the British, whose excessive mingling of church and state inspired the establishment clause.

Because this invocation is a practice that the Supreme Court could easily terminate if it were so inclined, I shall focus considerable attention on it. To say that the Supreme Court has not yet been persuaded of the unconstitutionality of this practice would be classic understatement. In Zorach v. Clauson the Court upheld a program permitting students to be released from public school to attend religious classes by imagining a parade of horribles that would befall us if the program were invalidated. The ultimate horrible was that "[a] fastidious atheist or agnostic could even object to the supplication with which this Court opens such session: 'God save the United States and this Honorable Court.'"

In Marsh v. Chambers the Supreme Court cited its own use of an invocation as well as similar use by the lower federal courts to uphold Nebraska's practice of opening its legislative session with prayers from a state-employed clergyman.

Let us now examine the reasons thought sufficient to justify this practice. The most prevalent justification is history. In Marsh the Court justified legislative (and inferentially judicial) prayer by relying on the contemporaneous passage in 1789 of the first amendment and a congressional act to pay chaplains. For a variety of reasons detailed by Justice Brennan, one cannot derive much mileage from such contemporaneous conduct. Most significantly, such reliance would have led to upholding the Alien and Sedition Acts and segregated public schools. A more serious historical argument is the uninterrupted and unchallenged practice of the invocation since the beginning of the Republic. As Justice O'Connor (quoting Justice Holmes) said: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the

46. 343 U.S. 306 (1952).
47. See supra note 6.
48. Zorach, 343 U.S. at 313.
50. Justice Brennan pointed to the lack of formal history, the probability that the framers in their role as congressmen were probably not thinking primarily in constitutional terms, the uncertain views of framers who contributed to drafting the first amendment but who were not congressmen, and the dynamic nature of the Constitution. Id. at 814-17 (Brennan, J., dissenting).
52. When the fourteenth amendment was adopted, many public schools throughout the Nation were segregated. See, e.g., Roberts v. City of Boston, 59 Mass. 198 (1849). The Supreme Court later held that segregated schools were unconstitutional. See Brown v. Board of Educ., 347 U.S. 483 (1954).
Fourteenth Amendment to affect it.'”

My response is twofold. First, regardless of how long judicial prayer has been practiced, there is an extremely strong case to be made against it. Under Justice O'Connor’s endorsement/disapproval test, the invocation sends a message of endorsement to theists and of disapproval to nontheists. Second, the practice has been continued by common consent only in the sense that schools were segregated by common consent. Nobody asked blacks about segregated schools, and nobody asked nontheists about the invocation.

It can be argued that the invocation should be sustained because its religiosity is de minimis. So long as establishment clause analysis was focused on the abstract impropriety of governmental involvement with religion, it is understandable that one could have viewed the Supreme Court’s invocation as a trifling matter, perhaps innocuously characterized as mere “‘ceremonial Deism.’” Once focus is directed towards the endorsement/disapproval principle, however, the matter is anything but trifling. We would not consider trifling a law that requires blacks to ride in a separate railroad car or sit in a separate section of a courtroom from whites. I doubt that many Moslems or Jews would consider it de minimis were the Supreme Court to begin its session with the invocation: “Christ save the United States and this Honorable Court.” Why then should we expect nontheists who are entitled to equal dignity under the establishment clause to react differently?

Another justification, tentatively advanced by Justice Brennan in his dissenting opinion in Marsh, is that the invocation has “lost any true religious significance.” Chief Justice Burger appeared to disagree, describing “the Court’s session [as opening] with an invocation for Divine protection.” Literally, the Chief Justice is clearly correct; the terms of the invocation are neither more nor less than a plea for divine protection for our country and the Court. Justice Brennan may have a point, however, insofar as theists are concerned. This, however, may be more of a point against rather than for constitutionality. Consider this hypothetical conversation following a session of the Supreme Court:

Nontheist: The Supreme Court has more regard for your beliefs than for mine. It asked God for protection.

Theist: Quite the contrary. The dignity of my God was compromised by a mundane invocation from the Court crier. As the Court has said on another occasion, “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”

57. Marsh, 463 U.S. at 818 (Brennan, J., dissenting).
59. Engel, 370 U.S. at 432.
Both the theist and nontheist are correct, of course. The nontheist has been informed that the Court regards another's beliefs as worthier than his or hers. The theist, on the other hand, has seen his or her holy God's name demeaned by its use in a ceremony that arguably has lost all religious significance. Either reason should be sufficient to invalidate the procedure.

Justice Brennan has argued that the legislative prayers upheld by *Marsh* and used by the United States Congress are a more substantial establishment than is the Supreme Court's invocation. Although this assessment has merit, it ignores the psychological importance of the Supreme Court's cleaning its own house. I can sympathize with the Court's unwillingness to invalidate legislative prayers in a session that itself began with a plea for divine protection. Similarly, I can understand how Chief Justice Burger, dissenting in the Alabama moment of silence case, and Justice Stewart, dissenting in the New York Regents' prayer case, felt a sense of incongruity in the Court's imposing strict limitations on prayer in schools after opening its own session with the invocation. Consequently, once the Court recognizes that its invocation is incompatible with the values embodied in the no endorsement or disapproval of religion concept and that these values should be taken seriously, it will be incumbent upon the Court to discontinue the practice forthwith.

Although it would not be fruitful to explore every conceivable practice that might contravene the establishment clause if the endorsement/disapproval principle were taken seriously, there is one additional practice on which I would like to focus: inclusion of the phrase "under God" in the flag salute. Because the salute is part of a patriotic exercise, it could be argued that it is different from the New York Regents' prayer. Unfortunately, the patriotic nature of the exercise aggravates rather than mitigates the establishment problems. The Regents' prayer, though rightly condemned as written and sanctioned by government, at least did not directly tie God to country. Even in the *Engel* situation some nontheists might have preferred to stay in the classroom and mouth the prayer so that they would not appear to be unpatriotic atheistic Communists. How much greater is the pressure on patriotic nontheists who would gladly pledge allegiance to the flag of the United States, but do not believe that

63. The psychological importance of internal housecleaning has probably influenced the Court on other occasions. For example, in United States v. Grace, 461 U.S. 171 (1983), the Court invalidated a statute which, as construed, forbade the display of any flag, banner, or similar device on the sidewalks surrounding the Supreme Court building. A contrary decision would have weakened the moral authority of other decisions that had invalidated laws limiting demonstrations at other locales. See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980) (demonstration immediately outside the home of the Mayor of Chicago). Similarly, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court held that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling*, 347 U.S. at 500.
64. See supra notes 40-41 and accompanying text.
65. In *Schempp*, 374 U.S. at 208 n.3, Mr. Schempp testified that his children did not take advantage of the excusal provision precisely because of this concern. See supra note 39.
the Republic for which it stands is under God? Must they exercise their constitutional right to leave the room, thereby appearing disloyal? Perhaps the problem would be clearer if we imagined that our government fell into the hands of atheists who revised the pledge to end: "one Nation, without God, indivisible, with liberty and justice for all." Assuming that the hypothetical pledge would be unconstitutional, how can the actual pledge be sustained? If the establishment clause means anything, it must mean that whether this Nation is under God or without God can neither depend on a vote of a temporary majority nor vacillate according to the tenor of the times.

Recently, Justice Brennan suggested that the reference to God in the Pledge of Allegiance, as well as our designation of "In God We Trust" as our national motto, might be justified as "uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases." Frankly, it is difficult to take this suggestion seriously. Public occasions were solemnized quite nicely by the Pledge of Allegiance before 1954 when the phrase "under God" was added to the Pledge. Although a national leader may personally invoke our trust in God to inspire commitment during a crisis, this is altogether different from prescribing the motto for such mundane things as our coins and currency. Indeed, was it not coins and currency that Jesus said should be rendered unto Caesar?

At an earlier stage of his career, Justice Brennan sought to justify the Pledge as an historical recognition that this "Nation was believed to have been founded 'under God.'" Although Brennan seemed uncertain when he first advanced this hypothesis and has seemed even more uncertain since then, it is an argument that should be addressed. The first difficulty with it is the evidence that Congress adopted this phrase in 1954 specifically to affirm the contemporary vitality of this Nation's belief in God. Second, and more important, the effect of this insertion is not merely historical; it requires each person who wishes to pledge allegiance to the flag to affirm the present union of God and country whenever he or she recites the Pledge. This stands in stark contrast to the Gettysburg Address from which the listener merely learns the historical fact that Abraham Lincoln, while dedicating a cemetery, perceived this Nation to be under God. Unlike its inclusion in the Gettysburg Address, government's inser-

of the phrase "under God" in the Pledge of Allegiance is precisely the type of religious endorsement that should not be tolerated.

III. DISAPPROVAL

In recent years, cases arguably involving government disapproval rather than endorsement of religion have increased significantly. These cases typically arise when a religious group seeks access to an otherwise open forum but is denied access because of the group's religious character. When the state has prevailed, it usually has been because of a judicial determination that granting access to the open forum for a prayer meeting endorses religion in violation of the establishment clause. When the religious group has prevailed, its victory has been predicated on freedom of speech or free exercise of religion. Thus, the conflict has been between nonestablishment on behalf of the states and free speech or religion on behalf of the religious groups. Because the religious groups have tended not to rely on the establishment clause, the courts have not seriously considered the establishment clause values threatened by the message of disapproval inherent in the denial. Disapproval, of course, is as bad as endorsement in that it sends the same forbidden insider/outsider message.

In *Widmar v. Vincent* the religious group prevailed on its free speech claim. A university made its facilities generally available to registered student groups, but denied the facilities to groups that wished to hold prayer meetings. Because the facilities were open to all, the Court was unpersuaded by the argument that the primary effect of a religious group's access to the facilities would be to advance religion. Thus, it rejected the university's establishment clause defense. Because it found for the students on freedom of speech grounds and rejected the university's establishment clause defense, the Court did not feel the need to evaluate the impact that the university's denial had on establishment clause values.


75. Professor Laycock has argued that the establishment clause has nothing to do with inhibiting religion. In his view, such claims can be analyzed better under the free exercise clause. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-85 (1981). So long as the Court spoke of "inhibition" rather than "disapproval," Laycock's argument had a good deal of force. Any inhibition of religion would, at least definitionally, seem to impede free exercise. "Disapproval," on the other hand, is a broader concept. It is the flip side of endorsement. For example, the flag salute does not deny nontheists the right to exercise religion freely, but, as this Essay contends, such a practice should be held to violate the establishment clause because it endorses theistic religions and disapproves nontheistic religions. Similarly, a religious group does not normally have a free exercise right to hold a prayer meeting in a public school, but for the reasons presented below, such groups have an establishment clause right not to be treated as second-class citizens and denied access to facilities to which similarly situated nonreligious groups have access.


77. *Id.* at 273.
In *Bender v. Williamsport Area School District* the United States Court of Appeals for the Third Circuit found a substantially similar situation to be distinguishable from *Widmar*. *Bender* involved a denial of a student request for religious activity in a high school during a regularly scheduled twice-a-week activity period. Because several different nonacademically oriented clubs had been approved over the years (e.g., archery, aviation, bowling, and chess) and, to the knowledge of the principal, no other proposed club had ever been rejected, the court quite sensibly concluded that an open forum had been created and that under the freedom of speech principles announced in *Widmar*, Petros (the religious group) had a constitutional right to meet.\(^7^9\) It also ruled, however, that the school's allowing Petros to meet would constitute an endorsement of religion forbidden by the establishment clause.\(^8^0\) Because it found conflicting constitutional principles, the court was compelled to assess the relative importance of each in the context of the case. Finding the nonestablishment interest paramount, it sustained the school board's position.\(^8^1\)

In concluding that *Widmar* did not foreclose the endorsement of religion issue, the *Bender* court focused on the age and relative immaturity of high school students vis-à-vis university students and on the presence of state-employed monitors in the classroom during the activity period. These factors, in the opinion of the court, transformed the neutrality of *Widmar* into an endorsement of religion in *Bender*.\(^8^2\) Notwithstanding a direct challenge by the dissenting judge to do so,\(^8^3\) the court refused to assess the effect of potentially conveying a message of religious disapproval on impressionable students. As far as the court of appeals was concerned, endorsement of religion was at issue; disapproval of religion was not.

In one sense, cases like *Bender* or *Widmar* require the school either to endorse or to disapprove religion. When Petros or Cornerstone (the religious group in *Widmar*) asked permission to meet in a classroom, the school official could either have endorsed the request by saying "yes," or disapproved the request by saying "no." This is quite different from a prescribed exercise (such as a prayer or the flag salute), in which the school can remain neutral by refusing collectively to acknowledge either the power of God, or the lack thereof.

Somewhat form of endorsement or disapproval, both of which are constitutionally forbidden, covers the universe of options in *Bender* and *Widmar*. Therefore, some calculus must be devised to distinguish forbidden endorsement or disapproval from purely incidental forms of endorsement or disapproval.

The open forum concept is extraordinarily well suited to this task. The

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\(^7^8\) 741 F.2d 538 (3d Cir., 1984), *cert. granted*, 105 S. Ct. 1167 (1985), *vacated and remanded*, 106 S. Ct. 1326 (1986). The United States Supreme Court held that respondents school board members had no standing. Therefore, because the court of appeals lacked jurisdiction, the majority opinion did not address the substantive issues discussed by the Third Circuit and examined in this Essay.

\(^7^9\) *Id.* at 549-50.

\(^8^0\) *Id.* at 560.

\(^8^1\) *Id.*

\(^8^2\) *Id.* at 554.

\(^8^3\) *Id.* at 565 (Adams, J., dissenting).
nature of an open forum is such that the administrator has no discretion to preclude the meeting. Consequently, when the administrator allows (endorses) the meeting, he or she is taking a strictly neutral approach to its content. It matters not whether the subject is aviation, chess, religion, or politics. The subject is "endorsed" only in the sense that, like every other subject, it is allowed. Thus, once an open forum is found, endorsement should be the norm. Because endorsement should be the norm, disapproval should be more significant than endorsement in that disapproval relegates the disapproved entity to outsider status.

When there is no open forum, the situation is different. Giving a school official the power to approve my religion and disapprove yours is, of course, something that you should find intolerable. In *Bender*, however, the court concluded under its freedom of speech analysis that the high school had adopted an open forum, under which it was required to permit the meetings of any group that contributed to the intellectual, physical, or social development of its members (concededly a description of Petros) and that was otherwise legally and constitutionally proper. Because the establishment clause forbids disapproval of religion, the conclusion that the school had adopted an open forum should have settled the establishment clause question as well.

It is sometimes argued that the impressionability of students compels public schools to avoid even the appearance of an endorsement of religion. If impressionability is taken seriously, however, the message of disapproval conveyed to Lisa Bender and her Petros classmates would seem to argue against rather than for the *Bender* result. In regard to her non-Petros classmates, it is just as important to avoid portrayal of Petros members as outsiders as it is to prevent their appearance as insiders. Let us suppose that the students of Williamsport High School were given the following question on a civics exam:

The Constitution requires that a high school principal not act with the purpose of endorsing or disapproving religion or do anything that would have such an effect. The principal of a high school has a general policy of allowing any group that would contribute to the intellectual, physical, or social development of its members to meet during activity period so long as the meeting would be legally and constitutionally proper. A group seeks the principal's permission to hold a prayer meeting during activity period. The group would contribute to the intellectual, physical, or social development of its members. What should the principal do? (A) The principal should deny the request because if it is granted, the school would be endorsing religion, which is not constitutionally proper, or (B) the principal should grant the request because if it is denied, the school would be disapproving religion, which is not constitutionally proper.

I believe that most students would give "B" as the correct answer.

The irony of the court's holding in *Bender* is that a school can begin its day with the flag salute, in which all manner of believers and nonbelievers come together to affirm the unity of God and country under the watchful eye of the teacher, but when homeroom is over and the students go to their individually
chosen activities, Lisa Bender and her like-minded compatriots are forbidden to meet together to utter a prayer, lest church and state become impermissibly intertwined. Much of the impetus for this (and similar decisions)\textsuperscript{84} stems from an inability or unwillingness to perceive the difference between government as a regulator of conduct and government as a participant in the conduct. In its regulatory role, government should not interfere in the free marketplace of ideas or beliefs. Merely providing a forum has never been thought to endorse the ideas conveyed therein. Surely, nobody ever thought that the City of Birmingham endorsed Martin Luther King’s political beliefs after the Court forbade interference with them.\textsuperscript{85} Similarly, when the states were compelled to grant to Jehovah’s Witnesses equal access to their parks in the 1950s,\textsuperscript{86} it would have been foolish to suggest that the states thereby endorsed the Jehovah’s Witnesses’ religion.

\section{IV. Hard Cases}

Thus far, the cases that we have examined easily could have been resolved under a serious application of the endorsement/disapproval test. Conditioning public office on a belief in God, beginning the school day with a state-endorsed prayer, opening Supreme Court sessions with a plea for divine protection, and tying God to country in the Pledge of Allegiance all should be unconstitutional because they favor theistic insiders over nontheistic outsiders. Similarly, excluding ministers from public office and denying religious groups access to our open forums are unconstitutional acts because they send an intolerable message of disapproval to those who take God most seriously. Unfortunately, not all cases alleging non-neutrality towards religion are that easy. Although the endorsement/disapproval test focuses attention on what should be the relevant question, it does not eliminate the hard cases. Two of the hardest such cases before the Court in recent years have been \textit{Lynch v. Donnelly},\textsuperscript{87} which upheld Pawtucket, Rhode Island’s, display of a government-owned crèche, and \textit{Wallace v. Jaffree},\textsuperscript{88} which invalidated Alabama’s moment of silence law. Each of these cases was difficult, sharply divided the Court, and, in my judgment, was wrongly decided.

\textit{Lynch} was a difficult case because the constitutionality of displaying a crèche, like the constitutionality of displaying the Ten Commandments,\textsuperscript{89} is contingent upon the context of the display and the intended or perceived message occasioned thereby. If a state were to post a replica of the crèche in every public school classroom as a symbol of peace on earth, the religiosity of the message would shine through loud and clear, and the display would be unconstitu-

\textsuperscript{86} Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951).
\textsuperscript{87} 104 S. Ct. 1355 (1984).
\textsuperscript{88} 105 S. Ct. 2479 (1985).
\textsuperscript{89} \textit{See supra} notes 42-43 and accompanying text.
At the other extreme, if a state were to display the crèche in a museum with other ancient artifacts under the heading: "Symbols of events that some people believe have supernatural significance," the display would neither endorse nor disapprove religion and therefore would be constitutional.

In evaluating the constitutionality of the crèche display in *Lynch*, it is helpful first to assess the constitutional justification for Christmas's status as a national holiday. The most obvious analogues are the Sunday closing laws, which are justified essentially because (1) there is secular value in everybody's resting at least one day during the week, (2) it is desirable that as many people as possible have the same day off to facilitate visits between family members and friends, and (3) it is reasonable to legislate the day that most people would choose anyway. Christmas is justifiable on substantially the same rationale. Many believe that it is desirable to have a secular winter holiday dedicated to merriment, good will, and gift giving and that it is reasonable to choose the day most people would choose on their own. Frankly, however, I believe that to avoid confounding the secular with the sacred, the secular holiday ought to be called something other than Christmas, such as "National Good Will Day." Notwithstanding the failure to implement this name change, it is at least incumbent upon government to actively support only the secular aspects of Christmas. Surely, the government could not place a government-owned cross in its parks or on its buildings every Sunday to celebrate its legitimate secular day of rest.

Despite the above analysis, a serious argument can be made for sustaining the crèche display at issue in *Lynch*. Justice O'Connor argued that the crèche's proximity to secular symbols in the display (Santa Claus, a wishing well, reindeer) rendered the display substantially similar to that in a museum. There is some force to this argument. Had the display been labeled: "Symbols that are displayed at this time of year," it might have been difficult to distinguish from a similar museum display. The display was not so labeled, however, thus poten-

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91. In *McGowan v. Maryland*, 366 U.S. 420, 449 (1961), the Supreme Court, upholding the constitutionality of Sunday closing laws, said: "[W]e accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation."

92. The Court stated:

[The State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.]

*Id.* at 450.

93. The Court noted:

Sunday is a day apart from all others. . . . The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord.

*Id.* at 452.

94. *Cf.* Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (en banc) (invalidating the city's display of a cross to endorse Easter).

tially leaving Christians with the belief that they had been endorsed as insiders and non-Christians with the belief that they had been disapproved as outsiders. Unfortunately, these potential beliefs were not left to chance. At a press conference held at the site of the crèche, Mayor Lynch publicly vowed to keep Christ in Christmas. Consequently, whatever nonendorsement message Pawtucket could have sent with the crèche was not sent. Rather, to all who listened, it was apparent that the city endorsed Christianity.

The City contended that the commercial setting of the display secularized the crèche sufficiently to dilute the religiosity of the message. Indeed, the entire display (crèche, Santa Claus, etc.) was designed by the city in cooperation with merchants to encourage people to shop at the downtown stores. Far from negating religiosity, this commercialization of God by Caesar misappropriated it. Although a commercial huckster may divert a religious symbol to commercial purposes, it is unseemly for a civil official to participate therein. Perhaps the ultimate irony of this case is that while the federal government mints its coins proclaiming trust in God, the City of Pawtucket displays its crèche—which many hold sacred—proclaiming prosperity for merchants. We need to return the coins to Caesar, and the crèche to God.

The other hard case, Wallace v. Jaffree, involving Alabama’s moment of silence law, was difficult because the state, although unquestionably enacting valid secular legislation, arguably packaged it with a message endorsing religion. The constitutional propriety of a moment of silence was conceded by all of the parties and specifically accepted by a majority of the Court. It is doubtful that anybody who has ever tried to teach a room full of screaming second graders would question the secular value of a moment of silence. Even with a more mature audience, a moment of silence can prepare one’s brain for the forthcoming stimulation in much the same way that sherbet can cleanse one’s palate for the next course of a gourmet meal.

It would be possible, of course, for a state to enact the following moment of silence law:

Whereas the State believes that every school child ought to begin the day with a prayer, but the United States Supreme Court forbids vocal prayer; be it enacted that each school day shall begin with a silent prayer. Those students who do not wish to pray may meditate about something else.

Much of the Supreme Court’s analysis in Jaffree seems predicated on the as-

97. Id. at 1163.
99. Two Justices in concurring opinions explicitly upheld the constitutional propriety of a moment of silence. Id. at 2493 (Powell, J., concurring); id. at 2498-99 (O’Connor, J., concurring). Inasmuch as the three dissenting Justices (Burger, White, and Rehnquist) would have upheld a moment of silence for meditation or prayer, they necessarily endorsed the constitutionality of a mere moment of silence. The Court’s opinion, although less explicit than the concurring and dissenting opinions, did not disagree. Rather, it noted that “[t]he 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.” Id. at 2491.
assumption that the Alabama statute at issue was substantially equivalent to this hypothetical statute. Were this assumption correct, the Court's decision would have been justified. It should be noted, however, that even the hypothetical statute is a milder endorsement of religion than either vocal school prayer or the blending of God and country in the Pledge of Allegiance. At least nonconforming students can silently meditate about nondivine things without focusing attention on themselves and need not listen to others recite the government-approved offensive message. Nevertheless, like the crèche given by Pawtucket's government to its citizens to keep Christ in Christmas, the hypothetical statute would endorse religion and should be unconstitutional.

The Alabama statute, which the Court thought to be substantially identical to the hypothetical statute, was worded as follows:

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 the 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 such period no other activities shall be engaged in.100

The Court's decision to treat this statute like the hypothetical statute was predicated on overwhelming evidence indicating that the only purpose of the legislation was to return voluntary prayer to the public schools.101 To the extent that "voluntary prayer" meant "state-endorsed prayer," *Jaffree* was correctly decided.

Without question, the term "voluntary prayer" is sometimes a euphemism for the type of state-endorsed prayer condemned in the school prayer cases.102 Various constitutional amendments have been proposed that would permit "voluntary"—state-sponsored—prayer in public schools from which dissenting students can be excused.103 This type of "voluntary prayer" is totally different from the truly voluntary prayer meetings at issue in *Bender*.104 To the extent that the Alabama statute authorized the first type of "voluntary prayer," I have no quarrel with the Court's decision. There is good reason, however, to believe that the statute did not sponsor prayer, but merely permitted it.

In both state and federal courts there exists a widespread animus against any and all school prayer. Thus, many if not most of the courts that have considered the *Bender* issue have held that religious groups such as Petros cannot meet in schools because prayer quite simply does not belong in school.105

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102. See supra notes 38-42 and accompanying text.
103. One proposed amendment provided: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer." Letter from American Jewish Congress to Arnold H. Loewy (May 21, 1982).
104. See supra notes 78-86 and accompanying text.
105. The Supreme Court recently evaluated the *Bender* decision, but did not address the merits, holding that respondent lacked standing. *Bender*, 741 F.2d at 538 (3d Cir. 1984), cert. granted, 105 S. Ct. 1167 (1985), vacated and remanded, 106 S. Ct. 1326 (1986).
106. See, e.g., *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S.
Indeed, this same animus against prayer in school has contributed to decisions invalidating moments of silence. Consequently, one should not be surprised to learn that much of the populace believes that it is school prayer and not just state-sponsored school prayer that the Constitution forbids. To the extent that Alabama has sought to combat this misconception, it should not be found to have endorsed religion.

Under the endorsement/disapproval test, the Alabama moment of silence statute would be unconstitutional if either the subjective intent of the state (purpose) or the objective message conveyed by the statute (effect) endorses or disapproves religion. Because it found an unconstitutional purpose, the Court never addressed the "effect" issue. Justice O'Connor, in a concurring opinion, did address this issue and concluded that "it . . . seems likely that the message actually conveyed to objective observers by [the statute] is approval of the child who selects prayer over other alternatives during a moment of silence." If her premise is correct, the statute would certainly be unconstitutional. The statute, however, is not so written. It permits meditation or voluntary prayer, in that order. Although the statute does mention prayer as a possible meditative activity and does not mention the myriad of other things upon which one could meditate, this is necessary to counteract the mistaken belief that law abiding students should not pray (even silently) in school.

The Jaffree Court's finding of purposeful endorsement was partially predicated upon the prior enactment of a statute calling for the school day to open with a moment of silence for "meditation." The Court found that because this prior statute already permitted students to pray silently, the only purpose for the challenged statute (which added the phrase "or voluntary prayer") was the endorsement of prayer. Additionally, the Court relied on statements by the sponsor of the legislation and the Governor of the State, indicating a purpose to prescribe prayer in the classroom.

Although these statements are similar to the Pawtucket Mayor's "Keep Christ in Christmas" statements, upon which I suggested the crèche display

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109. Id. at 2502.
110. Id. at 2481-82; ALA. CODE § 16-1-20 (Supp. 1985).
111. Jaffree, 105 S. Ct. at 2492.
112. The Court quoted the statements of Senator Donald Holmes, sponsor of the challenged statute, in the Alabama legislative record:

[B]y 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. . . . I believe [in] this effort to return voluntary prayer to our public schools . . . . 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.

Id. at 2490 n.43. The Governor of Alabama (then Fob James) admitted in evidence presented to the United States District Court for the Southern District of Alabama that "the enactment of Section 16-1-20.1 was intended to clarify [the State's] intent to have prayer as part of the daily classroom activity." Id. at 2490 n.44 (quoting Appendix to Record).
should have been invalidated,\textsuperscript{113} I believe that there is an important difference between the cases. In \textit{Lynch}, the placement of the crèche alone could have conveyed a message of endorsement to Christians and disapproval to others. The Mayor's statements, which were made at a news conference at the site of the crèche, simply removed any doubt. The Alabama statute, on the other hand, merely provided the opportunity for those inclined to pray to do so. Under these circumstances, when the apparent purpose of the activity is to accommodate rather than endorse religion, the endorsement motive of one or two officials ought not to render the activity unconstitutional.

I do not suggest that purposeful conduct by state officials might not render a statute such as the Alabama statute unconstitutional. If, for example, a teacher (who, more than the governor or the legislature, conveys the meaning of the statute to the students) were to begin class with a moment of silent prayer, rather than a moment of silent meditation or prayer, the teacher, being a state official,\textsuperscript{114} would have unconstitutionally endorsed religion. Similarly, if the teacher were to suggest, subtly or overtly, that prayer is expected or favored (or for that matter disapproved), that teacher would have violated the Constitution. If such practices had occurred, the Court would have had a meaningful basis for finding an impermissible purpose on the part of state officials. Because the statute had not been implemented when \textit{Jaffree} was decided, these practices had no opportunity to occur. Because they had not and might never occur, no message of endorsement had been communicated to the students. Because no such message was communicated, and because no impermissible purpose appeared on the face of the statute, the Court should not have invalidated it.

Although the Court wrongly found endorsement in \textit{Jaffree}, the decision did extraordinarily little damage. The right of a teacher in Alabama and in any other state to begin the school day with a moment of silence is more firmly ensconced than ever.\textsuperscript{115} Indeed, so long as prayer is not endorsed, there would appear to be no objection to the teacher's informing the children of their right to pray silently. Furthermore, while assuring these rights, the Court reaffirmed the importance of the nonendorsement principle, a critical reaffirmation in light of \textit{Marsh} and \textit{Lynch}.\textsuperscript{116}

Perhaps the Court was influenced to find endorsement because of Alabama's overall statutory scheme. Subsequent to enacting its "moment of silent meditation" and "moment of silent meditation or prayer" statutes, the legislature enacted a "teacher-led vocal prayer" statute, premised on the recognition that "the Lord God is one."\textsuperscript{117} Although the Supreme Court had previously

\textsuperscript{113} See supra notes 89-97 and accompanying text.


\textsuperscript{115} See supra note 99 and accompanying text.

\textsuperscript{116} The vitality of the nonendorsement principle had been weakened by the Court's decision in \textit{Marsh}, 463 U.S. 783 (1983), upholding the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the state, and in \textit{Lynch}, 104 S. Ct. 1355 (1984), upholding Pawtucket, Rhode Island's public display of a crèche at Christmas time.

\textsuperscript{117} The statute in pertinent part read as follows:

\begin{quote}
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
\end{quote}
invalidated this type of obviously unconstitutional statute, its mere enactment seems to have influenced the Court to find the "moment of silent meditation or prayer" statute unconstitutional. Exacerbating the impact of the "teacher-led vocal prayer" statute was the former Governor's statement that the "silent meditation or prayer" statute was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity." Although for reasons already given I do not believe that these factors should have invalidated the statute, they certainly complicated a case that otherwise should not have been so difficult and suggest that Alabama's loss was a self-inflicted wound, which is unlikely to set bad precedent.

V. CONCLUSION

I have advocated ascertaining neutrality towards religion by seriously implementing the endorsement/disapproval test. Although the test will not easily resolve difficult cases such as Lynch and Jaffree, it is well suited to preventing successful government attempts, whether subtle or overt, to impose a "badge of inferiority" on our religious minorities. Checking such government proclivities has long been the hallmark of our Nation. Even before the first amendment was adopted, the body of the Constitution provided that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." As early as 1797, our Senate approved a treaty with Tripoli which proclaimed that "the government of the United States of America is not in any sense founded on the Christian religion." Although our jurisprudence has occasionally been dotted by less pluralistic utterances, the Court's decisions since 1947 have consistently maintained that we are not a Christian Nation, but a pluralistic Nation, whose dominant religion happens to be Christianity.

To some it must seem a giant leap from the general principle of no endorsement or disapproval of religion to the prohibition of such "ceremonial Deism" as the Supreme Court's invocation or the phrase "under God" in the flag salute. My response is to recall my public school days when we began each assembly by singing the Lord's Prayer in unison. It never occurred to me that this had any significance beyond the ceremonial opening of the assembly. Consequently, I was quite surprised when the Supreme Court invalidated the practice. My subsequent reading of the opinions and evaluation of what we had done in school convinced me that the Court had correctly perceived our practice to be an unconstitutional endorsement of religion. If the Court were to take this same
nonendorsement principle seriously and apply it to its invocation (which is directly descended from the Anglican-established British invocation) and to the phrase "under God" in the flag salute (which was enacted in 1954 to distinguish this country from the Soviet Union), it would also invalidate these practices. Perhaps it should soften the blow in regard to the flag salute by suggesting that it end with: "One Nation, indivisible, with liberty, justice, and freedom of worship for all." Although it is not the function of the Supreme Court to rewrite the Pledge of Allegiance, the hypothetical pledge would at least reflect the true difference between the United States and the Soviet Union.

I do not propose these measures out of an antireligious animus. Indeed, I believe that strictly circumscribing government's role as a participant in religious activities frees it to allow its constituents to honor God as they see fit. In *Widmar*, for example, the university regulation that forbade the religious group Cornerstone from holding a prayer meeting in a university building expressly reserved the right to offer "prayer or other appropriate recognition of religion at public functions held in University facilities." If a university concerned with protecting the right to offer prayer at public functions and not wishing to appear associated with religion is more likely to deny religious groups access to its facilities than is a university that maintains a religious neutrality.

Professor Phillip Johnson has recently defended the Supreme Court's "muddled and internally inconsistent" religion cases on the ground that "[o]ne major objective of the first amendment is to keep the public peace on religious issues, and one way of doing this is for every religious and antireligious group to feel that government is neither squarely on its side nor squarely on the other side." Although I agree with his conclusion, I do not agree with the premise that muddled inconsistency is the only way or the best way to do the job. At least in the area of government neutrality towards religion, the best way for the Court to keep the peace is to refuse to tolerate endorsement or disapproval of religion.

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