SUPREME COURT OF THE UNITED STATES

No. 90–1014

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL., PETITIONERS *v.* DANIEL WEISMAN ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 24, 1992]

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, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation.

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 Education of Ewing*, 330 U. S. 1, 15 (1947). 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.

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.[1] Thus, in *Engel* v. *Vitale*, 370 U. S. 421 (1962), we held that the public schools may not subject their students to readings of any prayer, however "denominationally neutral." *Id.*, at 430. More recently, in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), we held that an Alabama moment-of-silence statute passed for the sole purpose of "returning voluntary prayer to public schools," *id.*, at 57, violated the Establishment Clause even though it did not encourage students to pray to any particular deity. We said that "when the underlying principle has been examined in the crucible of litigation, 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." *Id.*, at 52–53. This conclusion, we held,

> "derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among `religions'—to encompass intolerance of the disbeliever and the uncertain." *Id.*, at 53–54 (footnotes omitted).

Likewise, in *Texas Monthly, Inc.* v. *Bullock*, 489 U. S. 1 (1989), we struck down a state tax exemption

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[1]Cf. *Larson* v. *Valente*, 456 U. S. 228 (1982) (subjecting discrimination against certain religious organizations to test of strict scrutiny).

benefiting only religious periodicals; even though the statute in question worked no discrimination among sects, a majority of the Court found that its preference for religious publications over all other kinds "effectively endorses religious belief." *Id.*, at 17 (plurality opinion); see *id.*, at 28 (BLACKMUN, J., concurring in judgment) ("A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable"). And in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), we struck down a provision of the Maryland Constitution requiring public officials to declare a "`belief in the existence of God,'" *id.*, at 489, reasoning that, under the Religion Clauses of the First Amendment, "neither a State nor the Federal Government . . . can constitutionally pass laws or impose requirements which aid all religions as against non-believers . . . ," *id.*, at 495. See also *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion"); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 216 (1963) ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *id.*, at 319–320 (Stewart, J., dissenting) (the Clause applies "to each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker").

Such is the settled law. Here, as elsewhere, we should stick to it absent some compelling reason to discard it. See *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984); *Payne* v. *Tennessee*, 501 U. S. ——, —— (1991) (slip op., at 8) (SOUTER, J., concurring).

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, "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." *Wallace*, *supra*, at 106 (REHNQUIST, J., dissenting); see also R. Cord, Separation of Church and State: Historical Fact and Current Fiction (1988). 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 National Constitution, one of the provisions read that "[t]he 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." 1 Annals of Cong. 434 (1789). Madison's language did not last long. It was sent to a Select Committee of the House, which, without explanation, changed it to read that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729. Thence the proposal went to the Committee of the Whole, which was in turn dissatisfied with the Select Committee's language and adopted an alternative proposed by Samuel Livermore of New Hampshire: "Congress shall make no laws touching religion, or infringing the rights of conscience." See *id.*, at 731. 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. See, *e.g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U. S. 327 (1987) (upholding legislative exemption of religious groups from certain obligations under civil rights laws).

The House rewrote the amendment once more before sending it to the Senate, this time adopting, without recorded debate, 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." 1 Documentary History of the First Federal Congress of the United States of America 136 (Senate Journal) (L. de Pauw ed. 1972); see 1 Annals of Cong. 765 (1789). Perhaps, on further reflection, the Representatives had thought Livermore's proposal too expansive, or perhaps, as one historian has suggested, they had simply worried that his language would not "satisfy the demands of those who wanted something said specifically against establishments of religion." L. Levy, The Establishment Clause 81 (1986) (hereinafter Levy). We do not know; what we do know is that the House rejected the Select Committee's version, which arguably ensured only that "no religion" enjoyed an official preference over others, and deliberately chose instead a prohibition extending to laws establishing "religion" in general.

The sequence of the Senate's treatment of this House proposal, and the House's response to the Senate, 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 ultimately it 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." 1

Documentary History, *supra*, at 151 (Senate Journal). After rejecting two minor amendments to that proposal, see *ibid.*, the Senate dropped it altogether and chose a provision identical to the House's proposal, but without the clause protecting the "rights of conscience," *ibid*. With no record of the Senate debates, we cannot know what prompted these changes, but the record does tell us that, six days later, the Senate went half circle and 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." *Id.*, at 166. 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."[2] The Framers repeatedly

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[2]Some commentators have suggested that by targeting laws respecting "an" establishment of religion, the Framers adopted the very nonpreferentialist position whose much clearer articulation they repeatedly rejected. See, *e.g.*, R. Cord, Separation of Church and State: Historical Fact and Current Fiction 11–12 (1988). Yet the indefinite article before the word "establishment" is better seen as evidence that the Clause forbids any kind of establishment,

considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.

Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the Framers appreciated. See, *e.g.*, Laycock, "Nonpreferential" Aid 902–906; Levy 91–119. But cf. T. Curry, The First Freedoms 208–222 (1986). Of particular note, the Framers were vividly familiar with efforts in the colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments. See generally Levy 1–62. The Virginia Statute for Religious Freedom, written by Jefferson and sponsored by Madison, captured the separationist response to such measures. Condemning all establishments, however nonpreferentialist, the Statute broadly guaranteed that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," including his own. Act for Establishing Religious Freedom (1785), in 5 The Founders' Constitution 84, 85 (P. Kurland & R. Lerner eds. 1987). Forcing a citizen to support even his own church would, among other things, deny "the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind." *Id*, at 84. In general, Madison later added, "religion & Govt. will

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including a nonpreferential one. If the Framers had wished, for some reason, to use the indefinite term to achieve a narrow meaning for the Clause, they could far more aptly have placed it before the word "religion." See Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 884–885 (1986) (hereinafter Laycock, ``Nonpreferential'' Aid).

both exist in greater purity, the less they are mixed together." Letter from J. Madison to E. Livingston, 10 July 1822, in 5 The Founders' Constitution, at 105, 106.

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—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language." Laycock, ``Nonpreferential'' Aid 882–883; see also *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 647–648 (1989) (opinion of STEVENS, J.). We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment.[3] Thus, on balance, history

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[3]In his dissent in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), THE CHIEF JUSTICE rested his nonpreferentialist interpretation partly on the post-ratification actions of the early national government. Aside from the willingness of some (but not all) early Presidents to issue ceremonial religious proclamations, which were at worst trivial breaches of the Establishment Clause, see *infra*, at 22–23, he cited such seemingly preferential aid as a treaty provision, signed by Jefferson, authorizing federal subsidization of a Roman Catholic priest and church for the Kaskaskia Indians. 472 U. S., at 103. But this proves too much, for if the Establishment Clause permits a special appropriation of tax money for the religious activities of a particular sect, it forbids virtually nothing. See Laycock, "Nonpreferential" Aid 915. Although evidence of historical practice can indeed furnish valuable aid in the interpretation of contemporary language, acts like the one in question prove only that public officials, no

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.

While these considerations are, for me, sufficient to reject the nonpreferentialist position, one further concern animates my judgment. In many contexts, including this one, nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, 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, or more deliberately to be avoided where possible.

This case is nicely in point. Since the nonpreferentiality of a prayer must be judged by its text, JUSTICE BLACKMUN pertinently observes, *ante*, at 6, n. 5, that Rabbi Gutterman drew his exhortation "[t]o do justly, to love mercy, to walk humbly" straight from the King James version of Micah, ch. 6, v. 8. At some undefinable point, the similarities between a state-sponsored prayer and the sacred text of a specific religion would so closely identify the former with the latter that even a nonpreferentialist would have to concede a breach of the Establishment Clause. 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

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matter when they serve, can turn a blind eye to constitutional principle. See *infra*, at 18.

country's political and moral good. Thus, a nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government's preference for Theistic over non-Theistic 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 wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that. As Madison observed in criticizing religious presidential proclamations, the practice of sponsoring religious messages tends, over time, "to narrow the recommendation to the standard of the predominant sect." Madison's "Detached Memoranda," 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946) (hereinafter Madison's ``Detached Memoranda''). We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.

Petitioners rest most of their argument on a theory that, whether or not the Establishment Clause permits extensive nonsectarian support for religion, it 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. See generally *Allegheny County*, *supra*, at 655–679 (opinion of KENNEDY, J.); McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986).

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.

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 *Allegheny County*, *supra*, we forbade the prominent display of a nativity scene on public property; without contesting the dissent's observation that the crèche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity. *Id.*, at 589–594, 598–602. Likewise, in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), 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 "convey[ed] a message of state approval of prayer activities in the public schools." *Id.*, at 61; see also *id.*, at 67–84 (O'CONNOR, J., concurring in judgment). Cf. *Engel* v. *Vitale*, 370 U. S., at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that").

In *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), we invalidated a state law that barred the teaching of Darwin's theory of evolution because, even though the statute obviously did not coerce anyone to

support religion or participate in any religious practice, it was enacted for a singularly religious purpose. See also *Edwards* v. *Aguillard*, 482 U. S. 578, 593 (1987) (statute requiring instruction in "creation science" "endorses religion in violation of the First Amendment"). And in *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), we invalidated a program whereby the State sent public school teachers to parochial schools to instruct students on ostensibly nonreligious matters; while the scheme clearly did not coerce anyone to receive or subsidize religious instruction, we held it invalid because, among other things, "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public." *Id.*, at 397; see also *Texas Monthly, Inc.* v. *Bullock*, 489 U. S., at 17 (plurality opinion) (tax exemption benefiting only religious publications "effectively endorses religious belief"); *id.*, at 28 (BLACKMUN, J., concurring in judgment) (exemption unconstitutional because State "engaged in preferential support for the communication of religious messages").

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.

Like the provisions about "due" process and "unreasonable" searches and seizures, 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, that is, massive state support for religion through, among other means, comprehensive schemes of taxation. See generally Levy 1–62

(discussing such establishments in the colonies and early States). 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." See *supra*, at 4–6.

While some argue that the Framers added the word "respecting" simply to foreclose federal interference with State establishments of religion, see, *e.g.*, Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1157 (1991), the language sweeps more broadly than that. In Madison's words, the Clause in its final form forbids "everything like" a national religious establishment, see Madison's "Detached Memoranda" 558, and, after incorporation, it forbids "everything like" a State religious establishment.[4] Cf. *Allegheny County*, 492 U. S., at 649 (opinion of STEVENS, J.). The sweep is broad enough that Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional "establishments." Madison's "Detached Memoranda" 558–559; see *infra*, at 16–17, and n. 6.

While petitioners insist that the prohibition extends only to the "coercive" features and incidents of establishment, they cannot easily square that claim with the constitutional text. The First Amendment forbids not just laws "respecting an establishment of religion," but also those "prohibiting the free exercise thereof." Yet laws that coerce nonadherents to

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[4]In *Everson* v. *Board of Education of Ewing*, 330 U. S. 1 (1947), we unanimously incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment and, by so doing, extended its reach to the actions of States. *Id.*, at 14–15; see also *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (dictum). Since then, not one Member of this Court has proposed disincorporating the Clause.

"support or participate in any religion or its exercise," *Allegheny County*, *supra*, at 659–660 (opinion of KENNEDY, J.), would virtually by definition violate their right to religious free exercise. See *Employment Div., Dept. of Human Resources of Ore*. v. *Smith*, 494 U. S. 872, 877 (1990) (under Free Exercise Clause, "government may not compel affirmation of religious belief"), citing *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); see also J. Madison, Memorial and Remonstrance Against Religious Assessments (1785) (compelling support for religious establishments violates "free exercise of Religion"), quoted in 5 The Founders' Constitution, at 82, 84. Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity, as petitioners' counsel essentially conceded at oral argument. Tr. of Oral Arg. 18.

Our cases presuppose as much; as we said in *School Dist. of Abington*, *supra*, "[t]he 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." 374 U. S., at 223; see also Laycock, ``Nonpreferential'' Aid 922 ("If coercion is . . . an element of the establishment clause, establishment adds nothing to free exercise"). While one may argue that the Framers meant the Establishment Clause simply to ornament the First Amendment, cf. T. Curry, The First Freedoms 216–217 (1986), 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 than petitioners attribute to it.

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, see *infra*, at 15–18 and, even when challenging the hated assessments, they did not always temper their rhetoric with distinctions between coercive and noncoercive state action. When, for example, Madison criticized Virginia's general assessment bill, he invoked principles antithetical to all state efforts to promote religion. An assessment, he wrote, is improper not simply because it forces people to donate "three pence" to religion, but, more broadly, because "it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution, at 83. Madison saw that, even without the tax collector's participation, an official endorsement of religion can impair religious liberty.

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. Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution, at 98. In explaining his views to the Reverend Samuel Miller, Jefferson effectively anticipated, and rejected, petitioners' position:

> ``[I]t is only proposed that I should *recommend*, not prescribe a day of fasting & prayer. That is, that I should *indirectly* assume to the U. S. an authority over religious exercises which the Constitution has directly precluded from them. It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion.'' *Id.*, at 98–99 (emphasis in original).

By condemning such noncoercive state practices that, in "recommending" the majority faith, demean religious dissenters "in public opinion," Jefferson necessarily condemned what, in modern terms, we call official endorsement of religion. He accordingly construed the Establishment Clause to forbid not simply state coercion, but also state endorsement, of religious belief and observance.[5] And if he opposed

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[5]Petitioners claim that the quoted passage shows that Jefferson regarded Thanksgiving proclamations as "coercive": "Thus, while one may disagree with Jefferson's view that a recommendatory Thanksgiving proclamation would nonetheless be coercive . . . one cannot disagree that Jefferson believed coercion to be a necessary element of a First Amendment violation."

impersonal presidential addresses for inflicting "proscription in public opinion," all the more would he have condemned less diffuse expressions of official endorsement.

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.

Brief for Petitioners 34. But this is wordplay. The "proscription" to which Jefferson referred was, of course, by the public and not the government, whose only action was a noncoercive recommendation. And one can call any act of endorsement a form of coercion, but only if one is willing to dilute the meaning of "coercion" until there is no meaning left. Jefferson's position straightforwardly contradicts the claim that a showing of "coercion," under any normal definition, is prerequisite to a successful Establishment Clause claim. At the same time, Jefferson's practice, like Madison's, see *infra*, at 16–17, sometimes diverged from principle, for he did include religious references in his inaugural speeches. See Inaugural Addresses of the Presidents of the United States 17, 22–23 (1989); see also *supra* note 3. Homer nodded.

Petitioners also seek comfort in a different passage of the same letter. Jefferson argued that presidential religious proclamations violate not just the Establishment Clause, but also the Tenth Amendment, for "what might be a right in a state government, was a violation of that right when assumed by another." Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), in 5 The Founders' Constitution 99 (P. Kurland & R. Lerner eds. 1987). Jefferson did not, however, restrict himself to the Tenth Amendment in condemning such proclamations by a national officer. I do not, in any event, understand petitioners to be arguing that the Establishment Clause is exclusively a

See Madison's "Detached Memoranda," 562, and n. 54. Upon retirement, in an essay condemning as an unconstitutional "establishment" the use of public money to support congressional and military chaplains, *id.*, at 558–560,[6] he concluded that "[r]eligious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed. Altho' recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers." *Id.*, at 560. Explaining that "[t]he members of a Govt . . . can in no sense, be regarded as possessing an advisory trust from their Constituents in their religious capacities," *ibid.*, he further observed that the state necessarily freights all of its religious messages with political ones: "the idea of policy [is] associated with religion, whatever be the mode or the occasion, when a function of the latter is assumed by those in power." *Id.,* at 562 (footnote omitted).

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structural provision mediating the respective powers of the State and National Governments. Such a position would entail the argument, which petitioners do not make, and which we would almost certainly reject, that incorporation of the Establishment Clause under the Fourteenth Amendment was erroneous.

[6]Madison found this practice "a palpable violation of . . . Constitutional principles." Madison's "Detached Memoranda" 558. Although he sat on the committee recommending the congressional chaplainship, see R. Cord, Separation of Church and State: Historical Fact and Current Fiction 23 (1988), he later insisted that "it was not with my approbation, that the deviation from [the immunity of Religion from civil jurisdiction] took place in Congs., when they appointed Chaplains, to be paid from the Natl. Treasury." Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105.

Madison's failure to keep pace with his principles in the face of congressional pressure cannot erase the principles. He admitted to backsliding, and explained that he had made the content of his wartime proclamations inconsequential enough to mitigate much of their impropriety. See *ibid.;* see also Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 105. While his writings suggest mild variations in his interpretation of the Establishment Clause, Madison was no different in that respect from the rest of his political generation. That he expressed so much doubt about the constitutionality of religious proclamations, however, suggests a brand of separationism stronger even than that embodied in our traditional jurisprudence. So too does his characterization of public subsidies for legislative and military chaplains as unconstitutional "establishments," see *supra*, at 16–17, and n. 6, for the federal courts, however expansive their general view of the Establishment Clause, have upheld both practices. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (legislative chaplains); *Katcoff* v. *Marsh*, 755 F. 2d 223 (CA2 1985) (military chaplains).

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, see *Marsh* v. *Chambers*, *supra*, at 788, and Presidents Washington and Adams unapologetically marked days of ``public thanksgiving and prayer,'' see R. Cord, Separation of Church and State 53 (1988). 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. "Indeed, by 1787 the provisions of the state bills of rights had become what Madison called mere `paper parchments'—expressions of the

most laudable sentiments, observed as much in the breach as in practice." Kurland, The Origins of the Religion Clauses of the Constitution, 27 Wm. & Mary L. Rev. 839, 852 (1986) (footnote omitted). Sometimes the National Constitution fared no better. Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.

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.

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. See, *e.g.*, *Allegheny County*, 492 U. S., at 589–594, 598–602; *Texas Monthly*, 489 U. S., at 17 (plurality opinion); *id.*, at 28 (BLACKMUN, J., concurring in judgment); *Edwards* v. *Aguillard*, 482 U. S., at 593; *School Dist. of Grand Rapids*, 473 U. S., at 389–392; *Wallace* v. *Jaffree*, 472 U. S., at 61; see also Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 De Paul L. Rev. 993 (1990); cf. *Lemon* v. *Kurtzman*, 403

U. S. 602, 612–613 (1971). This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community, see *Allegheny County*, *supra*, at 594; J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 5 The Founders' Constitution, at 82–83, and protecting religion from the demeaning effects of any governmental embrace, see *id.*, at 83. Now, as in the early Republic, "religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from J. Madison to E. Livingston (10 July 1822), in 5 The Founders' Constitution, at 106. Our aspiration to religious liberty, embodied in the First Amendment, permits no other standard.

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. See, *e.g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U. S. 327 (1987); see also *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Contrary to the views of some,[7] such accommodation does not necessarily signify an

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[7]See, *e.g.*, *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 726 (1981) (REHNQUIST, J., dissenting); Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 685–686 (1980); see also *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 668–669 (1970); *Sherbert* v. *Verner*, 374 U. S. 398, 414, 416 (1963) (Stewart, J., concurring in result); cf. *Wallace* v. *Jaffree*, 472 U. S., at 83 (O'CONNOR, J., concurring in judgment).

official endorsement of religious observance over disbelief.

In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the nonadherent's vantage and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. Cf. *Welsh* v. *United States*, 398 U. S. 333, 340 (1970) (plurality opinion). Thus, in freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 C. F. R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans. See Note, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L. J. 1127, 1135–1136 (1990).

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. See *Allegheny County*, *supra*, at 601, n. 51; *id.*, at 631–632 (opinion of O'CONNOR, J.); *Corporation of Presiding Bishop*, *supra*, at 348 (O'CONNOR, J., concurring in judgment); see also *Texas Monthly*, *supra*, at 18, 18–19, n. 8 (plurality opinion); *Wallace* v. *Jaffree*, 472 U. S., at 57–58, n. 45. But see *Allegheny County*, *supra*, at 663, n. 2 (opinion of KENNEDY, J.). 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 likeminded 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. One may fairly say, as one commentator has suggested, that the government brought prayer into the ceremony "precisely because some people want a symbolic

affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities." Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841, 844 (1992).[8]

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

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[8]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. Cf. *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481 (1986). 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. See *Widmar* v. *Vincent*, 454 U. S. 263, 274–275 (1981); *Walz*, *supra*, at 696 (opinion of Harlan, J.) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter"). Finally, this is not a case like *Marsh* v. *Chambers*, 463 U. S. 783 (1983), in which government officials invoke spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead.

families. Madison himself respected the difference between the trivial and the serious in constitutional practice. Realizing that his contemporaries were unlikely to take the Establishment Clause seriously enough to forgo a legislative chaplainship, he suggested that "[r]ather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism de minimis non curat lex . . . ." Madison's "Detached Memoranda" 559; see also Letter from J. Madison to E. Livingston, 10 July 1822, in 5 The Founders' Constitution, at 105. But that logic permits no winking at the practice in question here. 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.