

January 2013

The Lautsi Decision and the American Establishment Clause Experience: A Response to Professor Weiler

William P. Marshall

Follow this and additional works at: <http://digitalcommons.maineraw.maine.edu/mlr>



Part of the [First Amendment Commons](#), and the [Religion Law Commons](#)

Recommended Citation

William P. Marshall, *The Lautsi Decision and the American Establishment Clause Experience: A Response to Professor Weiler*, 65 Me. L. Rev. 769 (2013).

Available at: <http://digitalcommons.maineraw.maine.edu/mlr/vol65/iss2/21>

This Essay is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

THE *LAUTSI* DECISION AND THE AMERICAN ESTABLISHMENT CLAUSE EXPERIENCE: A RESPONSE TO PROFESSOR WEILER

William P. Marshall

- I. INTRODUCTION
- II. THE AMERICAN NONESTABLISHMENT EXPERIENCE AS SUPPORT FOR PROFESSOR WEILER'S POSITION IN *LAUTSI*
 - A. *Doctrinal Confusion*
 - B. *The Contradictions Within the Nonestablishment Approach*
 - C. *The Non-Neutrality of the Nonestablishment Model*
- III. THE IMPORTANCE OF THE NONESTABLISHMENT NORM
 - A. *The Anti-Corruption Principle*
 - B. *The Concern With Religious Divisiveness*
- IV. CONCLUSION

THE *LAUTSI* DECISION AND THE AMERICAN ESTABLISHMENT CLAUSE EXPERIENCE: A RESPONSE TO PROFESSOR WEILER

*William P. Marshall**

I. INTRODUCTION

In *Lautsi v. Italy*,¹ the European Court of Human Rights (“ECHR”) held that an Italian law requiring crucifixes to be displayed in public school classrooms did not violate the European Convention on Human Rights (“European Convention”).² In so holding, the ECHR sent the message that it would not incorporate American nonestablishment norms into its interpretation of the European Convention.

The key advocate behind the *Lautsi* decision was Professor Joseph Weiler. Representing the nations intervening in the case on behalf of Italy,³ Professor Weiler took the lead in arguing against a strict nonestablishment interpretation of the European Convention—the position that the *Lautsi* Court subsequently adopted. Few persons, therefore, are as qualified as Professor Weiler to address the issues raised by the *Lautsi* decision, and I am humbled to share this forum with him.

I am not an authority on the European Convention and cannot offer any opinion as to whether or not *Lautsi* was correctly decided under that Treaty. But the *Lautsi* decision raises a number of issues that also are present in American Establishment Clause jurisprudence; and it is from that perspective that I will attempt to offer some insight.⁴ The remainder of this Essay is devoted to this project. Part II looks to American Establishment Clause jurisprudence for reasons that support Professor Weiler’s position against a strict nonestablishment mandate. Part III presents some of the insights from Establishment Clause jurisprudence that militates against Professor Weiler’s approach. Part IV offers a brief conclusion.

II. THE AMERICAN NONESTABLISHMENT EXPERIENCE AS SUPPORT FOR PROFESSOR WEILER’S POSITION IN *LAUTSI*

If American nonestablishment law influenced the *Lautsi* decision at all, it could well have been by negative example. American Establishment Clause jurisprudence is problematic on a number of counts. First, Establishment Clause case law is doctrinally incoherent. Second, nonestablishment principles often conflict with other important constitutional interests and with American history and culture. Third, nonestablishment is not neutral towards religion, although it is often defended on those grounds. Rather the nonestablishment principle presents its own religious viewpoint and for that reason may be considered problematic even under

* Kenan Professor of Law, University of North Carolina.

1. *Lautsi v. Italy*, 54 Eur. Ct. H.R. 3 (2011).

2. *Id.*

3. Notably, Professor Weiler represented his clients *pro bono*.

4. For an excellent comparative analysis of nonestablishment issues in the United States and Europe, see Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991 (2012).

its own terms. Each of these points will be discussed in turn.

A. Doctrinal Confusion

One of the strongest arguments against exporting the American approach to nonestablishment is the state of Establishment Clause doctrine. Few areas in constitutional law are as muddled as the Establishment Clause;⁵ even the United States Supreme Court itself has acknowledged the lack of cohesion in this area.⁶ Where else, after all, has the Court candidly acknowledged that it has “sacrifice[d] clarity and predictability for flexibility”?⁷ Where else has a Supreme Court Justice described (accurately) a governing constitutional test as being like “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried”?⁸

The Court’s inconsistencies in this area are longstanding and date back to the first major Establishment Clause case, *Everson v. Board of Education*.⁹ The issue in *Everson* was whether a state program that provided bus transportation to students attending religious schools violated the Establishment Clause because the transportation assistance effectively worked to subsidize religious education. In setting the stage for its future unintelligibility on the subject, the *Everson* Court famously stated that under the Establishment Clause “[n]o tax in any amount, large or small, can be levied to support any religious activities . . .”¹⁰ and further announced that the Establishment Clause was intended to erect “‘a wall of separation’ between church and state.”¹¹ It then proceeded to uphold the state aid program in question.¹²

The Court continued this pattern of inconsistency in later cases. It upheld legislative prayer¹³ while striking down prayer in public schools¹⁴ and at public

5. See B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 727 (2010) (there is considerable confusion in the tests the Court applies in Establishment Clause cases); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323 (1995) (noting that the tests the Courts apply in religion clause cases are in “nearly total disarray”); Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of A Standard*, 110 W. VA. L. REV. 315, 315 (2007) (“Establishment Clause doctrine is a muddled mess”).

6. *Lee v. Weisman ex rel. Weisman*, 505 U.S. 577, 598 (1992) (“Our jurisprudence in this area is of necessity one of line-drawing . . .”). See also *Utah Highway Patrol Ass’n v. American Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari) (Establishment Clause jurisprudence is in “shambles”).

7. *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

8. *Lamb’s Chapel v. Ctr. Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (describing the Court’s application of the Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

9. 330 U.S. 1 (1947).

10. *Id.* at 16.

11. *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

12. *Id.* at 17. As Justice Jackson stated in his dissent: “the undertones of the opinion, advocating complete and uncompromising separation . . . seem utterly discordant with its conclusion . . .” *Id.* at 19.

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

14. *Engel v. Vitale*, 370 U.S. 421, 424 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963).

school football games.¹⁵ It ruled that taxpayers have standing to challenge programs in which Congress appropriates funds used to support religion,¹⁶ but taxpayers do not have standing if government aid to religion is provided by the federal executive branch.¹⁷ It determined that a state's providing tax credits to parents of children attending religious schools is unconstitutional¹⁸ but providing tax deductions is permissible.¹⁹

The Court's decisions dealing with public displays of religious symbols are even more mind-bending.²⁰ According to Court doctrine, some public displays of nativity scenes are constitutional²¹ while others are not,²² with the difference ostensibly being how secularized is the display.²³ Add Santa Claus and a reindeer or two to your nativity scene presentation and you may avoid First Amendment scrutiny.²⁴ Exhibit the crèche by itself and you may find yourself on the losing end of a civil rights suit.²⁵

The Court's treatment of public displays of the Ten Commandments fares no better. To the Court, a recent posting of a plaque of the Ten Commandments on the walls of a Kentucky courthouse is unconstitutional,²⁶ but the long-standing exhibition of a large Ten Commandments monument on the grounds of the Texas Capitol Building is constitutionally permissible.²⁷

Notably, moreover, it is not only the discrepancies in the results in the public display cases that is confounding. It is often the way the Court reaches those results that stretches the imagination. One ploy that the Court often uses, for example, is claiming that a religious symbol or practice is no longer religious. In the Court's first nativity scene case, *Lynch v. Donnelly*,²⁸ for example, the Court upheld the Christmas display in part based on its conclusion that the Christmas holiday had become "secular[ized]."²⁹ In *McGowan v. Maryland*,³⁰ the Court

15. *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

16. *Flast v. Cohen* 392 U.S. 83 (1968) (granting taxpayer standing to challenge a federal spending program used in part to assist private religious schools).

17. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982); *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 605 (2007) (taxpayers do not have standing to challenge expenditures by the federal executive although taxpayers would have standing to challenge the same types of expenditures if appropriated by Congress).

18. *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

19. *Mueller v. Allen*, 463 U.S. 388 (1983).

20. B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 492 (2005) ("The treatment of Establishment Clause challenges to displays of religious symbolism by the Supreme Court and the lower courts is notoriously unpredictable . . .").

21. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

22. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

23. Jay D. Wexler, *The Rehnquist Court and the First Amendment: The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 268 (2006) ("Lynch teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine."). *Id.* at 269.

24. *See Lynch* 465 U.S. at 668.

25. *See Cnty. of Allegheny*, 492 U.S. at 573.

26. *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005).

27. *Van Orden v. Perry*, 545 U.S. 677 (2005).

28. 465 U.S. 668 (1984).

29. *Id.* at 685.

30. 366 U.S. 420 (1961).

upheld the constitutionality of a Sunday closing law on the grounds that those laws were essentially secular even though the religious basis and purpose of those laws was directly stated in the prologue to the challenged provision and the criminal sanction attached to the law was denominated “Sabbath breaking.”³¹ And consider, in this respect, the Court’s recent maneuver in *Salazar v. Buono*,³² the case examining whether the government display of a cross on public land violated the Establishment Clause. Unlike Professor Weiler, who in the *Lautsi* case was customarily forthright in proclaiming that the crucifix is a religious symbol,³³ the United States Supreme Court in *Salazar* somehow came to the conclusion that a cross used to memorialize the death of soldiers has a “complex meaning beyond the expression of religious views.”³⁴

Finally, Establishment Clause jurisprudence also, at times, appears to devolve into little more than ad hoc decision-making. In *Marsh v. Chambers*,³⁵ for example, the Court ignored its governing Establishment Clause test in order to uphold the constitutionality of legislative prayer.³⁶ In *Elk Grove Unified School Dist. v. Newdow*,³⁷ the Court chose to create an entirely new standing doctrine in order to avoid reaching the constitutionality of the inclusion of the words “under God” in the Pledge of Allegiance.³⁸

Establishment Clause case law, then, is anything but a model of sound jurisprudence. It is therefore no wonder why one might be reluctant to suggest that it be adopted by the European Court of Human Rights as a guidepost for interpreting the religious liberty guarantees of the European Convention. The ECHR presumably can do better.

B. *The Contradictions Within the Nonestablishment Approach*

In the Court’s defense, however, its incoherent jurisprudence may not necessarily be simply unprincipled decision-making. Rather, and pertinent to our discussion, it may reflect a deeper understanding that a wholesale adoption of the American nonestablishment principle would be problematic.³⁹ There are legitimate reasons why the jurisprudence is so jumbled. The nonestablishment mandate is

31. *Id.* app. at 453.

32. 130 S. Ct. 1803 (2010).

33. See JHH Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME L. REV. 759 (2013).

34. 130 S. Ct. at 1818. At oral argument, Justice Scalia appeared to take the position that the use of the cross to commemorate war dead had no religious significance at all. Transcript of Oral Argument at 38-39, *Salazar v. Buono*, 130 S. Ct. 1803 (2010) (No. 08-472).

35. 463 U.S. 783 (1983).

36. *Id.* at 796 (Brennan, J., dissenting) (“The Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal “tests” that have traditionally structured our inquiry under the Establishment Clause.”).

37. 542 U.S. 1 (2004).

38. The Court ruled that the plaintiff in the case, a divorced father, did not have standing to raise the Establishment Clause challenge to the Pledge because he was not his daughter’s custodial parent. *Id.* at 14-18.

39. I have expanded on the reasons why Establishment Clause jurisprudence is pervaded by inherent contradictions in an earlier work. See William P. Marshall “*We Know It When We See It*”: *The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495 (1985-1986).

beset by countervailing interests and the Court's understandable reluctance to override these interests explains, at least in part, the resulting doctrinal confusion. In *Everson*, for example, although the Court expressed its intention to conform to nonestablishment principles, it was also concerned that not allowing the state to provide transportation aid to parochial school children might evidence improper hostility towards religion.⁴⁰

Other conflicts may arise from the interaction of the Establishment Clause with the Free Exercise and/or the Free Speech Clause. In the case of free exercise, the very wording of the First Amendment seems to generate contradiction. The Religion Clauses provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁴¹ Taken literally, then, the text seems to simultaneously require that the state accord religion special protection (the Free Exercise Clause) and that it provide religion no special deference (the Establishment Clause).

The tension is not theoretical. Consider a public school teacher whose religion requires her to wear religious headgear or religious clothing. If the state denied her the right to wear the headgear or clothing, it could potentially raise Free Exercise concerns.⁴² At the same time, allowing her to wear the headgear or clothing might present an Establishment Clause problem if her actions are seen as constituting state-sanctioned religious practice in the public school classroom.

Free speech case law, meanwhile, is replete with examples of Establishment Clause conflicts with the Speech Clause. The state may believe that nonestablishment principles mean that it should not allow its classrooms to be used for prayer meetings,⁴³ its parks to be used for displays of religious symbols by private groups,⁴⁴ or its monies to be used to fund a student religious organization's efforts to disseminate a religious message.⁴⁵ But free speech requirements may demand that the state provide such benefits to religious entities anyway.⁴⁶

40. *Everson v. Bd. of Ed.*, 330 U.S. 1, 18 (1947).

41. U.S. CONST. amend. I.

42. *See Goldman v. Weinberger*, 475 U.S. 503 (1986) (addressing the lack of free exercise right of a member of the military to wear religious headgear in contravention of military uniform requirements). To be sure, under current doctrine the teacher's Free Exercise Claim will likely be denied. *See Emp't. Div. v. Smith*, 494 U.S. 872, 878–879 (1990) (holding that religious believers are not entitled to constitutionally-based exemptions from neutral laws under the Free Exercise Clause). *But see* the opinion of then Circuit Justice Alito in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366–67 & n.7 (3d Cir. 1999) cert. denied 528 U.S. 817 (1999) (holding Muslim police officers had a free exercise right to keep their beards despite a police policy requiring officers to be clean shaven).

43. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 & n.4 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

44. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

45. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

46. The Court has held that the state violated the free speech right of religious groups to have access to public school classrooms when the school allowed non-religious groups to use the facilities. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112, 112 n.4 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*, 508 U.S. 384, 393–394 (1993); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). It held the University of Virginia violated the free speech rights of a student organization when it did not give them funding to spread their religious message while at the same time funding non-religious groups disseminating their respective messages. *See Rosenberger v. Rectors & Visitors of*

At times, moreover, nonestablishment principles may even be at war with themselves. Nonestablishment principles suggest that the state should not aid religion but that it also should not entangle itself in religious matters. But what then should the Court do when faced with a religious property tax exemption (which undoubtedly aids religion) and the possibility that not providing such an exemption might lead the government to collect unpaid tax bills by executing liens on churches or requiring forced sales (which undoubtedly would entangle church and state). When faced with this exact problem, the Court therefore relied in part on nonestablishment grounds in *upholding* the religious property exemption.⁴⁷

Finally, nonestablishment principles commonly conflict with many deeply-embedded religious cultural traditions and symbols that pervade the American landscape. American cities are named St. Paul, Corpus Christi, San Francisco, and Los Angeles. National holidays include Thanksgiving and Christmas. The national anthem is replete with religious references,⁴⁸ the phrase ‘under God’ is in the Pledge of Allegiance,⁴⁹ and the national motto is “In God We Trust.” Mark DeWolfe was therefore correct when he noted that there exists in America a “de facto establishment.”⁵⁰

The fact that there are such de facto establishments existing in the American culture, of course, does not mean that they are constitutional. After all, school prayer was commonly recited in the public schools and might have been considered an aspect of the de facto establishment until the Court struck down the practice in *Engel v. Vitale*⁵¹ and *Abington School District v. Schempp*.⁵² But the price of excising all aspects of religion from American culture would be extraordinarily steep as well as self-defeating. For one, such an approach may exacerbate, rather than ameliorate, the concern with religious divisiveness that the Establishment

Univ. of Va., 515 U.S. 819, 831 (1995). And it held that denying the Ku Klux Klan the right to display a cross on public property violated the Klan’s First Amendment speech rights. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995).

47. *Walz v. Tax Commission of N.Y.*, 397 U.S. 664, 675 (1970) (“The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation.”).

48. The final verse of the Star Spangled Banner reads:

O, thus be it ever when freemen shall stand,
Between their lov'd homes and the war's desolation;
Blest with vict'ry and peace, may the heav'n-rescued land
Praise the Pow'r that hath made and preserv'd us as a nation!
Then conquer we must, when our cause is just,
And this be our motto: “In God is our trust”
And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave!

49. The constitutionality of the inclusion of the phrase “under God” in the Pledge was challenged in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The Court did not reach the merits, however, ruling that the Plaintiff did not have standing to maintain the action. *Id.* at 17-18.

50. MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 6 (1965). Indeed even the liberal icon jurist William O. Douglas once noted that “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

51. 370 U.S. 421, 436 (1962).

52. 374 U.S. 203, 225-27 (1963).

Clause was thought to address.⁵³ In this respect, Justice Breyer's concurring opinion upholding the display of the Ten Commandments in *Van Orden v. Perry*⁵⁴ is exactly on point:

[T]o reach a contrary conclusion here, based primarily upon on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.⁵⁵

The problem of too rigidly enforcing the Establishment Clause, moreover, is not only that it could cause, and likely has caused, its own form of divisiveness.⁵⁶ As Robert Bellah and others have taught us, social cohesion depends upon communities sharing beliefs, symbols, and rituals.⁵⁷ In the United States, many of those beliefs, symbols, and rituals that reflect our heritage and tradition are religious. Removing those religious artifacts of the public culture would damage those societal bonds as well as artificially ignore foundational aspects of American history.⁵⁸

C. *The Non-Neutrality of the Nonestablishment Model*

Finally, the nonestablishment position is also weakened because, as Professor Weiler has argued, one of its central assertions is not accurate. The constitutional commitment to the nonestablishment principle is often defended on the grounds that this principle is religiously neutral. But as Weiler points out, this claim is

53. See *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("[P]olitical debate and division . . . are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which [the First Amendment's religious clauses were] . . . intended to protect."). See also *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting) (lessening divisiveness is a "basic First Amendment objective"); Richard Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 604 (2011) (anti-divisiveness is an Establishment Clause concern). But see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1720 (2006) (contending that the concern with religious divisiveness is misplaced).

54. 545 U.S. 677 (2005).

55. *Id.* at 704 (Breyer, J., concurring).

56. See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 341-42 (2011) (noting that the rise of the religious right in the United States was a reaction to a perception that the country had become overly secular).

57. Robert Bellah, *BEYOND BELIEF* 171 (1970) (discussing "civil religion"); see also Michael M. Madsigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 321 (1993).

58. This is, of course, not to say that a nation needs to expand its exhibition of religious symbols, as Italy did in *Lautsi*, in order to preserve its culture. *Lautsi v. Italy*, 54 Eur. Ct. H.R. 3 (2011). The Court actually may have had it right in the Ten Commandments cases when it struck down a recently posted version yet upheld one that had been in place for over fifty years. Compare *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005) (striking down a recent posting of the Ten Commandments) with *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion) (upholding a monument of the Ten Commandments recognizing the historical meaning of the piece).

false.⁵⁹ First, the position is not neutral with respect to religion and secularism. The secular notion that government should not base its laws on religious principles and authority is itself religiously-laden as it depends upon a particular view of the relationship between church and state that comports with the beliefs of some religions but not others.⁶⁰ Treating a secular nonestablishment as if it presents the correct view of the relationship of government and religion, therefore, is not religiously neutral.⁶¹ Consider in this respect the fundamentalist claim that morality cannot be taught without religion.⁶² To those who share this belief, the public schools' teaching of morality without religious foundation expresses a religious point of view. And, more alarmingly for their purposes, it expresses a religious point of view that contradicts and is hostile to their own.⁶³ Thus, when the nonestablishment principle is interpreted to prohibit the state from teaching the proposition that morality is derived from religion, the result is not religiously neutral. From the fundamentalist perspective, it is biased against fundamentalist beliefs.

Second, the nonestablishment assertion that the state must be neutral among religions is not even neutral *among* religions. It prefers the beliefs of religions who believe in religious neutrality to those theologies that assert otherwise.⁶⁴ To be sure, one might argue that the fact that some religions may view neutrality as 'religious' does not actually make it religious. It is 'religious' only from one point of view. True neutrality, however, does not allow differing views or perspectives to be summarily dismissed or discounted. Taking neutrality seriously means that there is no privileged standing point from which to make universal observations of what is neutral and what is not.

III. THE IMPORTANCE OF THE NONESTABLISHMENT NORM

There are, however, powerful reasons for not too quickly rejecting the nonestablishment approach. Let me suggest two. The first responds to Professor Weiler's description of the Establishment Clause as expressing a principle of "freedom from religion."⁶⁵ The second pertains to the divisiveness along religious lines that would inevitably follow if the state's choice of a favored religion was a matter subject to political debate.

59. See JHH Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 759 (2013).

60. See Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 765 (1993).

61. For a fuller development of this argument that secularism is not neutral, see William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME. L. REV. 11 (2002).

62. A similar claim was advanced by the plaintiffs in *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

63. See generally Nomi Maya Stolzenberg, "He Drew A Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

64. *Id.*

65. See JHH Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 759 (2013).

A. The Anti-Corruption Principle

Professor Weiler's characterization of the nonestablishment principle as "freedom from religion" implies that the battle in *Lautsi* and other cases dealing with state support of religion is one between purportedly pro-religion forces seeking religion in public life on one side and "freedom from religion" secularists seeking to cleanse the public square from religion on the other. Actually, however, the American experience suggests that it is inaccurate to describe the nonestablishment debate in these terms. The American roots of the nonestablishment principle lie in Evangelical Christianity and not in modern secularism. Religious leaders like Isaac Backus⁶⁶ and Roger Williams⁶⁷ supported separationist principles because they believed there was no better way to corrupt religion than asking government to support it. Williams, for example, objected to state support of religion because he believed such aid would only serve to weaken churches by fostering their dependence upon government and subjecting them to "worldly corruptions."⁶⁸ To Williams and others, church-state separation was thought to be a mechanism to strengthen religion and not marginalize it.

The anti-corruption rationale, moreover, continues to inform Establishment Clause jurisprudence.⁶⁹ In striking down the school prayer at issue in *Engel v. Vitale*,⁷⁰ for example, the Court relied on that principle when it stated that "[t]he Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."⁷¹

Furthermore, because of the inevitable compromises inherent in public action, any government support of religion is likely to be watered down. The state authored prayer at issue in *Engel*, for example, was accurately described as little more than a "pathetically vacuous assertion of piety"⁷² than it was a true religious exercise.⁷³ One then has to question whether government displays of religious symbols truly are beneficial to religion. After all, what message does it send to students that lay teachers and caretakers are charged with maintaining an icon that

66. See Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-State Thought Since the Revolutionary Era* 15-26 (Fortress 1972) (detailing the involvement of Isaac Backus, a New England pastor, in advocating the evangelical theory of separation of church and state); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 469 (1991) (explaining Roger Williams repeated assertion that government should not be involved with the "spiritual affairs of the people"). See generally Mitchell v. Helms, 530 U.S. 793, 868 (2000) (Souter, J., dissenting) ("The establishment prohibition of government religious funding . . . [i]s meant . . . to protect the integrity of religion against the corrosion of secular support . . .").

67. See Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 BU L REV 455, 469 (1991).

68. Howe, *supra* note 50, at 6.

69. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1934 (2009).

70. 370 U.S. 421 (1962).

71. *Id.* at 431-32.

72. Louis H. Pollak, *The Supreme Court 1962 Term - Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 63 (1963).

73. The exact prayer at issue in *Engel* was "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our teachers and our Country." 370 U.S. 421, 422 (1962).

is supposed to represent sanctity and holiness?

B. The Concern With Religious Divisiveness

The concern with lessening religious divisiveness is an even more powerful argument against Professor Weiler's position in *Lautsi*. Throughout this Symposium, we have discussed *Lautsi* in the context of the conflict between religion and non-religion. But there is a potentially greater and more virulent conflict that can be triggered when the government chooses to display religious symbols; the conflict between one religion and another. Allowing the state to pick and choose which religion to favor inevitably leads to religions competing with each other for favored status and it further leads to resentment and alienation among those not chosen. This is not a prescription either for a healthy democracy or for limiting sectarian strife. For this reason, American nonestablishment jurisprudence has rightly suggested that the prevention of political divisiveness along religious lines is an important nonestablishment clause goal.⁷⁴

Of course, it may be, with respect to *Lautsi* itself that the potential for sectarian conflict is not as great in Italy as elsewhere because of the uncontested status of Catholicism in that country's history and culture. It, therefore, may be understandable that the ECHR in *Lautsi* overlooked the divisiveness concern in reaching its result. It may also be that Italy is not alone in this regard and there are other countries in the world where there is so little doubt as to the role that a particular religion has played in that country's national identity, that its choice by the government for special acknowledgement might be seen as expected and therefore not divisive. But during the colloquies at this Symposium, there was frequent mention of Ireland as such a country and I kept wondering exactly what part of Ireland was being discussed? If the answer was the Republic of Ireland, so be it. But let us think for a moment about Northern Ireland. Whose religious symbols should be placed in the classrooms on that part of the island? And what would be the likely result if the government of Northern Ireland decided to place the Protestant cross in the classrooms and not the Catholic crucifix, or vice versa? I think we know the answer. After all, even in the United States, people have died in fights over which religion's version of the Ten Commandments is the correct one.⁷⁵

And that is exactly the problem. Many people in the United States, for example, believe that there should be prayer in the public schools.⁷⁶ But the consensus breaks down when the issue becomes "whose prayer?"⁷⁷ So with that in

74. See sources cited *supra* note 53.

75. See RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE (1800-1860): A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 143-44 (Rinehart & Co. ed., 1952) (1938) (noting that in 1844, riots erupted in Philadelphia between Catholics and Protestants over whose version of the bible should be used in the public school setting).

76. See, e.g., David W. Moore, *Public Favors Voluntary Prayer for Public Schools: But Strongly Supports Moment of Silence Rather Than Spoken Prayer*, GALLUP (Aug. 26, 2005) <http://www.gallup.com/poll/18136/public-favors-voluntary-prayer-public-schools.aspx> ("76% of Americans favor 'a constitutional amendment to allow voluntary prayer in public schools,' while just 23% oppose such an amendment.").

77. For examples of the types of religious divisiveness that can arise when decisions about which prayers to use in government-led exercises are subject to the political process, see Christopher C. Lund,

mind, let us reconsider the hypothetical discussed in some of the oral remarks at this Symposium of a small community in Kentucky that is religiously homogenous (Protestant) and wants to celebrate its history, honor its traditions, and strengthen its community bonds by displaying the cross in its public school classrooms. Presumably, Professor Weiler would find that permissible. But what happens when Catholics, for example, begin to move into the community? When is the tilting point at which the classroom's cross should be taken down? At what point should a crucifix be displayed in its stead? Equally importantly, how are these changes to be decided? Should political campaigns be run on the basis of what religious symbol should be placed in the public schools? What type of politics would result?⁷⁸

The Court in *Engel v. Vitale*⁷⁹ recognized the basic dynamic that “zealous religious groups [may] struggle[] with one another to obtain the Government's stamp of approval”⁸⁰ The *Engel* Court was correct.⁸¹ Placing the prize of government imprimatur of religion as a winnable political spoil is an invitation to the worst sorts of religious divisiveness. It is also an invitation to those religions who would seek to establish dominance over others by gaining government approval.⁸² The Framers were well aware from their recent history as to why politics was especially hazardous when divided along religious lines.⁸³ Our recent history is replete with examples such as Yugoslavia, Northern Ireland, and Kashmir, among others, that tragically demonstrate that the combination of politics and religion remains a dangerously combustible mix. It may, of course, be argued that the reasons for religious strife in these countries stem from far deeper issues than the question of whose religious symbols would be placed in public school classrooms. But Oliver Wendell Holmes once wrote that “we live by symbols.”⁸⁴ And that is a reason to remember why, in cases like *Lautsi*, the stakes are so high.

IV. CONCLUSION

Professor Weiler's advocacy and his subsequent victory in *Lautsi v. Italy*

Legislative Prayer and the Secret Costs of Religious Endorsements, 94 MINN. L. REV. 972, 1045-46 (2010).

78. I should emphasize in making this point that I am not claiming that religion should be excluded from politics. What I am suggesting is that there are particularly dangerous and virulent politics that arise when politics are waged on sectarian grounds so that particular sects can win governmental favoritism and achieve political dominance.

79. 370 U.S. 421 (1962).

80. *Id.* at 429.

81. If anything, this observation might be understated. After all, even non-zealous religious groups may decide to enter the political fray if they see other religions vying for government imprimatur. See William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 862-63 (1993). At that point, the competition for government recognition may be seen as a test of faith for the religious adherent. *Id.*

82. See Gene R. Nichol, *Establishing Inequality*, 107 MICH. L. REV. 913, 930 (2009) (discussing the argument that the Establishment Clause is intended to prevent religious groups from using government power to establish dominance over other religious groups); MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 224-305 (2008).

83. See e.g. *Everson v. Bd. of Educ.*, 330 U.S. 1, 7-10 (1947).

84. OLIVER WENDELL HOLMES, *John Marshall: In Answer to a Motion That the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat As Chief Justice*, in COLLECTED LEGAL PAPERS 266, 270 (1920).

profoundly reject importing American style nonestablishment law into the European Convention on Human Rights. There is much to be said from this position. One could learn much by negative example from the American nonestablishment experience. Nonestablishment doctrine is incoherent, it cannot be rigidly enforced without doing damage to other important interests, and, as Weiler has powerfully argued, one of the major foundational arguments advanced in its behalf, its purported neutrality, is not even accurate. Nonetheless, there are serious reasons for caution before too quickly following the path that Professor Weiler asks us to follow. The nonestablishment principle does not, as Weiler suggests, subordinate religion to a dominant secularism. Rather, it protects religion from external corruptions. More importantly, nonestablishment removes from political contest any efforts by religion to gain state imprimatur. As such, it offers a major advancement for avoiding the type of religious strife that has long plagued the European continent.