

SECULAR ORTHODOXY AND THE ESTABLISHMENT CLAUSE IN
MAHMOUD V. TAYLOR

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From the founding of the Republic, religion has pervaded American public life. As the Supreme Court once observed, “we are a religious people whose institutions presuppose a Supreme Being.”¹ Presidents have proclaimed national days of prayer and fasting; Congress has appointed chaplains and has opened each session in a religious invocation; our currency still bears the motto “In God We Trust.”²

The ubiquity of religion has extended to the classroom. Early public schools began each morning with prayer, Bible readings, and lessons in moral virtue drawn from Scripture.³ Such instruction was regarded as essential to forming “a moral and religious people” capable of sustaining constitutional self-government.⁴

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¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

² See Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986) [hereinafter McConnell, *Coercion*]; Abraham Lincoln, Proclamation of a Day of National Humiliation, Prayer, and Fasting (Apr. 30, 1863), <https://www.loc.gov/resource/lprbscsm.scsm0265> [<https://perma.cc/6U46-DE3Z>]; see also *History of the Chaplaincy*, OFF. OF THE CHAPLAIN, U.S. HOUSE OF REPRESENTATIVES, <https://chaplain.house.gov/chaplaincy/history.html> [<https://perma.cc/6QLF-METS>]; Act of July 30, 1956, Pub. L. No. 84-851, 70 Stat. 732 (codified at 36 U.S.C. § 302) (designating “In God We Trust” as the national motto and authorizing its placement on U.S. currency); John R. Vile, *So Help Me God*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (July 2, 2024), <https://firstamendment.mtsu.edu/article/so-help-me-god/> [<https://perma.cc/J9UN-S87L>] (discussing the historical use of “So help me God” in presidential inaugurations).

³ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212–13 (1963); *Murray v. Curlett*, 179 A.2d 698, 699 (Md. 1962), *aff’d*, 374 U.S. 203 (1963).

⁴ John Adams, *Letter to the Massachusetts Militia* (Oct. 11, 1798), reprinted in NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-3102> [<https://perma.cc/6ZSM-7QRR>] (“Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other[.]”).

That understanding did not endure. Beginning in the 1960s, the Supreme Court interpreted the Establishment Clause to prohibit even voluntary exposure to religious expression in public schools. Classroom prayer,⁵ Bible reading,⁶ and the display of the Ten Commandments were all prohibited.⁷ Over time, forms of moral and civic instruction once considered integral to public education came to be regarded as constitutionally suspect.

And yet, in *Mahmoud v. Taylor*,⁸ the Court allowed schools to teach a secular moral worldview. And it did so without any Establishment Clause scrutiny. The Court sanctioned curricula that “disrupt” “heteronormativity” and present identity as a matter of self-creation are permissible. Yet, references to God or the Ten Commandments are forbidden.⁹ The result is an asymmetry that *Mahmoud v. Taylor* brings into sharp relief: a constitutional order that excludes theistic premises under the Establishment Clause but permits secular analogues.

This Comment argues that the Court’s claimed neutrality is neither neutral nor defensible on its own terms. Part I will summarize *Mahmoud*, which exposes this incoherence by its lack of Establishment Clause analysis. Part II will trace the emergence of “functionalism” in Establishment Clause jurisprudence. Part III will contrast that jurisprudence with *Mahmoud*, where the Court tolerated a comprehensive secular anthropology without invoking Establishment concerns. Part IV contends that this asymmetry reflects not neutrality but preference—one that excludes religious reasoning from civic life and undermines the moral premises on which constitutional self-government depends. Part V will offer two resolutions: (1) the functionalist option, which would eliminate all metaphysical worldviews from public school curricula under the Court’s functionalist jurisprudence, and (2) the originalist

⁵ *Engel v. Vitale*, 370 U.S. 421 (1962).

⁶ See *Schempp*, 374 U.S. at 205.

⁷ *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

⁸ 145 S. Ct. 2332 (2025).

⁹ Compare *id.* at 2342–43 (permitting secular moral teaching through books), with *Stone*, 449 U.S. at 42 (prohibiting the display of the Ten Commandments).

option, which would abandon functionalism altogether and restore the Establishment Clause to its original meaning of forbidding coercion and official preference alone.

I. UNDERSTANDING *MAHMOUD V. TAYLOR*

In November 2022, Maryland’s Montgomery County Board of Education (“the Board”) introduced five LGBTQ-affirming “Pride Storybooks” into the elementary curriculum, aiming to “disrupt” notions of “heteronormativity” and “cisnormativity.”¹⁰ The books depict same-sex romance between children, same-sex marriage between adults, gender fluidity, and gender transition.¹¹ One of the books, later withdrawn from the curriculum, invited preschoolers to locate in a Pride Parade illustrated items list, such as “underwear,” “leather,” “lip ring,” and “[drag] queen.”¹² The Board instructed teachers to tell students that people “guess about our gender” at birth, that affirmations of immutable sex are “hurtful,” and that “there is no one ‘right’ . . . way to be.”¹³ Teachers were required to teach the LGBTQ-affirming curriculum.¹⁴

Initially, the schools allowed families to opt their children out of instruction concerning the five books.¹⁵ But in March 2023, the district announced a new policy: opt-outs would no longer be permitted.¹⁶ Attorneys for the school system explained that the

¹⁰ *Mahmoud*, 145 S. Ct. at 2342–43.

¹¹ See, e.g., CHELSEA JOHNSON, *LATOYA COUNCIL & CAROLYN CHOI, INTERSECTIONALIES: WE MAKE ROOM FOR ALL* (2019); DANIEL HAACK, *PRINCE & KNIGHT* (2018); CHARLOTTE S. WILD, *LOVE, VIOLET* (2022); JODIE PATTERSON, *BORN READY: THE TRUE STORY OF A BOY NAMED PENELOPE* (2021); SARAH S. BRANNEN, *UNCLE BOBBY’S WEDDING* (2020); see also MONTGOMERY CNTY. PUB. SCHS., *PRIDE STORYBOOKS TEACHER GUIDANCE 3–4* (2023) (instructing teachers to tell students that “people make a guess about our gender” at birth and to ask, “[w]hat pronouns fit you best?”).

¹² ROBIN STEVENSON, *PRIDE PUPPY!* (2021).

¹³ *Mahmoud*, 145 S. Ct. at 2345. If children insisted that gender is immutable, teachers were instructed to respond: “[t]hat comment is hurtful.” *Id.*

¹⁴ *Id.* (recounting a school official’s statement that “[t]eachers cannot . . . elect not to use the LGBTQ-Inclusive Books at all”).

¹⁵ *Id.* at 2346.

¹⁶ *Id.*

growing number of requests created three difficulties: high absenteeism, administrative infeasibility, and potential stigmatization of students who identified with the books.¹⁷

When “widespread and impassioned pleas for accommodation” proved futile,¹⁸ three sets of parents and a parents’-rights organization (together, the “Plaintiffs”) filed suit in federal court against the Board and Superintendent Thomas Taylor.¹⁹ The Plaintiffs sought a preliminary and permanent injunction against the Defendants, prohibiting them from enforcing the new policy.²⁰ Plaintiffs alleged that the refusal to allow opt-outs substantially burdened their free exercise of religion in violation of the First Amendment.²¹

The District Court for the District of Maryland denied the Plaintiffs’ motion for a preliminary injunction.²² Judge Deborah Boardman characterized the parents’ Free Exercise claim as an unrecognized “indoctrination” theory.²³ She found *Wisconsin v. Yoder*²⁴—which exempted Amish children from compulsory public education—inapplicable, describing it as “inexorably linked to the Amish community’s unique religious beliefs and practices.”²⁵ She concluded that use of the “Pride Storybooks” did not constitute coercive indoctrination, noting that students were not required to affirm the books’ messages and parents remained free to teach their own beliefs at home.²⁶ Judge Boardman further found that religious

¹⁷ *Id.*

¹⁸ *Id.* at 2343.

¹⁹ The lead plaintiffs, Tamer Mahmoud and Enas Barakat, were Muslim parents of an elementary school son. Chris and Melissa Persak, Roman Catholic parents of two elementary-aged children, joined the litigation along with Jeff and Svitlana Roman, who were Roman Catholic and Ukrainian Orthodox parents of an elementary-aged son. The advocacy group, “Kids First,” also joined the litigation. *Id.* at 2347–48.

²⁰ *Id.* at 2349.

²¹ *Id.* at 2350.

²² *Mahmoud v. McKnight*, 688 F. Supp. 3d 265, 272 (D. Md. 2023), *aff’d*, 102 F.4th 191 (4th Cir. 2024), *rev’d and remanded sub nom.* *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

²³ *Id.* at 295.

²⁴ 406 U.S. 205 (1972).

²⁵ *Mahmoud*, 688 F. Supp. 3d at 295.

²⁶ *Id.* at 299.

exercise is not burdened merely because “children’s exposure to religiously offensive ideas makes the parents’ efforts less likely to succeed.”²⁷ Applying rational-basis review, the court found that the policy was likely reasonably related to legitimate interests, including fostering inclusivity, and therefore the school’s policy did not violate the law.²⁸

The Fourth Circuit affirmed.²⁹ Writing for the panel, Judge G. Steven Agee reasoned that the Board’s policy of eliminating opt-outs did not “affirmatively compel” students or their parents “to perform acts undeniably at odds with” their religion.³⁰ “Simply hearing about other views” did not bring this case within the scope of *Yoder* or *West Virginia State Board of Education v. Barnette*, which held that students could not be compelled to salute the flag or say the Pledge of Allegiance in public schools.³¹ Applying *Employment Division v. Smith*, the Fourth Circuit panel found the policy neutral and generally applicable, and thus not subject to strict scrutiny.³²

Judge A. Marvin Quattlebaum dissented. He argued that the parents had shown a likelihood of success on their claim of coercive pressure inconsistent with the Free Exercise Clause.³³ The schools, he argued, forced the parents to make an impossible choice: “either adhere to their faith or receive a free public education for their children.”³⁴ By treating the curriculum as mere “exposure to ideas,” the majority improperly narrowed *Yoder*’s protection for parental religious authority.³⁵ He further argued that the policy was neither neutral nor generally applicable because the Board retained discretion to grant exemptions but used it to deny all requests related to the LGBTQ-affirming books.³⁶ This selective

²⁷ *Id.* at 300.

²⁸ *Id.* at 306.

²⁹ *Mahmoud v. McKnight*, 102 F.4th 191, 211 (4th Cir. 2024).

³⁰ *Id.* at 211.

³¹ *Id.* at 210.

³² *Id.* at 217.

³³ *Id.* at 218 (Quattlebaum, J., dissenting).

³⁴ *Id.* at 222.

³⁵ *Id.* at 223.

³⁶ *Id.* at 225.

enforcement, he concluded, triggered strict scrutiny under *Fulton v. City of Philadelphia* and *Smith*.³⁷ In his view, the policy failed strict scrutiny because the Board had previously allowed similar religious opt-outs and it continued to permit opt-outs in other areas of instruction.³⁸ In any event, the Board's goals were unmeasurable.³⁹

The Supreme Court reversed.⁴⁰ Writing for a six-Justice majority, Justice Alito held that Montgomery County's policy eliminating opt-outs likely violated the parents' rights under the Free Exercise Clause.⁴¹ He rejected the Fourth Circuit's view that "exposure" to conflicting ideas is never constitutionally significant.⁴² The curriculum, he wrote, was "unmistakably normative," "hostile" to the parents' religious beliefs, and "exert[ed] upon children a psychological 'pressure to conform.'"⁴³ *Yoder*, Justice Alito explained, "embodies a principle of general applicability,"⁴⁴ and the district's refusal to grant opt-outs imposed the same burden recognized in that case: "a very real threat of undermining" the religious beliefs and practices parents seek to instill in their children.⁴⁵ Thus, strict scrutiny applied. Even granting that the school district's interest in uninterrupted instruction was compelling, the policy was not narrowly tailored, given that parental opt-outs remained available for other subjects.⁴⁶ The Court

³⁷ *Id.*; see also *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (holding that government actions burdening religion are subject to strict scrutiny if they allow for individualized exemptions); *Emp. Div. v. Smith*, 494 U.S. 872, 886–88 (1990) (holding that neutral, generally applicable laws do not violate the Free Exercise Clause merely because they incidentally burden religious practice).

³⁸ *Mahmoud*, 102 F.4th at 227.

³⁹ *Id.*

⁴⁰ See *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2350 (2025).

⁴¹ *Id.* at 2363.

⁴² *Id.* at 2356.

⁴³ *Id.* at 2353, 2355. Justice Alito also noted that "the Board has specifically encouraged teachers to reinforce [the curriculum's] viewpoint and to reprimand any children who disagree." *Id.* at 2356.

⁴⁴ *Id.* at 2357.

⁴⁵ *Id.* at 2361.

⁴⁶ *Id.* at 2362.

reversed and remanded for proceedings consistent with the opinion.⁴⁷

Justice Thomas concurred, emphasizing three points. First, drawing on *Yoder's* history-and-tradition analysis, he noted that early instruction on sexuality and gender identity is a “relatively recent development.”⁴⁸ It lacks any historical grounding sufficient to override parental freedom.⁴⁹ Second, he observed that the Board’s policy embodied the kind of ideological “standardiz[ation]” that *Pierce v. Society of Sisters* forbids.⁵⁰ Third, the Board’s asserted interests—“equity,” “inclusion,” and administrative convenience—were neither compelling nor narrowly tailored given obvious, less-restrictive alternatives.⁵¹

Justice Sotomayor dissented, joined by Justices Kagan and Jackson. In her view, the Constitution guarantees the right to teach one’s faith at home. It does not guarantee the right to “require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.”⁵² And while *Yoder* prohibited “compell[ing] Amish parents to do what their religion forbade,” this curriculum merely “exposed [children] to ideas and concepts that their parents may find objectionable”⁵³ Justice Sotomayor warned that the Court’s interpretation of *Yoder* would invite endless parental challenges and would force courts to act as school boards.⁵⁴

⁴⁷ *Id.* at 2364.

⁴⁸ *Id.* at 2375 (Thomas, J., concurring) (citation modified).

⁴⁹ *Id.*

⁵⁰ *Id.* at 2379 (citation modified). Acknowledging that *Pierce* was not a Free Exercise opinion, Justice Thomas nonetheless held that “the context in which *Pierce* arose confirms that it ‘stands as a charter of the rights of parents to direct the religious upbringing of their children.’” *Id.* at 2377 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)); see also Melissa Moschella, *Clarifying the True Breadth and Strength of Parental Rights Under Pierce*, 49 HARV. J.L. & PUB. POL’Y 95 (2026) (discussing the history of *Pierce* and *Yoder*).

⁵¹ *Mahmoud*, 145 S. Ct. at 2377 (Thomas, J., concurring).

⁵² *Id.* at 2385 (Sotomayor, J., dissenting).

⁵³ *Id.* at 2389, 2399.

⁵⁴ *Id.* at 2394.

The majority's reliance on *Yoder*, rather than *Smith*, signaled a renewed willingness to treat parental religious authority as a stand-alone constitutional right—one not contingent on a law's neutrality or general applicability.

Yet *Mahmoud* reveals a deep incoherence in First Amendment jurisprudence. The Court treated the case as a Free Exercise issue, not an Establishment issue. Granted, the parents did not litigate under the Establishment Clause—existing precedent would not have allowed such a claim. The facts of this case, however, show a secular coercion that would clearly be an Establishment Clause violation if it were explicitly religious. After all, merely *displaying* the Ten Commandments in classrooms is an “establishment” problem. But how then does the systematic effort to “disrupt” heteronormativity and teach the mutability of sex fit into this framework? The result is not “wholesome ‘neutrality’”⁵⁵ but asymmetry: an intellectually incoherent constitutional regime that privileges secular worldviews over religious ones.⁵⁶ And the First Amendment does not require a one-way establishment of secularism.

II. THE RISE OF A FUNCTIONAL ESTABLISHMENT DOCTRINE

Before the 1960s, Establishment Clause jurisprudence was sparse. The Court understood “establishment” to mean formal state involvement with religion—legal compulsion, official sponsorship, or direct financial aid.⁵⁷

But beginning with the Warren Court, the Supreme Court has defined “establishment” functionally, by the purposes and perceived effects of government action.⁵⁸ Nowhere has this shift

⁵⁵ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

⁵⁶ *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

⁵⁷ Paul G. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 270–72 (1968).

⁵⁸ *Id.* at 269 (“The Warren Court will be remembered for a number of reasons, but for many Americans it is distinctively and immediately identified as the tribunal which put an end to prayer and Bible-reading exercises in the public schools.”).

been more evident than in classroom prayer and Bible-reading cases.

In *Engel v. Vitale*,⁵⁹ the Court invalidated a brief, voluntary classroom prayer, reasoning that the Establishment Clause “does not depend upon any showing of direct governmental compulsion.”⁶⁰ It is violated whenever the state places its “power” or “influence” behind religion.⁶¹

The next term, in *School District of Abington Township, Pennsylvania v. Schempp*,⁶² the Court struck down daily Bible readings in public schools. Participation was voluntary, parents could opt out, and no teacher instruction accompanied the readings.⁶³ The legislature also stated plausible secular purposes: promoting “moral values,” contradicting “the materialistic trends of our times,” and the “teaching of literature.”⁶⁴ Yet the Court found that, because the Bible is an “instrument of religion,” the primary purpose and effect of daily readings was to advance religion.⁶⁵

*Stone v. Graham*⁶⁶ carried this logic to its end. The Court invalidated a Kentucky law requiring the posting of the Ten Commandments in public school classrooms.⁶⁷ The statute included a disclaimer stating that “the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”⁶⁸ But the Court rejected that justification,

⁵⁹ 370 U.S. 421 (1962).

⁶⁰ *Id.* at 430.

⁶¹ *Id.* at 429. *Contra id.* at 445 (Stewart, J., dissenting) (“I cannot see how an ‘official religion’ is established by letting those who want to say a prayer say it.”).

⁶² 374 U.S. 203 (1963).

⁶³ *Id.* at 207.

⁶⁴ *Id.* at 223.

⁶⁵ *Id.* at 224; *cf.* *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2355 (2025) (permitting classroom reading of LGBTQ-affirming books accompanied by teacher instruction that disagreement is “hateful,” provided that parents have the choice to opt-out of such instruction).

⁶⁶ 449 U.S. 39 (1980) (per curiam).

⁶⁷ *Id.* at 43.

⁶⁸ *Id.* at 41 (citation modified).

finding that “no secular legislative purpose” could justify displaying the Ten Commandments.”⁶⁹

*Lee v. Weisman*⁷⁰ held that a brief, non-sectarian prayer offered at a middle school graduation ceremony created a “pervasive” government entanglement with “formal religious observance,” and was therefore coercive.⁷¹ By treating “subtle and indirect” pressure as constitutionally significant,⁷² the decision likely represented the high-water mark of the Court’s aversion to allowing religious texts in the public square.

The Court has abandoned its functional approach in its Establishment Clause doctrine in most contexts, but that shift has not reached the public-school instruction context.⁷³ At least in classrooms, the Establishment Clause remains functionally defined: perceived endorsement is the operative concern. And current jurisprudence continues to invalidate conduct that falls far short of formal compulsion.

III. THE QUASI-ESTABLISHMENT OF SECULARISM

The Court’s analysis of religion in the classroom, when compared with *Mahmoud*, reveals a striking asymmetry. Mere exposure to religious viewpoints in classrooms is treated as de facto establishment, even when there is a stated secular purpose. But secular viewpoints get a much longer leash, even when they are expressly coercive.

⁶⁹ *Id.*

⁷⁰ 505 U.S. 577 (1992).

⁷¹ *Id.* at 587, 593.

⁷² *Id.* at 593.

⁷³ *Kennedy v. Bremerton School District* rejected pure functionalism in favor of “historical practices and understandings,” but its holding allowed private employee prayer, not state speech. 142 S. Ct. 2407, 2428 (2022) (citing *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). *Engel*, *Schempp*, and *Stone* remain undisturbed and continue to bar prayer and religious texts in classrooms. See, e.g., *Roake v. Brumley*, 141 F.4th 614, 642, 645 (5th Cir. 2025) (citing *Stone*, 449 U.S. at 42) (holding that displaying the Ten Commandments would induce the schoolchildren to “venerate and obey” them), *reh’g en banc granted*, 154 F.4th 329 (5th Cir. 2025) (mem.).

The facts of *Mahmoud* show an ideological coercion that, if historically affiliated with a specific religious tradition, would clearly be an Establishment Clause violation. The schools' curriculum explicitly aimed to "disrupt" heteronormativity and cisnormativity and to teach that sex is "guess[ed]" at birth, among other precepts.⁷⁴ That instruction articulated a comprehensive moral framework, grounded in the metaphysical claim that gender identity supersedes biology.⁷⁵ In other words, it functions as a "religion of secularism."⁷⁶

The Court itself has alluded to the functional equivalence between theistic and secular belief systems in the Free Exercise context. In *Torcaso v. Watkins*,⁷⁷ the Court observed that "religions in this country which do not teach what would generally be considered a belief in the existence of God" include "Buddhism, Taoism, Ethical Culture, [and] Secular Humanism."⁷⁸ "Religion" under the First Amendment, in the Court's view, does not require belief in God.⁷⁹ The Court went even further in *United States v. Seeger*,⁸⁰ defining "religious" belief as any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of [other religious believers]."⁸¹ And in *Welsh v. United States*,⁸² the Court extended that reasoning to encompass purely moral or ethical convictions that "function as a religion" in a person's life.⁸³

⁷⁴ *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2342, 2345 (2025).

⁷⁵ For more on transgender ideology's inheritance from more ancient philosophies of mind-body dualism, see Melissa Moschella, *Trapped in the Wrong Body? Transgender Identity Claims, Body-Self Dualism, and the False Promise of Gender Reassignment Therapy*, 46 J. MED. PHIL. 782, 783 (2021) ("The wrong-body account of transgender identity seems to presuppose a dualist anthropology . . .").

⁷⁶ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

⁷⁷ 367 U.S. 488 (1961).

⁷⁸ *Id.* at 495 n.11.

⁷⁹ *Id.*

⁸⁰ 380 U.S. 163 (1965).

⁸¹ *Id.* at 176.

⁸² 398 U.S. 333 (1970).

⁸³ *Id.* at 340.

Yet this functional understanding has not carried over to the Establishment Clause. A belief system that qualifies as “religious” for Free Exercise purposes is treated as wholly “secular” when advanced by the state, thereby escaping Establishment scrutiny even when it occupies the same metaphysical space as religion itself.

Plaintiffs like those in *Mahmoud* must therefore challenge what amounts to a quasi-establishment of secularism under the Free Exercise Clause—a doctrinal irony, given that Establishment Clause precedent is extraordinarily sensitive to endorsements of any religious worldview.

Against this backdrop, Justice Stewart’s *Schempp* dissent appears almost prophetic:

If religious exercises are held to be an impermissible activity in schools, religion is placed in an artificial and state-created disadvantage. . . . And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism⁸⁴

One could respond that the First Amendment forbids only the establishment of *religion*. It says nothing against establishing *secularism*. But it is the Court—not its critics—that has defined “establishment of religion” functionally. The Court’s precedents have transformed the Establishment Clause into a tool for excluding religious references from public schools, while, in its Free Exercise jurisprudence, expanded “religion” to encompass any metaphysical worldviews. Having made those moves, the Court cannot now treat explicitly theistic expression as constitutionally suspect, while labeling secular metaphysics as “neutral.” If the Court were consistent in its definition of religion across its Establishment and Free Exercise jurisprudence, then a state that forbids prayer but requires LGBTQ-inclusive sexual instruction has

⁸⁴ Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

not escaped an establishment of religion. The Court's inconsistency thus turns the neutrality principle into a one-way ratchet that burdens *only* religion.

IV. THE COSTS OF ASYMMETRY

Beyond this doctrinal inconsistency, the Court's framework rests on a deeper philosophical error: it presumes a clean distinction between "religious" and "secular" reasoning where none exists. Secular moral frameworks, like religious ones, rest on premises that are not empirically demonstrable—claims about the meaning of human life, the nature of personhood, and the content of moral truth. To exclude religious viewpoints while treating secular metaphysics as neutral rests on the fiction that only religion depends on faith. Those who accept that fiction are bound for disappointment when they discover that even the most avowedly "areligious" worldviews terminate in claims about ultimate reality that are not empirically verifiable.⁸⁵

Nor is this merely theoretical. The abolition of slavery,⁸⁶ the recognition of a universal right to sexual consent,⁸⁷ and the duty to care for the orphan and widow were shaped in significant part by religious moral traditions once dismissed as sectarian.⁸⁸ By treating

⁸⁵ See RUPERT SHELDRAKE, *MORPHIC RESONANCE: THE NATURE OF FORMATIVE CAUSATION* 111 (4th ed. 2009) ("Modern science is based on the principle: 'Give us one free miracle and we'll explain the rest.' The one free miracle is the appearance of all the mass and energy in the universe and all the laws that govern it in a single instant from nothing."). see also ROBERT JASTROW, *GOD AND THE ASTRONOMERS* 116 (2d ed. 1992) ("For the scientist who has lived by his faith in the power of reason, the story ends like a bad dream. He has scaled the mountains of ignorance; he is about to conquer the highest peak; as he pulls himself over the final rock, he is greeted by a band of theologians who have been sitting there for centuries.").

⁸⁶ See, e.g., Kenneth P. Minkema & Harry S. Stout, *The Edwardsean Tradition and the Antislavery Debate, 1740–1865*, 92 J. AM. HIST. 47 (2005).

⁸⁷ KYLE HARPER, *FROM SHAME TO SIN: THE CHRISTIAN TRANSFORMATION OF SEXUAL MORALITY IN LATE ANTIQUITY* 18 (2013).

⁸⁸ See generally TOM HOLLAND, *DOMINION: HOW THE CHRISTIAN REVOLUTION REMADE THE WORLD* (2019); NICK SPENCER, *THE EVOLUTION OF THE WEST: HOW CHRISTIANITY HAS SHAPED OUR VALUES* (2018).

only theistic moral reasoning as constitutionally suspect, the Court risks excluding from civic discourse the very insights on dignity, equality, and compassion that helped give shape to Western legal thought. As Justice Stewart observed in *Schempp*, “our free society” requires that “religion and government must necessarily interact in countless ways.”⁸⁹ A jurisprudence that denies this reality does not preserve neutrality; it impoverishes the moral imagination of the Republic itself.

V. ATTEMPTING DOCTRINAL RESOLUTION

Mahmoud v. Taylor exposes this endpoint. There, the Establishment Clause is deployed to exclude religious influence from education, while its underlying rationale—preventing coercive conformity on metaphysical viewpoints—is ignored when the state advances secular ideology. That tension reveals how far the Court’s functionalism has strayed from the Clause’s original purpose. *Mahmoud* thus invites a reckoning. Either the Court must apply its functional logic consistently, or it must abandon it altogether and return the Establishment Clause to its original office. Only the latter option is viable.

The Court may opt to push functionalism to its logical extreme and treat all metaphysical or moral teaching as implicating the Establishment Clause. The Court has already acknowledged that non-theistic moral frameworks can function as “religion” for Free Exercise purposes.⁹⁰ Extending that insight to the Establishment context, however, would not only strike down the curriculum in *Mahmoud*. It would render virtually every public-school curriculum constitutionally suspect.

Here, as Justice Rehnquist said in *Stone*, the “words of Justice Jackson . . . merit quotation at length.”⁹¹

⁸⁹ *Schempp*, 374 U.S. at 309 (Stewart, J., dissenting).

⁹⁰ See *supra* Part II.

⁹¹ *Stone v. Graham*, 449 U.S. 39, 46 (1980) (Rehnquist, J., dissenting).

I think it remains to be demonstrated whether it is possible, even if desirable, . . . completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.”⁹²

In other words, every educational act presupposes answers to questions of meaning, purpose, and human worth. A regime that treated those presuppositions as “establishments” would collapse under its own weight.

The more natural solution is to return to the Establishment Clause’s original meaning. At the Founding, “an establishment of religion” referred not to mere government contact with religion, but to the institutional union of church and state—legal preference, financial support, or coercive conformity.⁹³ In that sense, the object

⁹² *Id.* (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235–36 (1948)).

⁹³ Whether the Court may forbid official preferences of individual states as a matter of original meaning and in light of the Fourteenth Amendment is a question far too involved to address in full here. For more on this topic, see generally Timon Cline, Josh Hammer & Yoram Hazony, *Everson Must Fall*, 48 HARV. J.L. & PUB. POL’Y (forthcoming 2026).

of the First Amendment was not to “prostrat[e] Christianity” in the public square, but to “cut off the means of religious persecution” from the national government.⁹⁴

But noncoercive support for religion was not within the original understanding of “establishment.”⁹⁵ As Professor Michael McConnell has shown, “religious coercion [was] the fundamental evil against which the clause [was] directed.”⁹⁶ To treat mere “exposure” to religious ideas as establishment “is a prescription for secularization of areas of life that are properly pluralistic.”⁹⁷ And when democratic majorities are forbidden to include educational materials with religious origins in their schools, the very pluralism which the First Amendment was meant to protect is crushed and “the juices of sectarian tension [start] flowing.”⁹⁸

Under an originalist framework, an Establishment Clause challenge to *Mahmoud* would almost certainly fail. Teaching contested LGBTQ concepts would not, itself, constitute “establishment.” But an originalist approach *would* restore genuine neutrality by allowing religious perspectives to enter civic education on equal footing with secular ones. Parents would no longer be relegated to seeking opt-outs from moral instruction; they could engage directly in the democratic conversation about meaning and virtue that public education inevitably entails. Schools could acknowledge religious viewpoints as one voice in the moral conversation of a pluralistic republic. And in any event, this framework would correct the asymmetrical “neutrality” of current doctrine, ensuring that religious and secular moral reasoning stand on equal constitutional terms.

⁹⁴ *Wallace v. Jaffree*, 472 U.S. 38, 104–05 (1985) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1877 (5th ed. 1891)).

⁹⁵ See generally Michael W. McConnell, *No More (Old) Symbol Cases*, 2018–19 CATO SUP. CT. REV. 91 (2018), <https://www.cato.org/sites/cato.org/files/2019-09/cato-supreme-court-2019-6.pdf> [<https://perma.cc/EM78-B4TZ>] [hereinafter McConnell, *Symbol Cases*].

⁹⁶ McConnell, *Coercion*, *supra* note 2, at 939.

⁹⁷ Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 641.

⁹⁸ See McConnell, *Symbol Cases*, *supra* note 95, at 92.