

4-1-1995

The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education

Rena M. Bila

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 Brook. L. Rev. 1535 (1995).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol60/iss4/6>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

NOTES

THE ESTABLISHMENT CLAUSE: A CONSTITUTIONAL PERMISSION SLIP FOR RELIGION IN PUBLIC EDUCATION

It is no secret of history that the principalities of government and religion, when not producing oppression from their merger, are necessarily generating friction from their separation.¹

INTRODUCTION

In 1791, the states adopted the First Amendment to the Constitution. The amendment places various constitutional restrictions on government. The Free Exercise and Establishment Clauses, for example, provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."² These religion clauses primarily seek to prevent coerced religious adherence and to guarantee the free exercise of one's chosen religious beliefs.³

¹ Scott C. Idleman, *The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief*, 142 U. PA. L. REV. 1313, 1313 (1994).

² U.S. CONST. amend. I. This amendment is applicable to the states through the Fourteenth Amendment. See *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947).

³ *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); see also *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (stating that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so") (citations omitted); *Allegheny County v. ACLU*, 492 U.S. 573, 591 (1989) (stating that the Establishment Clause means at least that neither a state nor the federal government may "force [or] influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion," and that no person "can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance"); 1 ANNALS OF CONG. 730 (J. Gales ed. 1834) (noting that James Madison, the principal draftsman of the First

Despite the articulated mandates in the First Amendment, little consensus exists on the constitutional parameters of the religion clauses, particularly the Establishment Clause. One interpretation of the Establishment Clause is that the Constitution mandates the total separation of church and state.⁴ The Supreme Court, however, has rejected this argument, and has recognized that removing all governmental references to religion would be neither possible nor desirable.⁵ Rather, the Establishment Clause requires only that government maintain a

Amendment, interpreted the religion clauses to mean that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience").

For a detailed discussion of the history leading up to the enactment of the First Amendment, see ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* (1982) and ANSON STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* (1964); see also *School Dist. v. Schempp*, 374 U.S. 203, 219 (1963) (quoting *McCullum v. Board of Educ.*, 333 U.S. 203, 228 (1948)) (noting that the primary purpose of the Establishment Clause is to preclude government from "becoming embroiled, however innocently, in the destructive religious conflicts which permeate the history of our country").

⁴ The view that the Constitution mandates a total separation of church and state can be traced back to a letter written by Thomas Jefferson who interpreted the religion clauses as "building a wall of separation between church and state." *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting) (citing 8 *WRITINGS OF THOMAS JEFFERSON* 113 (H. Washington ed. 1861)); see also *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting) (stating that separation of church and state was intended to create "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion").

⁵ See *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (quoting *Zorach v. Clauson* 342 U.S. 306, 312 (1952)) (finding that the Establishment Clause does not compel a complete separation of church and state); *Schempp*, 374 U.S. at 309 (Stewart, J., dissenting) (noting that complete separation is "fallacious" since the two institutions necessarily must interact); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952) (recognizing that some relationship between government and religious organizations is inevitable).

One reason the two institutions necessarily must interact is that religion is, and has been, a major influence in shaping our society. See, e.g., JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE* 168 (1987) (explaining the role of religion in abolishing slavery); Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 *EMORY L.J.* 149 (1990) (discussing the role of religion in family life, education and social welfare during the late eighteenth and early nineteenth centuries); Edward McGlynn Gaffney, Jr., *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 *TUL. L. REV.* 1143, 1169 (1990) (discussing role of religion in motivating people to engage in the civil rights movement). Religion, therefore, should not be completely excluded from the public sphere, particularly from public education. See *infra* note 30 (discussing justifications for including religion in the public education curriculum).

position of neutrality toward religion.⁶ To maintain this neutrality, a statute or governmental action may neither advance one religion over another nor prefer religion over nonreligion.⁷

Establishment clause jurisprudence demonstrates, however, that no reliable method exists to determine whether a statute or governmental action constitutes an advancement or preference of religion in violation of the clause. Interactions between government and religion can be placed on a continuum, with the Supreme Court easily deciding cases on the extremes.⁸ On one end are state laws that overtly coerce adherence to religious beliefs. For example, the colonies and the early states enacted laws that required taxpayers to support state churches financially and mandated attendance at Sunday services.⁹ Failure to comply with these laws resulted in criminal or civil punishment. Where religious exercises were mandated in public schools, students faced expulsion for noncompliance.¹⁰ On the other end of the continuum are laws that few would challenge as constitutionally infirm. For instance, the Establishment Clause permits religious institutions to take advantage of generally applicable laws, such as tax exemptions.¹¹ The more difficult task for the Court is to determine

⁶ *Schempp*, 374 U.S. at 215 (holding that the Establishment and Free Exercise Clauses place government in a position of neutrality toward religion).

⁷ *Id.* at 216.

⁸ Because Supreme Court decisions lay the framework for the lower courts to follow, this Note will focus on Supreme Court precedent.

⁹ See generally Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73 (1963) (discussing the history of religion in the United States). Two examples of improper relationships between government and religion include New Amsterdam, where citizens were required to pay taxes to construct church buildings, and Pennsylvania, where public officers were obligated to profess their belief in Jesus Christ upon taking office. *Id.* at 78 n.33.

¹⁰ See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating a West Virginia statute that permitted schools to expel students for refusing, based on religious objections, to stand and recite the Pledge of Allegiance); *Commonwealth v. Cook*, 7 A.L.R. 417 (1859) (upholding a teacher's beating of a child's hands for 30 minutes after the student refused to recite the Ten Commandments); *Donahoe v. Richards*, 38 Me. 379 (1854) (upholding a Maine statute that expelled students who refused to read from the Bible).

¹¹ *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970) (explaining that a tax exemption is not sponsorship since the government does not transfer its revenue to churches, but simply abstains from demanding that the church support the state). Tax exemptions have not converted libraries, art galleries or hospitals into state supported institutions, nor should they be deemed to convert churches into state

where on this continuum the distinction between constitutional and unconstitutional governmental actions lies.¹²

Since 1971, the Court has used a three-prong test promulgated in *Lemon v. Kurtzman*¹³ (the "*Lemon* test") to determine the constitutionality of state actions involving religion.¹⁴ To withstand an establishment clause challenge under the *Lemon* test a statute must have a legitimate secular purpose; cannot advance or inhibit religion; and must not create an excessive entanglement of government with religion.¹⁵ The three factors mirror the primary aims of the Establishment Clause: to prevent governmental sponsorship, financial support of, or involvement in religious matters. Despite these three articulated factors, application of the *Lemon* test has yielded inconsistent results, leading some commentators and justices to seek its modification and even abandonment.¹⁶ Indeed, the Supreme

supported institutions. *Id.* at 675; see also *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (finding that providing interpreter services to student attending Catholic high school did not violate Establishment Clause).

¹² See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (recognizing that courts can only "dimly perceive the lines of demarcation in this extraordinary sensitive area of constitutional law" and stating that the division between constitutional and unconstitutional activities is a "blurred, indistinct and variable barrier"); see also *Meuller v. Allen*, 463 U.S. 388 (1983) (holding that Minnesota statute satisfies the three-prong test set forth in *Lemon* and did not violate the Establishment Clause).

¹³ 403 U.S. at 602.

¹⁴ *Id.* at 612-13.

¹⁵ *Id.*

¹⁶ See, e.g., Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151 (1987). Professor Beschle points out that the tests used to detect free exercise and establishment clause violations elicit criticism based on their vague language, the inconsistent results of their application and the tests' validity. *Id.* at 163-64. Cf. *infra* notes 106-12, 168-88 (discussing an alternate approach to the *Lemon* test). Indeed, several Supreme Court Justices have criticized the *Lemon* test. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2498-5000 (1994) (O'Connor, J., concurring); *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting) ("in many applications [the *Lemon* test] has been utterly meaningless"); *Allegheny County v. ACLU*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that he does "not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area"); *Edwards v. Aguillard*, 482 U.S. 578, 636 and 40 (1987) (Scalia, J., dissenting) (stating that "[o]ur cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional" and that this is the result of a test that "has no basis in the . . . history of the Amendment it seeks to interpret"); *Wallace v. Jaffree*, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting) (stating that difficulties in applying the *Lemon* test arise because the test has "no

Court acknowledged that it has "sacrifice[d] clarity and predictability for flexibility" in establishment clause decisions to achieve specific results in certain cases.¹⁷

The first two prongs of the *Lemon* test are particularly vulnerable to criticism. Currently, under the first prong, the Court evaluates the personal beliefs and motivations of individual legislators to determine whether they have a legitimate secular purpose for enacting a statute.¹⁸ This inquiry raises many concerns. Not only is determining the subjective motivations that prompt legislators to vote for legislation inherently difficult,¹⁹ but this inquiry also inhibits the free speech necessary for a healthy political system.²⁰

The Court's second-prong analysis, which uses two subtests to determine whether an action advances or inhibits religion, also presents problems. Primarily, the subtests are overinclusive, resulting in frequent invalidation of state actions that should be deemed constitutional.²¹ The Court also fails to apply the subtests consistently. This inconsistent application has led to inconsistent results and a lack of predictability.²²

more grounding in the history of the First Amendment than does the wall theory upon which it rests and the three-part [*Lemon*] test represents a determined effort to craft a workable rule from a historically faulty doctrine"; *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring); see also Kevin T. Baine, *Education Litigation: Prospects for Change*, 35 CATH. LAW. 283, 287 (1994) ("the Supreme Court has decided a series of education cases that, read together, simply defy comprehension").

¹⁷ *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Justice Scalia criticized this approach in his dissent in *Edwards v. Aguillard*, 482 U.S. 578 (1987). He stated the Court should realize that the flexibility-over-predictability rationale for its inconsistent results is merely a facade for a lack of a principled rationale. *Id.* at 638-40 (Scalia, J., dissenting). Thus, he argued, the Court should modify its constitutional analysis in establishment clause cases to formulate a test that allows for both flexibility and predictability while adhering to the nation's longstanding recognition of the importance of religion. *Id.* See generally William P. Marshall, "We Know it When We See It": *The Supreme Court Establishment Clause*, 59 S. CAL. L. REV. 495, 495 (1986) (explaining that "logical consistency and establishment clause jurisprudence . . . have little in common").

¹⁸ See *infra* notes 80-105 (discussing problems with the Court's first-prong analysis).

¹⁹ See *infra* notes 95-100 and accompanying text.

²⁰ See *infra* note 99 and accompanying text.

²¹ The two subtests are the endorsement test and coercion test. See *infra* notes 116-50 and accompanying text.

²² Marshall, *supra* note 17, at 495.

Additionally, the Court frequently has upheld religious activities such as legislative prayer or references to God in presidential speeches because these practices traditionally have been permitted in society.²³ While these results may be correct, the Court's failure to explain how these actions comport with the Establishment Clause only complicates the task of establishing a clear constitutional principle.²⁴

Attempts to introduce religious activities into public school classrooms succinctly illustrates the defects of the current *Lemon* test analysis. Not only must the Court contend with the lack of a clear principle to apply to establishment clause challenges, but it must also balance highly sensitive competing interests. On one hand, public education serves an important role in training children to be members of a society, where many consider religion to be an important facet of life.²⁵ On the other hand, great potential for conflict exists when religion is introduced into a forum with young children who hold diverse religious beliefs. Without a clearly articulated and uniformly applicable test, the Court's solution has been to exclude most actions in public schools that involve religion.²⁶

²³ See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court upheld a Nebraska statute that authorized the state to pay chaplains to open each legislative session with a prayer because the practice of opening sessions of Congress with prayer has continued for almost 200 years. *Id.* at 792. According to the Court, to interpret the Establishment Clause in a manner that places more limits on government than the framers of the Constitution had imposed would be inappropriate. *Id.* at 788.

²⁴ See *infra* notes 151-67 and accompanying text (discussing the Court's rationale for upholding longstanding religious activities without reference to the activities' compliance with establishment clause principles).

²⁵ See *Board of Educ. v. Pico*, 453 U.S. 853, 864 (1982) (noting that "public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'" (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979))).

²⁶ The Court has said that "[i]n no activity of the State is it more vital to keep out divisive forces than in schools." *Id.* at 854. Mandatory attendance requirements, children's susceptibility to peer pressure, and students' emulation of teachers as role models all enable school officials to significantly impact a student's perspective on an issue. *Id.* These concerns have provided the foundation for excluding most religious activities from public education. See *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (invalidating a school policy that allowed prayers at graduation ceremonies); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (invalidating a statute that mandated the teaching of creation-science when evolution was taught); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating a "moment of silence"

An examination of establishment clause decisions will reveal that the Court has failed in its efforts to define the parameters of the Establishment Clause correctly. The primary reason for this failure is the Court's application of the *Lemon* test. While the three prongs of the test provide the proper framework to effectuate the policies underlying the Establishment Clause, the Court improperly applies the test. If properly applied, the *Lemon* test would protect the rights of the religious and nonreligious equally.²⁷

statute that specifically stated the time could be used for silent prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (invalidating a statute that required the posting of the Ten Commandments in classrooms); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating a statute that prohibited the teaching of evolution in public schools); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (invalidating a statute that required recitation of the Lord's Prayer at the beginning of each day); *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating a statute that required recitation of prayer at the beginning of each school day). *But see* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993) (holding on free speech grounds that the school district cannot deny churches' request to rent school facilities when other nonreligious groups use the facilities); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding on equal access grounds that students cannot be prohibited from forming a Bible study group when the school permitted other noncurricular groups to meet). Although legitimate, the concerns have resulted in the exclusion of religious activities that present no establishment clause violation.

²⁷ Some commentators have suggested that because of the religious beliefs of the framers, their only concern when drafting the First Amendment was to protect believers. *See, e.g.,* PERRY MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 89, 98 (1953); *see also* John W. Whitehead & Alexis I. Crow, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 *TULSA L.J.* 149, 157 (1992) (discussing different theories behind formation of Establishment Clause). Professor Dorsen, however, uses fourteenth amendment principles to demonstrate that the First Amendment protects nonbelievers as well as believers. Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 *WM. & MARY L. REV.* 863, 867 (1986). He points out that the historical evidence of the Equal Protection Clause does not speak to the protection of women, aliens or extramarital children, yet the Supreme Court has held that the amendment demands equal protection for these groups. *Id.* Similarly, the "core purpose of the religion clauses applies to nonbelievers as well as to believers. The key objective . . . is to safeguard minorities and outsiders with respect to religious beliefs." *Id.* at 868. Justice Stewart supported this view in his dissenting opinion in *Schempp*:

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government.

374 U.S. at 319-20 (Stewart, J., dissenting). This view differs from the Court's current application of the *Lemon* test, which tends to err in favor of invalidating statutes that introduce religion into public education. *See infra* notes 80-105, 116-

This Note examines the evolution of establishment clause jurisprudence with particular focus on challenges involving religion in public education.²⁸ Part I discusses the formation and interpretation of the Establishment Clause. Part II analyzes the Court's current application of the *Lemon* test and proposes changes to primarily the first and second prong analyses.²⁹ Part III evaluates three recent Supreme Court decisions and criticizes the defects in the Court's analysis. Additionally, this part applies the proposed changes to the *Lemon* test as advocated in Part II and discusses the projected results.³⁰

I. BACKGROUND

The Establishment Clause has spawned great debate since its inception.³¹ Commentators and scholars never have reached complete agreement on the permissible boundaries of the clause, particularly in the context of public education. The historical conditions that led to the clause's ratification, however, provide guidance for its interpretation and application in modern society.³²

50 (arguing that the Court's current application of the first and second prongs of the *Lemon* test renders unconstitutional some conduct that is, in fact, constitutional).

²⁸ This Note does not address whether religion *must* be in public schools, but rather considers whether the Court can constitutionally invalidate legislative decisions that allow religious activities in public schools.

²⁹ See *infra* notes 80-188 and accompanying text.

³⁰ There should be greater exposure of religion in public schools for several reasons. Children who may have an adequate understanding of their own respective faiths are often ignorant about other faiths. This ignorance can result in religious tension and fear of difference. Public classrooms, where students with different religious beliefs assemble, provide good places to correct this ignorance. Moreover, omitting religion from the curriculum conveys a negative impression of religion to children. Schools today provide students with broad curricula designed to instruct them on a variety of issues students confront in daily life. Excluding religion from schools and relegating it to the home and church conveys that religion is not useful for resolving life situations. The Establishment Clause does not mandate this hostility toward religion. In fact, hostility is contrary to the principle of neutrality. See LEO PFEFFER, CHURCH, STATE AND FREEDOM 352-53 (1967); see also *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929, 939-41 (D.N.J. 1993); *infra* notes 208-81 and accompanying text.

³¹ 1 ANNALS OF CONG. 214 (1789); see also *infra* notes 37, 47.

³² The same establishment clause issues of prayer and Bible reading in public schools that were litigated in the 1820's are still litigated today. See DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 85-87 (1991); see also *Adler v.*

A. Historical Influences

The idea that government should not promote or foster religion grew out of the conflict-laden relationship between government and religion that had existed for centuries in Europe. European history is marked by conflict between the papacy and reigning monarchs, bloody religious wars that ravaged the continent, and persecution of religious dissenters.³³ Despite the desire to prevent this conflict from occurring in America, many of the colonies enacted laws that supported a particular religion to the exclusion of others. Examples of these establishments include the Puritans in New England, the Anglicans in Virginia, the Quakers in Pennsylvania, and the Catholics in Maryland.³⁴ A resolution passed by the General Court of Massachusetts in 1641 illustrates the improper union of government and religion in the early states. The resolution provided that "[t]he civil authority . . . hath power and liberty to see the peace, ordinances, and rules of Christ observed in every Church, according to His word. . . . It is the duty of the Christian magistrate to take care that the people be fed with wholesome and sound doctrine."³⁵ Although at the time of the Constitutional Convention some states had begun to separate

Duval County Sch. Bd., 851 F. Supp. 446 (M.D. Fla. 1994); Gearon v. Loudon County Sch. Bd., 844 F. Supp. 1097 (E.D. Va. 1993). The fact that the Court has been unable to establish a coherent standard over the past 170 years highlights the need for a well-defined standard to apply uniformly to all establishment clause challenges.

³³ See generally STOKES & PFEFFER, *supra* note 3 (discussing the historical background of the First Amendment); Theodore Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395 (1966) (discussing the evolution of establishment clause cases with particular attention on the historical prominence of religion in our society).

³⁴ Establishments exist in various forms, but all stem from a governmental action that symbolizes improper state endorsement of religion. See generally WILLIAM H. MARNELL, *THE FIRST AMENDMENT* 49-72 (1964) (detailing which churches dominated the early states); PFEFFER, *supra* note 30, at 73-91; H. Frank Way, *The Death of the Christian Nation: The Judiciary and Church-State Relations*, 29 J. CHURCH & STATE 509 (1987).

³⁵ PFEFFER, *supra* note 30, at 73-91. This fusion between government and religion allowed Massachusetts to limit the voting privilege to members of the Congregationalist church and to banish from the church any person who denied the fundamental beliefs of the religion. *Id.* at 75. Moreover, any Quaker who entered the state was jailed and whipped. *Id.* at 76.

government from religious influences, many still maintained state-supported churches.³⁶

Although the original Constitution was drafted within this historical context, the document failed to address the proper relationship between government and religion. Almost every state expressed some objection to the absence of restrictions on the federal government's power to legislate religion.³⁷ Accordingly, Congress convened on June 8, 1789, to draft the Bill of Rights.³⁸ James Madison—often referred to as the “leading architect” of the First Amendment—introduced the new amendments.³⁹ He explained to the legislators that a bill of rights was necessary to allay the fears of people who believed that the new government would deprive them of liberties they recently had won.⁴⁰ He stated further that he understood the first amendment religion clauses to mean that “Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”⁴¹

B. Interpretation

Despite an appreciable contemporary understanding of the religious oppression that prompted the enactment of the First Amendment, little consensus exists about how to interpret or apply the Establishment Clause. Courts often look to legislative history for guidance in determining the meaning and scope

³⁶ MARNELL, *supra* note 34, at 109-10.

³⁷ PFEFFER, *supra* note 30, at 125-27. Six states ratified the Constitution but also proposed amendments for a guarantee of religious liberty. *Id.* at 125. North Carolina and Rhode Island would not ratify the Constitution until the adoption of a bill of rights that included religious freedom and disestablishment. *Id.*

Many in Congress justified the omission on the ground that such a guarantee of religious liberty was unnecessary. They argued that absent an express grant of power to legislate on religion, the federal government could not act in that area and thus, an express prohibition was unnecessary. The American people, however, were not satisfied with this argument and made ratification of the Constitution contingent upon Congress' effort to add a bill of rights to the Constitution. *Id.*

³⁸ See *Wallace v. Jaffree*, 472 U.S. 38, 93 (1985) (Rehnquist, J., dissenting) (citing 1 ANNALS OF CONG. 424).

³⁹ *Flast v. Cohen*, 392 U.S. 83, 103 (1968). See generally 1 ANNALS OF CONG. (1789) (providing a comprehensive summary of the amendments that Madison introduced).

⁴⁰ 1 MADISON'S WRITINGS 432 (1904).

⁴¹ PFEFFER, *supra* note 30, at 163 (quoting 1 ANNALS OF CONG. 729-31).

of the clause.⁴² Discerning the framers' intent, however, is problematic. The ambiguous historical record readily lends support to differing interpretations.⁴³ The structure of public education also has changed so drastically since the drafting of the clause that the framers' intentions may be inapplicable to our current educational system.⁴⁴ Moreover, the current religious composition of the United States makes our nation much more diverse than at any other time in our history.⁴⁵ Thus, practices that the framers found unobjectionable could offend many people in today's society.

⁴² *Lee v. Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting) ("the meaning of the clause is to be determined by reference to historical practices and understandings") (quoting *Allegheny County v. ACLU*, 492 U.S. 573, 670 (1989)); see also *DRAKEMAN*, *supra* note 32, at 53, 96 (stating "[t]he vast majority of the debates have surrounded the search for the true intent of the First Congress"); *PFEFFER*, *supra* note 30, at 161-62 (noting "[t]he versions of the First Amendment . . . are offered as evidence that the intent of the states and of Congress was only to prevent Congress from establishing a national religion"); *Sky*, *supra* note 33, at 1401-02; Comment, *supra* note 9, at 80-83.

⁴³ See *School Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (arguing that "[a] too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected"); *Sky*, *supra* note 33, at 1403 (noting the limitations of a constitutional analysis that attempts to measure modern judicial results against the "scant, inadequate and poorly reported record of debates that took place in another age").

⁴⁴ Indeed, the framers of the Bill of Rights may not even have considered the issue of prayer in public schools because education at that time was largely committed to church-related schools in which religious exercises were an inherent part of the curriculum. *Sky*, *supra* note 33, at 1403-04.

In *Schempp*, Justice Brennan provided a detailed description of the evolution of public education. It was not until the late 1820s and early 1830s that a system of public education took root in the United States. Over the next 50 years, state courts were quite deferential to local school boards. For example, when a school board required religious exercises, a court would uphold that decision. Similarly, when school boards chose to exclude religious exercises, a court also would support that decision. With the rise of religious diversity in the last quarter of the nineteenth century, however, courts began to question decisions to include religious exercises. In light of the clearly religious content and the difficulty of avoiding sectarian controversy, many courts struck down mandatory religious exercises in public schools. These changes in the structure of American education indicate that the framers did not contemplate the full scope of religion in public education. *Schempp*, 374 U.S. at 238-39 n.7 (Brennan, J., concurring) (citations omitted).

⁴⁵ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). The framers primarily faced differences among Christian sects, whereas today our society is much more religiously diverse. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1992) (Table No. 77) (reporting that 79 different religious faiths exist in the United States, each with at least 60,000 followers).

Despite the inherent problems with a search for the framers' true collective intent and its subsequent application to modern situations, history still can serve as a useful guide. Rather than searching for the framers' intent, a more productive exercise is to examine the early application of the clause in the laws the first Congress enacted. These statutes indicate the types of activities that the framers thought permissible under the Establishment Clause.⁴⁶

An early interpretation of the clause suggested that it required an absolute separation of church and state.⁴⁷ Indeed, the first case to consider a challenge to a state action under the Establishment Clause, *Everson v. Board of Education*,⁴⁸ adopted this view.⁴⁹ Justice Rutledge's dissent in *Everson*

⁴⁶ *Lee*, 112 S. Ct. at 2679 (Scalia, J., dissenting) (arguing that history indicates what the framers intended the clause to do and how it should be interpreted). When the first Congress permitted an action, it is unlikely that they simultaneously intended for the Establishment Clause to later forbid the same actions. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Sky*, *supra* note 33, at 1404.

⁴⁷ Three rationales support separation of church and state. The first is that separation is required for the protection of churches against the state. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6 (1965); Whitehead & Crow, *supra* note 27, at 157. The second is that states need to be protected from undue religious influence by the church to ensure governmental autonomy. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947); HOWE, *supra*, at 2. The third rationale is that the Establishment Clause should protect both institutions equally because each can best achieve its purposes by operating wholly independent of the other. See 9 *THE WRITINGS OF JAMES MADISON* 487 (Gaillard Hunt ed., 1910); PFEFFER, *supra* note 30, at 163. James Madison supported the third view. He believed that an inevitable result of a union between the two institutions would be that government-supported religion would incur hatred, disrespect and contempt by nonadherents, ultimately destroying government and degrading religion. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE COMPLETE MADISON: HIS BASIC WRITINGS* 299, 302-305 (Saul K. Padover ed. 1953) (1785) (hereinafter *Memorial and Remonstrance*); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1159 (2d ed. 1988).

⁴⁸ 330 U.S. 1 (1947).

⁴⁹ *Everson* involved a New Jersey statute that had authorized the board of education to reimburse parents for fares paid for public transportation to public and nonprofit private schools. *Id.* at 3-4. The Court held that the statute did not violate the Establishment Clause, which "erected a wall between church and state." *Id.* at 18. The statute in *Everson* merely provided a general program that only incidentally benefitted religion. *Id.*

Justice Souter provided a recent example of reasoning in support of an absolute separation of church and state in *Lee v. Weisman*. In *Lee*, Justice Souter provided a detailed history of the House and Senate debates over the wording of the Establishment Clause. James Madison's original proposal stated that *no national religion* should be established. The adopted version of the Establishment

most clearly articulated the separation principle and has been cited consistently by separation advocates.⁵⁰ He stated that separation of church and state was intended to create "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."⁵¹ He urged that this separation was necessary to avoid the inevitable conflicts that arise along religious lines, especially in a pluralistic society.⁵²

It soon became evident that the Constitution required a less rigid standard than Justice Rutledge's interpretation of the Establishment Clause. Interactions between government and religion that had existed contemporaneously with the drafting of the Constitution supported this accommodation.⁵³

Clause forbids *an* establishment of religion. Advocates of separation of church and state argue that the language "an establishment" should be interpreted as forbidding any kind of religious establishment, not just a national church. *Lee*, 112 S. Ct. at 2668-70 (Souter, J., concurring) (citations omitted).

⁵⁰ All the Justices adopted the separation principle, but Justice Rutledge dissented from the majority's application of the standard. *Everson*, 330 U.S. at 28.

⁵¹ *Id.* at 31-32 (Rutledge, J., dissenting).

⁵² *Id.* at 54 (Rutledge, J., dissenting) (explaining that governmental involvement with religion will only "embroil the state" in conflicts between religion and nonreligion and between different religions); *accord* *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (noting that when government attempts to enforce religious beliefs by legal sanction, people who oppose the laws will naturally find contempt for the laws, which only diminishes the effectiveness of government); *McCormack v. Board of Educ.*, 333 U.S. 203, 215 (1948) (Frankfurter, J., concurring) (stating that conflicts will inevitably arise in a country with a variety of religions whenever government involves itself in religious matters).

Those who support complete separation often view religion as an "unreasoned, aggressive, exclusionary and divisive force" that must be confined solely to the private sphere. *Lee*, 112 S. Ct. at 2660. For example, Justice Black, who was extremely influential in the early development of establishment clause doctrine, candidly criticized religion. During early conflicts between the dominant Protestant religion and the growing Catholic sect, Justice Black accused Catholics of "looking toward complete domination and supremacy" of their particular beliefs. *Board of Educ. v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting) (citations omitted). More recently, in 1981, the president of Yale University told the entering freshman class that politically active Christians were "peddlers of coercion." See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 58 (1993). And in February 1993, in a front page story of *The Washington Post*, Michael Weisskopf referred to religious people as "largely poor, uneducated, and easy to command." Michael Weisskopf, *Energized by Pulpit or Passion, the Public Is Calling*, WASH. POST, Feb. 1, 1993, at A1.

⁵³ Separation proponents are "embarrassed by the many breaches in the wall of separation countenanced by [the framers]." Michael W. McConnell, *Coercion: The*

For example, on the same day that Madison proposed his wording for the First Amendment, Congress re-enacted the Northwest Territory Ordinance, which provided that religion, morality and knowledge were necessary for "good government and the happiness of mankind."⁵⁴ In addition, the day the House of Representatives adopted the First Amendment, a resolution passed later that day asked President Washington to issue a Thanksgiving Day proclamation that would offer an opportunity to all citizens to give God their sincere thanks for their many blessings.⁵⁵

Some of these interactions between government and religious activities still continue today. For example, branches of the U.S. armed forces provide chaplains,⁵⁶ and Congress opens its daily sessions with prayer.⁵⁷ Interestingly, the United States Supreme Court opens its sessions with "God Save

Lost Element of Establishment, 27 WM. & MARY L. REV. 933, 939 (1986).

⁵⁴ 1 Stat. 50 (1789).

⁵⁵ 1 ANNALS OF CONG. 914 (1789). *Engel* provides examples of Presidents who have officially recognized God. 370 U.S. at 446-48 (Stewart, J., dissenting). For instance, in 1789 President George Washington stated that "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe." *Id.* at 446 n.3. In 1809, President Madison said that "we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations . . . and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." *Id.* at 447. And in 1961, President Kennedy said that "[t]he world is very different now. . . . [a]nd yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state but from the hand of God." *Id.* at 448-49.

⁵⁶ 3 Stat. 297 (1816).

⁵⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayers, which have occurred for over 200 years). Interestingly, Madison, the founding father of the First Amendment, was a member of the committee that arranged for congressional chaplains. No one can assert with intellectual honesty that the First Amendment intended a complete and utter separation of church and state when the drafter of the Establishment Clause helped draft legislation that provided public monies for prayer in Congress. See PFEFFER, *supra* note 30, at 247.

Until recently, attendance at religious services was mandatory at both the U.S. military and naval academies. See REGULATIONS FOR THE U.S. CORPS OF CADETS (1947) ("Each cadet will receive religious training in one of the three principal faiths: Catholic, Protestant or Jewish."); U.S. NAVAL ACADEMY REG., art. 1503(1) (providing that midshipmen shall attend church services on Sunday at the Naval Academy Chapel or at one of the regularly established churches in the city of Annapolis); see also *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) (finding these mandatory chapel services an unconstitutional establishment of religion).

this Honorable Court."⁵⁸ Thus, throughout history, religion and government have interacted, with the latter acknowledging, to a degree, the importance of religion in our society. Even the Supreme Court has stated that these statutes and resolutions "recognize[] deeply entrenched and highly cherished spiritual traditions of our nation."⁵⁹

Consequently, the Court has rejected a strict separation principle and replaced it with a neutrality standard. Governmental neutrality dictates that states cannot set up a church, aid one religion over another, or prefer religious believers to nonbelievers.⁶⁰ Conversely, a generally applicable program that provides benefits to broad classes without reference to religion is constitutional even though religious institutions also receive benefits under the program.⁶¹ The Court has been un-

⁵⁸ Kevin T. Baine, *Education Litigation: Prospects for Change*, 35 CATH. LAW. 283, 285 (1994). Indeed, Chief Justice Burger highlighted the irony in the Supreme Court's invalidating a moment-of-silence statute when the Court opens its sessions with a prayer.

Some who trouble to read the opinions in these cases will find it ironic—perhaps even bizarre—that on the very day we heard arguments in the cases, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. . . . They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditating—or a moment of silence.

Wallace v. Jaffree, 472 U.S. 38, 84-85 (1985).

⁵⁹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Court also pointed out that "[w]e are a religious people whose institutions presuppose a supreme being." *Id.* Consequently, the Court concluded that when the state encourages religion it is following the best of our traditions. *Id.* at 313-14.

⁶⁰ *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (stating that the Court has "rejected unequivocally the contention that the Establishment Clause forbids only government preference of one religion over another").

⁶¹ See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2467-68 (1993). A statute that benefits religion is unconstitutional if it creates an incentive for people to undertake religious education because government then prefers religion over nonreligion in violation of the *Lemon* test's second prong. If, however, the benefit to religion is only incidental to a legitimate secular purpose that benefits a broad class, the statute is constitutional. See, e.g., *Meuller v. Allen*, 463 U.S. 388, 390 (1983) (upholding a Minnesota statute that granted taxpayers a tax deduction for expenses incurred in providing tuition, textbooks and transportation for their children's attendance at both public and private elementary and secondary schools); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (upholding a New Jersey statute that reimbursed costs of public transportation to public and nonprofit

able, however, to define clearly what actions, beyond generally applicable programs, comport with the Establishment Clause.

II. THE *LEMON* TEST: CURRENT APPLICATION & PROPOSALS FOR CHANGE

In an attempt to clarify establishment clause standards, the Court promulgated the *Lemon* test in 1971.⁶² Courts utilize the three-prong test to determine when a governmental action violates the Establishment Clause. The test requires that the statute have a secular purpose, that its principal or primary effect be one that neither advances nor inhibits religion, and that the statute not foster an excessive entanglement with religion.⁶³ Despite the longstanding existence of the *Lemon* test, inconsistent results have prompted calls for its abolishment or modification.⁶⁴ Critics of the test argue that it has no foundation in the First Amendment and has produced such inconsistent results that one can only guess what statutes will

private schools).

⁶² *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Lemon* involved a challenge to a Pennsylvania program that reimbursed private schools for teacher's salaries, books and materials used in certain secular subjects, and a Rhode Island program that granted a 15% salary supplement to teachers in private schools. The Court invalidated both programs. *Id.* at 625.

⁶³ *Lemon*, 403 U.S. at 612-13 (citations omitted). This tripartite test combined the "purpose" and "primary effect" tests used in *School District v. Schempp*, 374 U.S. 203 (1963), with the "excessive entanglement" test of *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In applying these tests to the facts in *Lemon*, the Court concluded that the statutes had the secular legislative purpose of fostering high-quality secular education. The complicated statutory precautions designed to ensure that the effect of the statutes would not advance religion, however, created an excessive entanglement of government with religion. *Lemon*, 403 U.S. at 612.

⁶⁴ Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 164-65 (1992) (criticizing the *Lemon* test as vague, producing inconsistent results and that are simply incorrect). One alternative approach is a single test for both establishment clause and free exercise clause challenges. This test would require a statute to be facially neutral, so that it would not single out religion or a particular religion for favorable or unfavorable treatment. *Id.* at 165; Phillip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 24 (1978). Another suggested test would invalidate a statute only if it lacked a legitimate secular purpose and was "likely to impair religious freedom by coercing, compromising or influencing religious beliefs." Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980); see also *supra* note 16 (detailing criticism of the *Lemon* test by the Supreme Court Justices).

be held unconstitutional. Even the Supreme Court has characterized the test as no more than a "helpful signpost" in detecting constitutional violations.⁶⁵

A summary of Supreme Court decisions illuminates the magnitude of this problem. For example, the Court has held it constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers,⁶⁶ but unconstitutional for a state to set aside a moment of silence in public schools with prayer designated as an acceptable use of that time.⁶⁷ The Court also has held it unconstitutional for a state to require employers to accommodate their employees' work schedules to allow for sabbath observances,⁶⁸ but constitutional for a state to require employers to pay unemployment benefits when the employee is discharged for refusing to work on the sabbath.⁶⁹ In addition, government may give money to religiously affiliated organizations, among others, to teach adolescents about proper sexual behavior,⁷⁰ but not to teach them about history or science.⁷¹ The government also can provide religious school students with books,⁷² but not maps,⁷³ and with bus rides to

⁶⁵ *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

⁶⁶ *Marsh v. Chambers*, 463 U.S. 783, 792-93 (1983).

⁶⁷ *Wallace*, 472 U.S. at 56; see *infra* notes 209-21 and accompanying text (discussing the *Wallace* decision).

⁶⁸ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (finding that a Connecticut statute that provided Sabbath observers with an absolute right not to work on their Sabbath violates the Establishment Clause where it imposes on employers the absolute duty to conform their business practices to particular religious practices of employees).

⁶⁹ *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) (finding that Illinois's denial of unemployment compensation benefits to a worker who refused employment because the job would have required him to work on Sundays violated the Free Exercise Clause); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963) (determining that termination of unemployment benefits because of employee's refusal to accept employment that would have required her to work on Saturdays, constituted a violation of the Free Exercise Clause).

⁷⁰ *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988). The Supreme Court held that the Adolescent Family Life Act did not have the primary effect of advancing religion, even though the Act provided for grants to religious and other organizations that offer counseling on teenage sexuality without expressly requiring that the funds be used for religious purposes.

⁷¹ *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971); see *supra* note 62 (discussing facts of *Lemon*).

⁷² *Board of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (holding that a New York statute requiring local public school authorities to lend textbooks free of charge to all students in grades seven through 12 was not a law respecting an establishment of religion, nor prohibiting the free exercise thereof simply because it autho-

religious schools,⁷⁴ but not from a religious school to a museum as part of a field trip.⁷⁵ Finally, government can pay for state-mandated tests administered in religious schools,⁷⁶ but cannot pay for safety-related maintenance of the school buildings.⁷⁷

An erroneously applied *Lemon* test generates these inconsistent results. Not only does the Court improperly apply the test, but it fails to be consistent in its misapplication. While limitations must be placed upon the interaction between religion and government to ensure compliance with the Constitution, current attempts to curtail establishment clause violations yield both unpredictable and over-restrictive results.⁷⁸

rized the loan of textbooks to students attending parochial schools).

⁷³ *Wolman v. Walter*, 433 U.S. 229, 249-51 (1977) (holding that loaning auxiliary equipment like maps was unconstitutional because they could be used in a way that conveyed the parochial school's religious doctrine).

⁷⁴ *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947); see *supra* note 49 (discussing facts of *Everson*).

⁷⁵ *Wolman*, 433 U.S. at 252-55.

⁷⁶ *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 653-54 (1980) (determining that a New York statute, which appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the state, including the administration, grading and reporting of the results of state-prepared tests, had the secular purpose of providing educational opportunity of a quality that will prepare students for participation in society).

⁷⁷ *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80 (1973). In *Nyquist*, the Court held that a tuition reimbursement statute that provided income tax benefits to parents of children attending nonpublic schools violated the Establishment Clause. Notwithstanding that the tuition grants were given as reimbursement for tuition already paid and that recipients were not required to spend the money on education, the Court pointed out that the system was not sufficiently restricted to assure that it would not have an impermissible effect of advancing religion.

⁷⁸ Stephen L. Carter, Professor of Law at Yale University, addresses the need for a clear test to apply uniformly to all establishment clause challenges while acknowledging the difficulty of the task. In his recent book, *The Culture of Disbelief*, he notes:

We are trying, here in America, to strike an awkward but necessary balance, one that seems more and more difficult with each passing year. On the one hand, a magnificent respect for freedom of conscience, including the freedom of religious belief, runs deep in our political ideology. On the other hand, our understandable fear of religious domination of politics presses us, in our public personas, to be wary of those who take their religion too seriously. . . . We are one of the most religious nations on earth, in the sense that we have a deeply religious citizenry; but we are also perhaps the most zealous in guarding our public institutions against explicit religious influences. One result is that we often ask our citizens

There can be little doubt that this consequence is a primary reason why the same issues are litigated year after year.⁷⁹

to split their public and private selves, telling them in effect that it is fine to be religious in private, but there is something askew when those private beliefs become the basis for public action.

....

The problem goes well beyond our society's treatment of those who simply want freedom to worship in ways that most Americans find troubling. An analogous difficulty is posed by those whose religious convictions move them to action in the public arena. Too often, our rhetoric treats the religious impulse to public action as presumptively wicked—indeed, as necessarily oppressive. . . .

....

. . . The First Amendment guarantees the "free exercise" of religion but also prohibits its "establishment" by the government. There may have been times in our history when we as a nation have tilted too far in one direction, allowing too much religious sway over politics. But in late twentieth-century America, despite some loud fears about the influence of the weak and divided Christian right, we are upsetting the balance afresh by tilting too far in the other direction—and the courts are assisting in the effort.

CARTER, *supra* note 52, at 8-11.

⁷⁹ The December holiday seasons are a good example of the type of problems caused by the lack of clear establishment clause principles. See Kimberly J. McLarin, *Holiday Dilemma at Schools: Is That a Legal Decoration?*, N.Y. TIMES, Dec. 16, 1993, at A1.

Pity the public school principle in December. Between Hanukkah, Christmas and Kwanzaa, this long last month lays a minefield of grand proportions for educators trying to acknowledge the holidays without bridging the separation of church and state.

....

Between parents who want their religion in the schools, parents who want less of some other religion in the schools and parents who want no religion at all in the schools, school officials in the New York region know that come December, their phones will be jingling.

....

Two years ago, officials in Voorhees, N.J., decided they needed a policy to guide them through the holiday season. . . . [A district spokesperson said,] "We were to the point where people were objecting to red and green sprinkled on cookies"

Id.; see also Grossbaum v. Indianapolis-Marion County Bldg. Auth., 870 F. Supp. 1450 (S.D. Ind. 1994) (challenging private placement of menorah in lobby of city building after the city erected a Christmas tree in the lobby); Chabad-Lubavitch v. Miller, 5 F.3d 1383 (11th Cir. 1993) (challenging display of menorah in state capital rotunda).

Whether prayers should be allowed at graduation ceremonies is another issue that is re-litigated yearly. See, e.g., Goluba v. School Dist. No. 94-2010, 1995 WL 8235 (7th Cir. Jan. 11, 1995); Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447 (9th Cir. 1994); Friedman v. Sheldon Community Sch. Dist., 995 F.2d 802 (8th Cir. 1993); Ingebretsen v. Jackson Public Sch. Dist., 864 F. Supp. 1473 (S.D. Miss. 1994).

A. Lemon's *First Prong*

1. Current Application

The first prong of the *Lemon* test requires a legitimate secular purpose for the statute.⁸⁰ This prong strives to ensure that the legislative process does not become the machinery by which local churches effectuate their policies.⁸¹ Religious groups should be able to lobby, however, for their respective causes on the same footing as other interest groups.⁸² A limitation upon the state is that there must be a legitimate secular purpose—one that serves legitimate state interests—for enacting the statute.⁸³ This requirement acts as a constitutional check on the relationship between religion and government, and ensures that the two do not combine in the oppressive manner that had existed for centuries in Europe and, to a limited degree, in colonial America.

Several flaws mar the Court's current first-prong analysis. First, the Court consistently merges together the analyses of the first and second prongs of the *Lemon* test.⁸⁴ An inquiry into the statute's effect of either advancing or inhibiting religion is proper under the second prong, but irrelevant to the first. The Court, however, frequently considers a statute's effect when it determines whether the legislature had a secular purpose for enacting the statute under the first prong. For example, in *Stone v. Graham*,⁸⁵ the Court invalidated a Kentucky statute that required the posting of the Ten Commandments in each public school classroom.⁸⁶ To reach the conclu-

⁸⁰ *Lemon*, 403 U.S. at 612.

⁸¹ *Id.* at 621.

⁸² Although religious groups should be entitled to petition the government in the same manner as other interest groups, some argue that religion should be a factor solely for private life and consequently should be banned from the political arena entirely. See CARTER, *supra* note 52, at 113 (discussing attempts to preclude religion from the public sphere).

⁸³ *Lemon*, 403 U.S. at 612.

⁸⁴ See *infra* notes 113-80 and accompanying text for a discussion of the second prong of *Lemon*.

⁸⁵ 449 U.S. 39 (1980).

⁸⁶ The displays were purchased with private funds and contained a notation on each display that "the secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the

sion that the statute lacked a legitimate secular purpose, the Court analyzed the statute's effect.⁸⁷ Because the statute had the effect of advancing religion and was "plainly religious in nature," the Court held that the statute lacked a legitimate secular purpose.⁸⁸ Thus, the Court relied on the statute's effect to determine that it lacked a legitimate secular purpose.

The Court's analysis in *Stone* effectively rendered the first prong irrelevant. The Court used the same factors to deem a statute unconstitutional under the second prong of the *Lemon* test as it did to find the lack of a legitimate secular purpose required by the first prong.⁸⁹ The Court did not perform a separate analysis of the legitimate secular purpose articulated by the legislators.⁹⁰ Thus, despite the Supreme Court's articulation of a three-prong test in *Lemon*, geared to address three separate concerns,⁹¹ the Court frequently has failed to perform three independent inquiries.⁹² Although the Court's current *Lemon* test analysis deems some constitutional statutes unconstitutional, when the first two prongs are merged into one, the opposite and equally incorrect result occurs. A statute without the effect of advancing or inhibiting religion could have been enacted solely for religious purposes. Such a statute fails *Lemon*'s first prong and, as such, is unconstitutional. Without an independent inquiry into a statute's pur-

Common Law of the United States." *Stone v. Graham*, 449 U.S. 39, 41 (1980).

⁸⁷ *Id.* at 42. The Court stated that "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* (emphasis added).

⁸⁸ *Id.* at 41.

⁸⁹ To determine whether the statute satisfied the first prong of *Lemon*, the Court looked at the statute's effect on students. The Court did not proceed to perform a second-prong inquiry, but if it had, presumably it would then have asked again, what effect the statute had on students. Thus, the Court merged the first and second prong so that both prongs relied on the same inquiry. See *infra* notes 168-80 and accompanying text (discussing the proper second-prong inquiry).

⁹⁰ See *Stone*, 449 U.S. at 41-42; see also *Lemon*, 403 U.S. at 612.

⁹¹ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection. . . . Three such tests may be gleaned from our cases.").

⁹² See, e.g., *Board of Educ. v. Grumet*, 114 S. Ct. 2481 (1994) (not explicitly addressing any of *Lemon*'s prongs); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (merging the first and second prongs); *Marsh v. Chambers*, 463 U.S. 783 (1983) (failing to use the *Lemon* test).

pose, an unconstitutional statute could withstand judicial scrutiny. While it is probably rare that a statute enacted solely to support religion would not have the effect of aiding that religion, the possibility of this type of unconstitutional establishment is just what the first prong was designed to detect.

Furthermore, when the Court has performed a first-prong inquiry, it has persistently scrutinized legislators' motivations for supporting a statute.⁹³ Thus, even when a statute may have served a legitimate secular purpose, the Court has invalidated it when legislators had religious motivations for supporting it.⁹⁴ Establishment clause decisions based solely on legislators' personal motivations present several concerns.

First, reliance on personal motivations to invalidate state actions allows the Court to ignore the inherent difficulties of an inquiry into subjective beliefs. The Court can determine objectively whether a statute serves a legitimate secular purpose, but to determine legislators' subjective motivation for enacting a statute is nearly an impossible task. Legislators may have numerous motivations for supporting a given statute.⁹⁵ In fact, it is inherent in our pluralistic society that a multitude of factors motivate the enactment of any legislation.⁹⁶ What motivates one legislator to make a speech on the

⁹³ The Supreme Court discusses its decision-making process for its first-prong determination in relatively few cases. When it has explained its decision, personal motivations of legislators were afforded great weight in the Court's decision. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). See generally *Stone v. Graham*, 449 U.S. 39 (1980).

⁹⁴ Some commentators are concerned that nonbelievers will be excluded from meaningful participation in the political process if legislators are allowed to express religious reasons for supporting legislation. See Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1615 (1993). Religious arguments allegedly exclude nonbelievers from full participation in the process and thus should not be the sole basis for enacting legislation. *Id.* at 1619-23. But this argument ignores the fact that the political process should be open to all ideas and ideologies. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

⁹⁵ *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting); see also DRAKEMAN, *supra* note 32, at 106-07. Drakeman points out that it is quite difficult to ascertain the purpose behind a law when the law has been enacted by a few hundred members of a state legislature and then signed by a governor. Even if all of these people were in agreement as to the statute's meaning, they certainly had a multitude of purposes for supporting the statute. Moreover, the Court's decisions have made it unclear whether the entire legislature must have an improper motivation to invalidate a statute or if the motives of one legislator is sufficient. *Id.* If the latter case is true, then it is incongruous that one legislator cannot enact a statute by her vote alone, but can bring down a statute merely by her statement. *Id.*

⁹⁶ See *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446, 451 (M.D. Fla. 1994)

House floor may not motivate others to vote in favor of a statute. Furthermore, a single legislator may have many reasons for supporting a piece of legislation.⁹⁷

In addition to this difficult subjective analysis, the Court has not indicated how many legislators must adopt the improper legislative motivation to render the statute unconstitutional. Thus, the intent of one legislator might counter or taint the proper motives of all others and thereby invalidate an otherwise constitutional statute.⁹⁸ Professor Stephen L. Carter aptly explains the inappropriateness of this analysis:

A rule holding that the religious convictions of the proponents are enough to render a statute constitutionally suspect represents a sweeping rejection of the deepest beliefs of millions of Americans. . . . In a nation that prides itself on cherishing religious freedom, it would be something of a puzzle to conclude that the Establishment Clause means that a Communist or a Republican may try to have his or her world view reflected in the nation's law, but a religionist can not. . . . [I]f the courts continue to read *Lemon* as they have, the Establishment Clause might well end up not antiestablishment but antireligion.⁹⁹

The Establishment Clause cannot mean that all views other than religious beliefs are entitled to representation and free discourse in the legislative process.¹⁰⁰

(stating that "where the law or policy under review is the result of an institutional process, such as a vote of a multi-member legislature, . . . [t]he individual, and quite possibly varied, purposes or intentions of the several operative decision makers . . . would have little or no probative value").

⁹⁷ Greene, *supra* note 94, at 1624 (noting that "[m]any laws will be expressly based not on a single religious or secular purpose, but on an intertwined set of purposes").

⁹⁸ *Edwards*, 482 U.S. at 637-38 (Scalia, J., dissenting). Justice Scalia discussed three arguments against relying on individual legislators' motives to invalidate a statute. First, determining subjective motivations is extremely difficult: "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 637. Second, there are no limitations on the scope of statements considered to detect an improper motive. Should all statements ever made on the subject be considered? Third, "is it possible that the intent of the bill's sponsor is alone enough to invalidate [the statute]—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?" *Id.* at 638.

⁹⁹ CARTER, *supra* note 52, at 113.

¹⁰⁰ Justice Brandeis stated that:

Those who won our independence . . . believed liberty to be the secret of happiness and courage. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery

The second problem with a constitutional determination based on personal motivations is that it fails to grant sufficient deference to legislative decisions. The Court, when determining the constitutionality of a state legislature's act, should "have 'due regard to the fact that th[e] Court is not exercising a primary judgment but sitting in judgment upon those who also

and spread of political truth; that without speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972) (concluding that "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide open"). In light of the importance placed upon freedom of speech and upon the free exercise of religion, the Constitution should not be interpreted in a manner that permits all but religious views to be represented in government.

A tangential issue is the right to free exercise of one's religious beliefs. The effect of the Court's current analysis is that if legislators freely express religious motivations, then otherwise constitutional statutes could be deemed unconstitutional. This consequence would seem to deter legislators from debating all issues in an open and uninhibited manner. In *Sherbert v. Verner*, 374 U.S. 398 (1963) the Court held that state action that burdens the free exercise of religion, as would a political process that precludes public expression of religious beliefs, may be upheld only if the law is justified by a compelling interest that cannot be served by less-restrictive means. Seventeen years later, however, the Court lowered the standard in *Employment Division v. Smith*, 494 U.S. 872 (1990), to allow the state to infringe upon the free exercise of one's religion when the statute is substantially related to a significant governmental interest.

In November 1993, Congress passed the Religious Freedom Restoration Act of 1993, which restored the *Sherbert* standard. Thus, a state statute that burdens free exercise of religion must have a compelling state interest, which cannot be served by less restrictive means. H.R.J. RES. 1308, 103d Cong., 1st Sess. (1993). It is uncertain, however, whether Congress has the constitutional authority to establish a standard for the federal courts to follow in deciding free exercise challenges. For an interesting discussion of the constitutionality of the Religious Freedom Restoration Act, see Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993) (discussing the implications of congressional attempts to legislate constitutional norms); Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1032 (1993) (concluding that as a matter of precedent and constitutional structure, Congress' power under the enforcement provision of the Fourteenth Amendment is very broad and that the Religious Freedom Restoration Act is well within that power); see also Rodney J. Blackman, *Shoving the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 396 n.400 (1994).

have taken the oath to observe the Constitution and who have the responsibility for carrying on government.”¹⁰¹ State legislators and school boards, acting pursuant to state statutes, should be granted deference and should have their decisions invalidated only when they clearly violate the Constitution.¹⁰² The Court, however, has ignored this principle, and continually has questioned legislators’ motives when statutes are challenged under the Establishment Clause regardless of whether the legislature clearly has articulated a legitimate secular purpose.¹⁰³

In addition to the constitutional defects of a test that prohibits religious motivations for supporting legislation, this analysis ignores the historical importance of religion in our society. Inevitably, government and religion will “intersect, conflict and combine.”¹⁰⁴ For example, if legislators’ personal motivations will render a statute unconstitutional, states could not criminalize murder, theft or place restrictions on abortion because it is likely that at least one legislator would support such statutes based on religious beliefs. Thus, a proper first-prong analysis would recognize that legislators will be motivated by religious beliefs, and attempt only to ensure that statutes are enacted for legitimate secular purposes.¹⁰⁵

2. Proposed First Prong

To determine whether a statute satisfies *Lemon’s* first prong, the Court should perform a two-part inquiry. The Court should determine first whether the legislature had a legitimate

¹⁰¹ *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951)).

¹⁰² *Edwards*, 482 U.S. at 695 (Powell, J., concurring) (“States and locally elected school boards should have the responsibility for determining the educational policy of the public schools.”). An establishment clause challenge to the subject matter taught in public schools should be interfered with only when the purpose for the school’s decision is “clearly religious.” *Id.*

¹⁰³ See, e.g., *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2488-89 (1994); *Edwards v. Aguillard*, 482 U.S. 578, 592-93 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 56-60 & nn.43, 45 (1985).

¹⁰⁴ *Wallace*, 472 U.S. at 69 (O’Connor, J., concurring).

¹⁰⁵ See *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1380 (9th Cir. 1994) (explaining that the Establishment Clause is not violated simply because government action coincides or harmonizes with the tenets of some or all religions).

secular purpose for enacting the statute and, second, whether the statute furthers that purpose. The Court's analysis would entail, for example, reading the preamble and text of the statute and looking to legislative history to determine what problem the statute sought to remedy.¹⁰⁶ If this inquiry reveals a legitimate secular purpose for the statute's enactment, the Court must then determine whether the statute could serve that purpose.¹⁰⁷ This analysis should not be confused with *Lemon's* second-prong inquiry into the effects of the statute. The focus here should be whether the statute could serve the legitimate state interest, not whether it actually does serve the interest. For example, one legislative purpose for including creationism in the science curriculum might be to ensure academic freedom.¹⁰⁸ A statute that includes creationism in the science curriculum while excluding evolution, however, would not serve the legitimate secular purpose of academic freedom.¹⁰⁹

One common criticism of a first-prong inquiry that ignores consideration of personal motivations is that religion should be

¹⁰⁶ The Court performs this inquiry in other areas of the law. See, e.g., *Business Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 540-41 (1991) (looking to the text of the Federal Rules of Civil Procedure to determine the meaning of Rule 11 and finding that nothing in the text detracted from the plain meaning of the rule); *Rubin v. United States*, 449 U.S. 424, 429 (1981) (explaining that to determine the meaning of "offer" and "sale" of § 17(a) of the 1933 Securities Exchange Act, the Court begins its inquiry by looking to the language of the Act); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (addressing the question of whether scienter is required to establish a § 10b-5 violation of the 1934 Securities Exchange Act, the Court first turned to the language of § 10(b) because "the starting point in every case involving construction of a statute is the language itself").

¹⁰⁷ This analysis is different from the current inquiry because it focuses on objective legislative materials and the political process rather than on individual beliefs. Thus, the modified first-prong analysis requires a legitimate secular purpose for the statute, and the second part of the inquiry focuses on whether the statute serves the legitimate secular purpose.

¹⁰⁸ See *infra* notes 239-45 and accompanying text (detailing the Supreme Court's treatment of the academic freedom argument in *Edwards v. Aguillard*).

¹⁰⁹ This statute would not further academic freedom because it precludes students from exposure to a widely accepted scientific theory on the origins of man. Arguably, a school does not have to include any reference to the origins of humankind in its science curriculum. If it chooses to include evolution, then academic freedom is furthered by including creationism. It would be difficult, however, to convince a court that a statute that allowed teachers to teach only creationism did not serve a religious purpose.

excluded from the political process.¹¹⁰ Commentators express concern that religious groups with a broad political base will utilize the political machinery to further their interests to the detriment of minority groups' interests.¹¹¹ The second prong, however, would prevent this result. Under the revised second prong, a statute that advances religion would be unconstitutional irrespective of whether the religious belief is held by a majority or minority group. Thus, a statute that serves a legitimate secular purpose will be unconstitutional only if it impermissibly advances religion. If, however, the statute serves a legitimate secular purpose and does not impermissibly advance religion, then the personal beliefs of the legislators will not render a statute unconstitutional.¹¹² *Lemon's* first

¹¹⁰ See *supra* note 94.

¹¹¹ Politicization of religious issues is a legitimate concern because our political process is a majoritarian system. Every issue before Congress, however, is subject to this abuse. Thus, the concern that majority religions will use the political machinery to the detriment of minority religions should not lead to the exclusion of religion from the political process. Many unpopular views are allowed to compete in the political process, and so should religion. Professor Carter points out that it "would be something of a puzzle to conclude that the Establishment Clause means that a Communist or a Republican may try to have his or her world view reflected in the nation's law, but a religionist cannot." CARTER, *supra* note 52, at 113.

There are checks to preclude abuse of the system. For example, the amendments to the Constitution specifically preclude legislatures from enacting certain laws. With regard to religion, the Establishment and Free Exercise Clauses serve this purpose. The *Lemon* test, however, needs to be applied correctly to act as a check on religion in the public sphere, without unconstitutionally excluding the free exercise of religion. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 n.5 (1992) (explaining that "an articulable secular rationale is all that is required; a requirement of a secular motivation trenches too far on the freedoms of conscience and expression of citizens and legislators"); see also Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 994 (1989) (arguing that the overturning of laws because the legislators who enacted them expressed religious purposes "raises a potentially serious threat to the freedom of expression of legislators who hold religious beliefs").

¹¹² Assuming that the third *Lemon* prong is not violated, there are four possible outcomes for statutes challenged under the Establishment Clause. The statute could: (1) lack a legitimate secular purpose and advance or inhibit religion; (2) lack a legitimate secular purpose but not advance or inhibit religion; (3) have a legitimate secular purpose but advance or inhibit religion; or (4) have a legitimate secular purpose but not advance or inhibit religion. Only the fourth fact pattern is constitutional. Cf. Smith, *supra* note 111, at 994 and Sullivan, *supra* note 111, at 197 n.5 (discussing First Amendment guarantees that prevent an analysis of legislators' personal motivations for enacting a statute).

and second prongs, when properly applied, have the ability to protect minority religious groups from a majoritarian democratic process without rendering public expressions of religion taboo.

B. Lemon's *Second Prong*

1. Current Application

The second prong of the *Lemon* test requires that the primary effect of a statute be neither to advance nor to inhibit religion.¹¹³ Governmental neutrality dictates that government neither favor one religion over another nor prefer religion over nonreligion.¹¹⁴ The First Amendment itself provides the rationale behind the second prong of the *Lemon* test: "Congress shall make no law respecting an establishment of religion."¹¹⁵ When a state or federal government passes legislation that either advances one religion over another, or prefers religion over nonreligion, this moves toward the type of religious oppression that prompted enactment of the First Amendment. People should be as free to express their religious beliefs in the public sphere as they are free from compulsory adherence to religion.

The Court has developed two subtests to determine whether a statute comports with this requirement. In some cases the Court simultaneously uses both subtests, while in other cases it applies none. These subtests are overinclusive in their application, often detecting a constitutional violation when none is actually present. Thus, these tests fail to strike the proper balance between freedom of religious expression and the Establishment Clause.

a. *The Coercion Test*

The First Amendment guarantees that government may not coerce anyone to support or participate in religion.¹¹⁶ In

¹¹³ *Lemon*, 403 U.S. at 612.

¹¹⁴ *School Dist. v. Schempp*, 374 U.S. 203, 215 (1963).

¹¹⁵ U.S. CONST. amend. I.

¹¹⁶ *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (quoting *Lynch v. Donnelly*,

1834, James Madison interpreted this guarantee to mean that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."¹¹⁷ He feared that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."¹¹⁸ "[A]ttempts to enforce [religious adherence] by legal sanctions" would only "tend to enervate the laws in general."¹¹⁹ When government and religion had united, the result was the creation of laws that mandated church attendance, compelled donations to religious institutions, and required Bible reading in public schools.¹²⁰ Those who chose to violate these rules faced criminal as well as civil sanctions.¹²¹ Madison envisioned a First Amendment that prohibited this type of coerced religious adherence.¹²²

Madison's interpretation of the First Amendment prevailed in establishment clause decisions through the mid-1900s. In 1940, the Court paraphrased the Establishment Clause as "forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship."¹²³ The presence or lack of compulsion were central to the Court's later decisions in *Illinois ex rel McCollum v. Board of Education*¹²⁴ and *Zorach v. Clauson*.¹²⁵ In 1961, the Court explained that the

465 U.S. 668, 678 (1984)) (noting that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so").

¹¹⁷ 1 ANNALS OF CONG. 730 (1834).

¹¹⁸ *Id.* at 731.

¹¹⁹ *Memorial and Remonstrance*, *supra* note 44, at 304.

¹²⁰ For a detailed discussion of unconstitutional relationships, see generally LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986). See also *supra* notes 9-10.

¹²¹ *Lee*, 112 S. Ct. at 2683 (Scalia, J., dissenting) (noting that the type of coercion present in the historical establishment of religion was coerced religious belief and financial support "by force of law and threat of penalty").

¹²² Madison argued that states should prevent religion from being "armed with the sanctions of a law" because religion should not be directed by "force or violence." *Memorial and Remonstrance*, *supra* note 47, at 299.

¹²³ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

¹²⁴ 333 U.S. 203 (1948) (invalidating a release-time program that provided religious instruction on public school property).

¹²⁵ 343 U.S. 306 (1952) (upholding release-time programs that provided religious instruction on private property).

distinction between the constitutional Sunday closing laws and the unconstitutional release-time program in *McCollum* was that the closing laws did not compel religious participation.¹²⁶ Typical of the Court's ambivalence in this area, one year later, it stated that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."¹²⁷ The Court failed to explain its sudden departure from a coercion analysis.

Recently, the Court once again has adopted a coercion analysis in establishment clause cases but has expanded the definition of what constitutes a coercive activity. In fact, the Court currently prohibits actions that present none of the original Establishment Clause concerns, but contain the mere possibility of a subjective feeling of coercion.¹²⁸ This subjective feeling of coercion is established simply by demonstrating that people exposed to the religious activity dislike it.¹²⁹

The Court's current coercion standard favors those who oppose the presence of religion in the public sphere over those who support it and is contrary to the principle of neutrality that the Establishment Clause mandates.¹³⁰ For example, in *Mozert v. Hawkins County Board of Education*,¹³¹ parents of children in the public schools claimed that particular textbooks denigrated their religion.¹³² The parents asked that their chil-

¹²⁶ *McGowan v. Maryland*, 366 U.S. 420, 451-53 (1961) ("In *McCullum* tax-supported buildings were used to aid religion; in the instant case, no tax monies are being used in aid of religion.").

¹²⁷ *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (invalidating a New York statute that required recitation of prayer every morning in the public schools). See generally *McConnell*, *supra* note 53, at 934-36 (criticizing the basis for the proposition as adopted in *Engel* for its lack of precedent, explanation or relevance to the case at bar).

¹²⁸ See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) (finding graduation prayers coercive solely because the dissenter had a "reasonable perception that she [was] being forced" to conform). There was no showing in *Lee*, however, that anyone was coerced to participate in the graduation prayer. *Id.* at 2653. Thus, although no actual coercion existed, the Court invalidated the action.

¹²⁹ *McConnell*, *supra* note 64, at 152-53.

¹³⁰ See *supra* note 60 and accompanying text.

¹³¹ 827 F.2d 1058 (6th Cir. 1987).

¹³² *Id.* at 1060-61.

dren be permitted to use substitute texts.¹³³ The Sixth Circuit rejected the claim on the ground that enforced exposure to contrary views does not violate the Free Exercise Clause.¹³⁴ According to the Sixth Circuit, "[w]hat is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of plaintiff's religion."¹³⁵ Thus, a religious person objecting to state conduct was required to show actual compulsion.

In sharp contrast to this interpretation of coercion are the nativity scene cases.¹³⁶ In these cases, the Court has recognized a constitutional claim for unwilling exposure to a government message supporting another religion, even if the claimant easily could have avoided the exposure. Consequently, the Court's coercion analysis has established a standard where compelled exposure to governmental messages denigrating one's religion is constitutional, while avoidable exposure to governmental messages favorable to another religion is not.¹³⁷ Since nearly all incidents of religion in the public sphere, particularly in public education, will elicit some objection, the effect of the Court's analysis is to remove nearly all such activities. Whether or not citizens prefer that religion be

¹³³ *Id.* at 1060.

¹³⁴ *Id.* at 1065 (emphasizing that plaintiff's sole objection was to the children's exposure to the challenged material).

¹³⁵ *Id.* at 1069.

¹³⁶ See, e.g., *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

¹³⁷ *McConnell*, *supra* note 64, at 152-53; see also *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984). Currently, claims based on religious objections must involve a burden on the free exercise of religion, while claims under the Establishment Clause succeed merely because the plaintiff dislikes the religious activity or display. Compare *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (rejecting claim by students that public school textbooks denigrated their religion) with *Allegheny*, 492 U.S. at 573 (finding creche display unconstitutional). Some argue that this outcome is justified because religious people are free to worship in their homes and churches and consequently government should not have to accommodate their religious beliefs in the public sphere. This outcome, however, violates the neutrality standard. Religious people are exposed to state laws and displays that offend their beliefs, yet those statutes are deemed constitutional. Accordingly, the nonreligious should realize that occasionally they may be exposed to religious displays and activities that they dislike. See *McConnell*, *supra* note 64, at 158-59 (stating that the same coercion standard for both the Free Exercise Clause and Establishment Clause would restore the symmetry between the religion clauses that was broken when the Court declared coercion was an element of a successful Free Exercise claim while not for an Establishment Clause).

included or excluded from public education, the Constitution does not mandate this result. The Constitution simply requires that government not compel religious adherence.¹³⁸

b. *Justice O'Connor's Endorsement Test*

Justice O'Connor suggests that, to determine whether a statute advances or inhibits religion, the Court must ask whether the action has the effect of endorsing religion.¹³⁹ Under this test, the central question is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive the statute as a state endorsement of religion. According to Justice O'Connor, an endorsement of religion sends a "message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, and favored members of the political community."¹⁴⁰ Any governmental action that appears to make adherence to religion relevant in any way to a person's standing in the community is prohibited.¹⁴¹ According to Justice O'Connor, the *Lemon* test's second prong prohibits state endorsement of religion because state endorsement normally involves an inherent pressure to conform to a particular religion.¹⁴²

Vital to the application of the endorsement test is an understanding of who is the objective observer. This factor renders the endorsement test inappropriate for determining an establishment clause violation. The diversity of beliefs concern-

¹³⁸ Another problem with the renewed application of the coercion test is that courts are unsure whether the coercion test is part of the *Lemon* test, or whether it is a separate test to be applied instead of the *Lemon* test or in addition to the *Lemon* test. See *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446, 450 (M.D. Fla. 1994); see also Brook Millard, Note, *Lee v. Weisman and the Majoritarian Implications of Establishment Clause Jurisprudence*, 71 DENV. U. L. REV. 759 (1994).

¹³⁹ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Justice Brennan expressed that 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." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

ing religion in this country makes it difficult to define an objective observer.¹⁴³ One who agrees with a state-supported religious activity may simply interpret an action as an accommodation of his or her beliefs, whereas one who opposes the activity may interpret the government action as an endorsement of religion contrary to his or her own beliefs.¹⁴⁴ An objective standard is difficult to establish when both the adherent and nonadherent are naturally biased—the adherent in favor of the state action and the nonadherent against the state action.¹⁴⁵

Justice O'Connor, however, attempts to define the objective observer by focusing on how an objective nonadherent perceives the situation.¹⁴⁶ Thus, Justice O'Connor's objective observer is actually an objective nonadherent. If a nonadherent would perceive the governmental action as an endorsement of religion, then the action violates the second prong of the *Lemon* test.¹⁴⁷

¹⁴³ See *supra* note 45.

¹⁴⁴ See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2667 (1992) (Souter, J., concurring). Justice Souter explained that accommodation of religious beliefs merely demonstrates respect for the other's religion, it is not a state endorsement. The majority in *Lee*, however, did not accept this argument and viewed the prayers as forcing students to participate. *Id.* at 2681-82.

¹⁴⁵ Justice O'Connor's endorsement test, with its reliance on an objective observer analysis, is highly individualistic and subject to manipulation. According to this test, a government action is an establishment because it is perceived as such. See *Allegheny County v. ACLU*, 492 U.S. 573, 630, 632 (1989). A test that relies upon who is interpreting the action is particularly troublesome in our pluralistic culture. For example, whether a parochial aid program endorses religion depends upon whether the observer views the aid as supporting religious education or as a program designed to equalize the treatment of parents and students who desire a religious education with those who prefer a secular education. See Marshall, *supra* note 17, at 533-34.

¹⁴⁶ See *Allegheny County*, 492 U.S. at 634 (finding that a menorah standing alone in front of the government building may well send a message of endorsement to "nonadherents"); see also *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (allowing a student-run Bible study group to meet on school property). In *Mergens*, the Board of Education argued that allowing the group to meet would send a message to the students that the school was endorsing the group. *Id.* at 228. The Court disagreed, stating that since the school could take measures to ensure that students did not perceive endorsement, such as specifically communicating to the student body that the group was not officially endorsed, there was no establishment clause violation. *Id.* at 251.

¹⁴⁷ Under this analysis, a creche surrounded by secular symbols of the Christmas holiday, such as Santa Claus, reindeer and candy canes, would not send an endorsement of religion message, but endorsement of a national holiday. *Lynch v. Donnelly*, 465 U.S. 668, 669 (1984). A creche surrounded by a white fence and

Justice Kennedy has pointed out correctly that the primary flaw in Justice O'Connor's analysis is its focus on the minority or majority status of religion.¹⁴⁸ Thus, a state action that favors a minority religion does not send a message of endorsement, but one of supporting pluralism. For example, if a legislature in a predominantly Judeo-Christian community enacts a law that benefits a minority religion, the statute will be deemed constitutional because the nonadherent is the majority group. If, however, that same legislature enacts a statute that benefits the majority religious belief, then the nonadherent, a member of a minority religion, may perceive the action as an unconstitutional endorsement of a majority faith.¹⁴⁹ This analysis is inherently biased against the majority religion. The difficulties with the application of the objective observer standard are magnified in challenges to religion in public education, since the affected objective observers "are by reason of age, barely able of objectivity."¹⁵⁰

flowers which do not detract an observer's attention away from the religious message of the display, however, is considered an endorsement of religion. *Allegheny County*, 492 U.S. at 598-99.

Professor Tribe explains that the reasonable non-adherent is "not 'hypersensitive,' but may be, because of her position as an outsider, offended by actions that 'may seem so natural and proper to adherents as to blur into the background noise of society.'" *TRIBE, supra* note 47, at 1293.

¹⁴⁸ *Allegheny County*, 492 U.S. at 677 (Kennedy, J., concurring in part and dissenting in part) (writing that a reasonable nonadherent standard naturally turns on the minority status of the observer).

¹⁴⁹ For example, in *Allegheny*, the Court upheld the combined display of a menorah and Christmas tree because it sent a message of pluralism. In the same case, however, the Court invalidated the city's creche display because it sent a message to minority religions that government supported the Christian faith.

Justice Kennedy correctly summarized the Court's application of the endorsement test: "[t]hose religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions." *Id.* at 677. Accordingly, under the endorsement test, the Judeo-Christian faiths could not successfully challenge religious displays because they enjoy majority status in our society and could not possibly perceive the government as endorsing a different belief.

¹⁵⁰ Age has been considered a relevant factor in a number of establishment clause decisions. See, e.g., *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985) (noting that "[t]he symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited"); *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring) (distinguishing presidential proclamations from school prayer in that the former are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination); *Widmar v. Vincent*, 454

c. *Trivialization of Religion*

In addition to the overinclusiveness of the second prong, the Court's application of the prong also trivializes religion. Two arguments that uphold statutes that intertwine religion and government accomplish this unfortunate result. One argument is that the activity has become a part of the fabric of our society through historical acceptance.¹⁵¹ Thus, longstanding societal acceptance of an activity makes that activity constitutional regardless of the extent to which the statute benefits religion. A second argument is that the activity is an expression of ceremonial deism¹⁵²—meaning that since traditionally our society has been a religious society, our Presidents and government are permitted to acknowledge God. These two arguments trivialize religion, as the Court upholds statutes not because the Establishment Clause permits a certain amount of interaction between government and religion, but because the activities have endured.¹⁵³

The fabric-of-society rationale (the "fabric rationale") focuses on society's repeated historical acceptance of and continued exposure to a religious activity. For example, in *Marsh v. Chambers*,¹⁵⁴ the Court upheld a state statute that paid a chaplain to conduct prayers each morning in the legislative chambers.¹⁵⁵ The Court explained that "[i]n light of the un-

U.S. 263, 274 n.14 (1981) (noting that university students are young adults who are less impressionable than younger students).

¹⁵¹ See *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁵² See *infra* note 165 (explaining ceremonial deism).

¹⁵³ Professor Carter explains that the purpose of his book is to examine: the attitude that we as a political society hold toward religion. It is not a call to tear down the wall between church and state or to impose oppressive religious regimes on each other willy-nilly. It is an effort to understand our instincts and our rules and our rhetoric, to figure out why it is that religion is seen as worse than other forces that mold people's minds, and to try to discover whether there might be a way to preserve the separation of church and state without trivializing faith as we do today.

CARTER, *supra* note 52, at 15; see also McConnell, *supra* note 64, at 127 (stating that the Court does not object to a little religion in public life, but it must be "tamed, cheapened and secularized").

¹⁵⁴ 463 U.S. 783 (1983).

¹⁵⁵ *Id.* at 795.

ambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become a part of the fabric of our society. . . . [I]t is simply a tolerable acknowledgment of beliefs widely held among the people of this country."¹⁵⁶ The essence of this rationale is that the activity has become such an accepted part of society that it has lost its offensiveness to nonbelievers.¹⁵⁷ This premise, however, fails to consider the religious diversity of our nation. Even a widely accepted practice can be offensive to some. For example, an atheist might take offense to a chaplain opening congressional sessions with a prayer, yet the Court considers the activity nonoffensive, one that fully comports with the Establishment Clause.¹⁵⁸

¹⁵⁶ *Id.* at 792; see also *School Dist. v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (referring to the motto "In God We Trust" as one so deeply interwoven into the fabric of society that its use does not present the type of governmental involvement with religion that the First Amendment prohibits).

¹⁵⁷ The fabric rationale also has been referred to as *de facto* establishment. HOWE, *supra* note 47, at 11-12 (arguing that practices that are deeply ingrained in our society, such as legislative prayer, are "*de facto* establishments"). Although these practices have plainly religious purposes they are consistently upheld by the Court. *Id.* Occasionally, the Court attempts to explain that these activities somehow are not religious. For example, a creche depicts a holiday season and is used for commercial purposes, and accordingly does not violate the Constitution. Howe suggests that if the Court continues to allow these activities, rather than rationalizing its decisions or attempting to minimize the religious characteristics of the activity, it should simply acknowledge that *de facto* establishments are permissible. *Id.* at 11-15; see also Marshall, *supra* note 17, at 508; accord Mark V. Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 1004 (1986) (arguing that "[t]hese practices plainly have religious purposes, and no good is done by pretending . . . that the ordinary understanding of 'purpose' somehow allows a holding that these practices do not have religious purposes").

But Howe's suggestion does not solve the problems with the Court's current application of the *Lemon* test. Either an activity that advances religion is unconstitutional or it is not. Historical acceptance cannot replace constitutional principles. If these activities are permissible, then a test should be developed that clearly demonstrates why these activities comport with the Establishment Clause. More importantly, a proper test would guide courts in future cases. A "*de facto*" establishment rationale only hinders the articulation of a workable test since the Court only distinguishes, distorts or fails to apply the *Lemon* test in order to uphold these *de facto* establishment activities.

¹⁵⁸ *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); see also *Allegheny County v. ACLU*, 492 U.S. 573, 673-74 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that it "seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step

In addition to the problem of religious diversity, the fabric rationale presents constitutional concerns. Because the Constitution enumerates various permitted and forbidden state and federal activities, the Court's belief that society repeatedly has accepted an action cannot negate a constitutional prohibition of the activity.¹⁵⁹ For example, if the President singlehandedly raised taxes for a four-year period, the action would not become constitutional because Article I of the Constitution clearly dictates that Congress "shall lay and collect taxes," not the President. Moreover, actions that are not explicitly prohibited by the Constitution require courts to interpret relevant provisions of the Constitution in a manner consistent with its theme.¹⁶⁰ The Court, in applying the fabric rationale, has failed to explain why an early and continued acceptance of a practice should continue despite a constitutional theme indicating otherwise.¹⁶¹ For example, in *Marsh*, the Court did not explain how the legislative prayers, a clearly religious activity, harmonized with the Establishment Clause.

The Court also fails to apply the fabric rationale consistently.¹⁶² Not all longstanding religious activities are afforded the protection of the fabric rationale. The fabric rationale does not protect school prayer, for example, despite its presence in public schools for over 170 years.¹⁶³ In recent years, creche

with the political norm").

¹⁵⁹ See *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970) (stating that "[n]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence [or] predates it").

¹⁶⁰ Chief Justice Marshall explained that "[a] constitution . . . [by] its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819).

¹⁶¹ See *Allegheny County*, 492 U.S. at 674 (Kennedy, J., concurring in part and dissenting in part) (explaining that the fabric rationale presents constitutional problems because the *Lemon* test must be "twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past"); cf. *Walz*, 397 U.S. at 681 (attempting to establish a standard for courts to follow by stating that the more longstanding and widely accepted a practice is, the greater its impact will be on a constitutional interpretation).

¹⁶² The Court utilized the fabric rationale to uphold legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983), but did not apply it in *Engel v. Vitale*, 370 U.S. 421 (1962), where the Court invalidated school prayer despite the fact that prayers in schools predated the creation of the public educational system.

¹⁶³ See *supra* note 44.

displays on public property have been held both constitutional and unconstitutional.¹⁶⁴ The sporadic application of the fabric rationale indicates its ineffectiveness as an interpretive guide of establishment clause principles.

Similar to the fabric rationale, ceremonial deism emphasizes the historical prominence of religion in society. Indeed, in many cases the two arguments overlap.¹⁶⁵ The fabric rationale, however, focuses on the role of a particular religious activity in our society, whereas ceremonial deism highlights the role of religion itself. The fabric rationale trivializes the importance of a particular activity's religious aspects to characterize the activity as less offensive to nonadherents. Ceremonial deism trivializes religion through a process of secularization. Thus, the Court has found expressions of ceremonial deism acceptable because, over time, certain religious activities allegedly lose their religious significance. For example, society has become so accustomed to Presidents concluding their speeches with "God Bless You" that its rote recitation eventually diminished the religious significance of this activity.¹⁶⁶

¹⁶⁴ A striking inconsistency involved two challenges to creche displays. In *Lynch v. Donnelly*, 465 U.S. 668, 669 (1984), the Court utilized the fabric rationale and described the display as depicting the historical origins of a longstanding national holiday. In *Allegheny County*, 492 U.S. at 573, however, the Court did not apply the rationale and held the display unconstitutional. The primary reason for the different decisions was that in *Lynch* there were other decorations surrounding the display which detracted people's attention from the creche, whereas, in *Allegheny* there were none. The surrounding decorations should not make one creche display a part of the fabric of our society while their lack preclude another.

¹⁶⁵ "Ceremonial deism" also is referred to by scholars and commentators as civil religion or civil deism. Thomas Cooley aptly described the concept in his treatise on constitutional limitations:

[T]he American constitution contains no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires. . . . Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe. . . . No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy. . . .

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470-71 (8th ed. 1927).

¹⁶⁶ Under this rationale, President Washington's Thanksgiving Day Proclamation giving thanks to God, coins that bear the words "In God We Trust," and the

The Constitution, however, does not mandate that religion be secularized in order to be the proper subject of a state statute.¹⁶⁷

2. Proposed Second Prong

To determine whether a statute satisfies *Lemon's* second prong, the Court should perform a revised three-part inquiry. First, the Court should determine whether the statute coerces support for, or participation in, religion. This coercion standard would include direct and indirect coercion. Direct coercion would encompass statutes that secure religious adherence through intimidation or punishment—criminal or civil. Indirect coercion would encompass situations where people, such as students, have no choice but to participate in the religious

Pledge of Allegiance which refers to "One Nation Under God," are not establishments of religion.

In *Allegheny*, the Court invalidated a statute that required the reading of Bible verses or recitation of prayer at the beginning of each school day. *Allegheny*, 492 U.S. at 573. Justice Brennan pointed out that many religious people opposed the statute because they feared that compelled religious observances would eventually deteriorate into an empty formality. *Id.* at 284 n.60 (Brennan, J., concurring). Anna Quindlen discussed this phenomenon through reference to her own childhood:

I'm not making light of prayer here, but of so-called school prayer, which bears as much resemblance to real spiritual experience as that freeze-dried astronaut food bears to a nice standing rib roast. From what I remember of praying in school, it was almost an insult to God, a rote exercise in moving your mouth while daydreaming.

Anna Quindlen, *School Prayer Issue All Symbol, No Spirit*, SUN-SENTINEL, Dec. 11, 1994, at 5G.

Ceremonial deism relies on this type of desensitization to render inherently religious activities, like prayer, nonoffensive to the Establishment Clause. Thus, it is not surprising that both religious and nonreligious groups want the Court to articulate a clear standard for all establishment clause challenges.

¹⁶⁷ McConnell, *supra* note 64, at 127 ("The Court does not object to a little religion in our public life. But the religion must be tamed, cheapened and secularized."). Other courts have expressed similar concerns. In a concurring opinion in *Sherman v. Community Consolidated Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993), Judge Manion concluded that recitation of the Pledge of Allegiance in public schools is constitutional, but disagreed with the majority's rationale for this decision. He noted that a civic reference to God does not become permissible only when it has been repeated so often that "it is sapped of religious significance." *Id.* at 448. Such an approach implies that these civic references to God, when initially passed by Congress, violated the Establishment Clause because "they had not yet been rendered meaningless by repetitive use. . . . Such state action simply does not amount to an establishment of religion." *Id.* at 448.

activity.¹⁶⁸ Daily recitation of prayer in school classrooms would constitute indirect coercion because students continually would be confronted with a dilemma: participate in the prayer against their wishes or leave the classroom and face potential ridicule by peers. Reading the Bible or the Koran as literature, however, is noncoercive exposure to religion for the legitimate secular purpose of enhancing academic freedom.¹⁶⁹ This test differs from the Court's current coercion analysis because it does not rely on the students' subjective feeling of coercion but on overt manifestations of coercion.¹⁷⁰ This coercion test also would be consistent with the requirement of standing in other areas of constitutional law.¹⁷¹ For example, racial minorities who allege that they have been stigmatized by government

¹⁶⁸ A clear case of coercion occurred in Wingfield High School. The principal, Mr. Knox, allowed a nondenominational prayer to be read over the school loudspeaker during the morning announcements. The prayer read: "Almighty God, we ask that you bless our parents, teachers and country throughout the day. In your name we pray. Amen." Although the students had voted, 490 to 96 to hold the prayers, school administrators dismissed the principal. This prompted a protest by students, who walked out of classes, and by citizens, who rallied at the state capital. See *Principal in a School Prayer Dispute is Reinstated*, N.Y. TIMES, Dec. 17, 1993, at A33. The prayers constituted indirect coercion. Even though students had voted to hold the prayers, there were at least 96 students who did not want the prayers. Those students were forced to listen to the prayers every morning. This circumstance differs from the prayer in *Lee*, where the students had to listen to a short prayer once during their school career. See *infra* notes 255-80 (discussing *Lee v. Weisman*).

¹⁶⁹ Teaching religion advances academic freedom because it provides an understanding of our culture, literature, art, history and current affairs. See PFEFFER, *supra* note 30, at 361 (arguing that to omit all references to religion from schools is to neglect an important part of American life).

Although the Establishment Clause would preclude public schools from teaching denominational beliefs, they can provide much useful information about religious faiths and the important role they have played in society. Even the Supreme Court has recognized that education might not be complete without a study of comparative religions or the history of religion and its importance in society. *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

¹⁷⁰ See, e.g., *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993). In *Duncanville*, the high school basketball coach conducted team prayers on the court before and after games. Plaintiff refused to participate. The coach and school district informed her that she could stand outside the group during the prayer. She often was insulted by spectators and teammates. The court found that Doe was singled out and criticized for her religious beliefs and consequently granted the injunction to stop the prayers. *Id.* at 162-64. Under the modified *Lemon* test, these activities would constitute overt manifestations of coercion and would violate the Establishment Clause.

¹⁷¹ *McConnell*, *supra* note 64, at 164-65.

action cannot sue under the Equal Protection Clause absent actual or potential injury.¹⁷² Similarly, religious individuals who allege that the government has denigrated their faith have no claim under the Free Exercise Clause absent an actual or potential burden on the free exercise of their religious beliefs.¹⁷³ Indeed, except for establishment clause challenges, the general rule dictates that plaintiffs who suffer no personal injury "other than the psychological consequences presumably produced by observation of conduct with which one disagrees" lack standing to sue.¹⁷⁴ In the case of establishment clause challenges, an objective standard to detect coercion would preclude invalidation of statutes that plaintiffs merely dislike. A plaintiff would need to demonstrate coercion—indirect or direct—or a violation of another part of the *Lemon* test, to establish standing to sue.¹⁷⁵

The second inquiry under *Lemon*'s second prong should be whether the statute benefits religion. Benefits incidental to the statute's purpose would not be held unconstitutional.¹⁷⁶ A statute that is generally applicable to a broad class would remain constitutional even if religion also benefits.¹⁷⁷ For ex-

¹⁷² See *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen*, the plaintiffs claimed that the Internal Revenue Service's failure to enforce its rule against denying tax exempt status to racially discriminatory private schools interfered with their children's opportunity to receive education in desegregated schools. Plaintiffs did not allege that they had been denied admission to any private school. *Id.* at 737. The Court held that they lacked standing to sue because only "those persons who are personally denied equal treatment" by the challenged conduct can sue. *Id.* at 738. "[T]hey do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment." *Id.* at 755.

¹⁷³ See *Employment Div. v. Smith*, 494 U.S. 872 (1990); *supra* note 100 (discussing the Religious Freedom Restoration Act).

¹⁷⁴ *Valley Forge College v. Americans United*, 454 U.S. 464, 485 (1982) (requirement of standing focuses on party seeking to get his complaint before federal court and not on issues he wishes to have adjudicated).

¹⁷⁵ Michael McConnell, who strongly advocates a change in the Court's coercion analysis, also emphasizes that *direct* coercion cannot be the sole standard to detect establishments. Minority groups would be subject to the religious desires of the majority if the Court fails to invalidate statutes that indirectly coerce. McConnell, *supra* note 64, at 158-59.

¹⁷⁶ Courts have traditionally made this inquiry in cases involving aid to parochial schools. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985) (invalidating a New York City ordinance that paid salaries of public school employees who taught in parochial schools); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (upholding a generally applicable tax exemption statute that also benefitted churches).

¹⁷⁷ *Walz*, 397 U.S. at 672-73.

ample, a general tax deduction for non-profit organizations would still be valid even though churches also claim the deduction.¹⁷⁸ A statute, however, that solely benefits religion would be unconstitutional.¹⁷⁹

The third inquiry under *Lemon's* second prong should be whether the statute prefers one religious belief over another. Neutrality under the Establishment Clause prevents government from preferring one religion over another.¹⁸⁰ When a statute surpasses a neutral recognition of religion to the point of supporting a particular religious belief, then it becomes unconstitutional. Thus, the overall effect of the statute cannot advance one faith—for example, Christianity, Judaism or Islam—or a particular sect, to the exclusion of others.

C. *Lemon's Third Prong*

The third prong of the *Lemon* test forbids an excessive entanglement between religion and government.¹⁸¹ A statute that would require continued governmental supervision to ensure that religion is not advanced would constitute excessive entanglement. This prong addresses the concern that continued governmental supervision will impermissibly intertwine religion and government. James Madison cautioned that such a union would inevitably result in the two institutions incurring the "hatred, disrespect and contempt" of nonadherents, which ultimately would destroy government and degrade religion.¹⁸²

The Court's current third prong analysis generally produces proper results.¹⁸³ The third prong should be used only

¹⁷⁸ *Id.* at 673.

¹⁷⁹ *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (upholding statutory scheme that aided colleges through issuance of revenue bonds for projects regardless of whether the institution had a religious affiliation). *Contra* *Board of Educ. v. Mergens*, 496 U.S. 226 (1992) (invalidating a school policy that excluded religious groups from renting school buildings while other nonreligious groups were permitted to rent the facilities).

¹⁸⁰ See *supra* notes 60-61 and accompanying text.

¹⁸¹ *Lemon*, 403 U.S. at 612-13; see also *Walz*, 397 U.S. at 669.

¹⁸² *Memorial & Remonstrance*, *supra* note 47, at 304.

¹⁸³ See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (upholding statute that provided services of an interpreter to a student attending a Catholic high school); *Meuller v. Allen*, 463 U.S. 388 (1983) (rejecting an establishment clause challenge to a statute that allowed taxpayers to deduct certain

when statutes require governmental oversight of religious activities, or vice-versa. When continual oversight is required over the other institution, then there would be an unconstitutional establishment. For example, the Court properly found an excessive entanglement between religion and government in *Larkin v. Grendel's Den, Inc.*¹⁸⁴ In *Larkin*, a Massachusetts statute vested schools and churches with the power to veto the issuance of liquor licenses for businesses within a 500-foot radius of the school or church.¹⁸⁵ The power was "standardless, calling for no reasons, findings, or reasoned conclusions" for the veto.¹⁸⁶ Such a statute presents two concerns. First, the statute delegated traditional governmental functions to a religious body. Second, the statute did not specify that the religious organization act in a religiously neutral manner, as mandated by the Establishment Clause. Consequently, the statute resulted in an excessive entanglement between religious and governmental functions.

In contrast, in *Zobrest v. Catalina Foothills School District*, the Court properly decided that providing services of an interpreter under the Individuals with Disabilities Act to a student attending a sectarian school did not violate the Establishment Clause.¹⁸⁷ *Zobrest* simply involved a generally applicable law that incidentally benefitted religion.¹⁸⁸ Even though a state-paid interpreter would be on the premises of a sectarian school, this did not constitute an excessive entanglement between religion and government because the interpreter merely worked at the sectarian school without necessitating any further administrative decisions by either the government or religion.

educational expenses in computing their state income tax, even though the vast majority of the deductions went to parents whose children attended sectarian schools); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating a statute that vested in churches and schools the power effectively to veto applications for liquor licenses within a 500 foot radius of the church or school).

¹⁸⁴ 459 U.S. 116 (1982).

¹⁸⁵ *Id.* at 117.

¹⁸⁶ *Id.* at 125.

¹⁸⁷ 113 S. Ct. 2462 (1993).

¹⁸⁸ *Id.* at 2464-65.

D. *The Year in Retrospect*

On June 27, 1994, the Supreme Court released its most recent establishment clause decision, *Board of Education v. Grumet*.¹⁸⁹ This case can be added to the long list of post-*Lemon* establishment clause decisions that not only confuse the constitutional principles involved but also lend no guidance for future cases.¹⁹⁰ Despite the divergent views in *Grumet*, one consistency throughout the opinions was that the Court had little idea of how to apply the *Lemon* test. For example, Justice Souter's majority opinion refers to a "fusion of governmental and religious functions" as well as a "primary and 'principal' effect of advancing religion."¹⁹¹ Although these phrases bring to mind the second and third prong of the *Lemon* test, the

¹⁸⁹ 114 S. Ct. 2481 (1994).

¹⁹⁰ In *Grumet*, the New York legislature passed a statute that provided that the Village of Kiryas Joel would constitute a separate school district and enjoy all the powers and duties of a union-free school district. Because the residents of Kiryas Joel interpret the Torah strictly, and limit their contact with nonadherents, most children are educated at private religious schools. These schools, however, do not provide services for handicapped children. The need for these services prompted the creation of the separate school district.

The Court held that the division violated the Establishment Clause. The majority decision was written by Justice Souter and joined by Justices Blackmun, Stevens, O'Connor and Ginsburg. Justices Stevens, O'Connor and Kennedy each filed separate concurrences, while Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined.

The majority's decision primarily relied on two factors. First, the Court was not assured that the legislature would exercise its governmental authority in a religiously neutral manner: there "was no assurance that the next similarly situated group seeking a school district of its own will receive one." *Id.* at 2487. Because Kiryas Joel was not one of many communities receiving special school district laws, and because review of a legislature's failure to enact a special law in the future would be impossible, the Court could not ensure that the principle of neutrality would be upheld. Second, the Court pointed out that this statute could not be saved as an accommodation of religious needs because "an otherwise unconstitutional delegation of political power to a religious group [cannot] be saved as a religious accommodation." *Id.* at 2493. Consequently, the statute was unconstitutional. "It delegates a power this Court has said 'ranks at the very apex of the function of a State,' to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment." *Id.* at 2494 (citations omitted).

¹⁹¹ *Id.* at 2488 (quoting *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982)).

majority decision did not explicitly use the *Lemon* test as a guiding principle.¹⁹² Justice O'Connor, in her concurring opinion, specifically stated that "the Court's opinion does not focus on the establishment clause test . . . set forth in *Lemon*."¹⁹³ She suggested different categories of establishment clause cases with different tests for each.¹⁹⁴ Justice Kennedy emphasized that the Establishment Clause forbids governmental line-drawing based on religious beliefs as an unconstitutional preference of religion.¹⁹⁵ Justice Scalia, like Justice O'Connor, advocated different establishment clause analyses depending on the issue, but based his position on the longstanding traditions of the people and would not leave the Court to devise tests in an evolutionary fashion.¹⁹⁶

The Court's most recent failure to articulate a clear standard for the Establishment Clause merely emphasizes the need for a test that would properly detect unconstitutional establishments. This year alone, there were over seventy-five federally reported establishment clause decisions.¹⁹⁷ Additionally, the

¹⁹² Indeed, the majority only referred to *Lemon* on two occasions in "see also" references. *Id.* at 2515 (Scalia, J., dissenting).

¹⁹³ *Id.* at 2498.

¹⁹⁴ Because the Establishment Clause may operate differently in different contexts, Justice O'Connor proposed creating various tests. For example, one test would apply to government speech on religious topics, while another would pertain to governmental decisions about matters of religious doctrine and religious law. *Id.* at 2499-2500 ("setting forth a unitary test for a broad set of cases may sometimes do more harm than good").

¹⁹⁵ *Grumet*, 114 S. Ct. at 2504.

¹⁹⁶ *Id.* at 2515. Peculiarly, Justice Blackmun concurred separately to point out that the Court had relied on *Lemon* in its decisionmaking. In fact, as Justice Scalia noted, the majority referred only twice to *Lemon*.

¹⁹⁷ These cases involve some of the same issues that are litigated year after year, as well as modern twists to old controversies. Litigants have challenged prayers at graduation. *See Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994). Various religious, as well as non-religious groups, challenged public school curricula. *See, e.g., Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994). Students challenged the Oklahoma State University Board of Regents' suspension of the screening of the film "The Last Temptation of Christ." *Cummins v. Campbell*, 44 F.3d 847 (10th Cir. 1994). Community members challenged the constitutionality of a sign that stated "THE WORLD NEEDS GOD", which hung over the main entrance to the county courthouse. *Doe v. Montgomery*, 41 F.3d 1156 (7th Cir. 1994). A school board denied a religious club access to public school property. *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994). And

Supreme Court recently granted certiorari in another first amendment case, *Rosenberger v. Rector and Visitors of the University of Virginia*.¹⁹⁸ Although the circuit court in *Rosenberger* primarily rested its decision on the Free Speech Clause, the decision also touched on whether the disputed conduct constituted an establishment clause violation. Thus, the Court is presented with yet another opportunity to modify its application of the *Lemon* test and to bring establishment clause jurisprudence into line with the underlying principles that prompted its enactment.

III. CASE LAW EXAMINED: PUBLIC EDUCATION AND RELIGION

The Court's current *Lemon* analyses illustrate the test's deficiencies. The lack of a clear standard for all establishment clause challenges has produced results that forbid nearly all instances of religion in public schools. Religion, however, is a "pervasive and enduring human phenomenon which is an appropriate, if not desirable, subject of secular study."¹⁹⁹ Indeed,

it is the responsibility of educators to "foster mutual understanding and respect for the rights of all individuals regarding their beliefs, values and customs." In a nation as diverse as America, it is impos-

during the December holiday season, litigants challenged menorah and Christmas tree displays. See, e.g., *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 870 F. Supp. 1450 (S.D. Ind. 1994).

A striking example of the lower courts' need for guidance is the Ninth Circuit's decisions in *Peloza v. Capistrano Unified School District*. In the Ninth Circuit's first *Peloza* decision, it remanded the establishment clause claim for a determination of whether the school district was establishing the religion of evolutionism or atheism in violation of the First Amendment. See *Peloza*, 37 F.3d 517 (9th Cir. 1994). The second decision then denied the existence of a religion based on evolutionism or secular humanism. See *id.* at 519. The *Peloza* decisions emphasize that a definition of religion is essential to establishment clause decisions. Absent a broad definition that encompasses belief systems like secular humanism, the establishment clause jurisprudence will always be biased against "traditional" religious beliefs. A Christian will not be able to challenge school conduct or curriculum that advances nontraditional belief systems like secular humanism because the courts do not consider such belief systems to be religions. See also *supra* notes 148-50 (discussing the *Lemon* test's current bias toward majority religions).

¹⁹⁸ *Rosenberger v. Rector and Visitors*, 18 F.3d 269 (4th Cir.), cert. granted, 115 S. Ct. 417 (1994).

¹⁹⁹ *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929, 939 (D.N.J. 1993).

sible to overestimate the secular importance of teaching this lesson. We learn this lesson not by being offended or threatened by the religious symbols of others, but by understanding the meanings of those symbols and why they have the capacity to inspire intense emotions. If our public schools cannot teach this mutual understanding and respect, it is hard to envision another societal institution that could do the job effectively.²⁰⁰

Because religion holds such an important place in society, public schools should not preclude exposure to religious beliefs. In fact, a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."²⁰¹ The Court must focus on the constitutional line between the educational goal of promoting a student's knowledge of and appreciation for this nation's cultural and religious diversity and the impermissible endorsement of religion forbidden by the Establishment Clause.

Three recent cases illuminate the defects in the Court's application of the *Lemon* test. In *Wallace v. Jaffree*,²⁰² the Court invalidated Alabama's "moment of silence" statute, which had permitted school teachers to tell their students that the designated time could be used for prayer or meditation.²⁰³ In *Edwards v. Aguillard*,²⁰⁴ the Court affirmed a summary judgment motion invalidating Louisiana's Balanced Treatment Act. This Act had mandated the teaching of creationism when teachers chose to include evolution in their science curriculum.²⁰⁵ Finally, in *Lee v. Weisman*,²⁰⁶ the Court held that graduation prayers conducted by a member of the clergy were unconstitutional.²⁰⁷

Changes to the underlying inquiries of the *Lemon* test, while retaining the three original prongs, would produce a clear standard for all establishment clause challenges and

²⁰⁰ *Id.*

²⁰¹ *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992).

²⁰² 472 U.S. 38 (1985).

²⁰³ *Id.* at 61; see *infra* notes 203-31 and accompanying text (discussing the *Wallace* decision).

²⁰⁴ 482 U.S. 578 (1987).

²⁰⁵ *Id.* at 581-82; see *infra* notes 232-54 and accompanying text (discussing the *Edwards* decision).

²⁰⁶ 112 S. Ct. 2649 (1992).

²⁰⁷ *Id.* at 2661; see *infra* notes 255-81 and accompanying text (discussing the *Lee* decision).

create the proper balance between the free exercise of religion and an establishment of religion. The modified *Lemon* test would require:

1. A Legitimate Secular Purpose
 - a. the legislative body must demonstrate a legitimate secular purpose for enacting the statute; and
 - b. the statute must be capable of serving the secular purpose; and
2. Neither Advancement nor Inhibition of Religion
 - a. no coercion;
 - b. no direct benefit to religion; and
 - c. no preference of a particular faith or sect; and
3. No Excessive Entanglement of Government and Religion

Only statutes that satisfy all three prongs would be constitutional under the Establishment Clause.

Reevaluation of *Wallace*, *Edwards* and *Lee* under the modified *Lemon* test demonstrates its feasibility and utility. The statutes invalidated in *Wallace* and *Edwards* would be upheld, while the Court's decision in *Lee* prohibiting graduation prayers would remain unchanged. Because a faulty analysis can occasionally produce the proper result, the results should not simply be compared; rather, the analyses that led to the decisions should be evaluated. The modified test would produce results that comport with the First Amendment while establishing clear guidelines for lower courts and state legislators.

A. *Wallace v. Jaffree*²⁰⁸

1. The Supreme Court's Decision

In 1978, Alabama enacted a "moment of silence" statute that provided for a period of silence at the beginning of each school day.²⁰⁹ Subsequently, in 1981, the state enacted a sim-

²⁰⁸ 472 U.S. 38 (1985).

²⁰⁹ Alabama Code § 16-1-20 (Supp. 1984) provides:

At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities

ilar statute that provided explicit instructions for students. These instructions stated that the time could be used for "meditation or voluntary prayer."²¹⁰ Plaintiffs did not contest the constitutionality of the first statute, but argued that the second was impermissible because it specifically stated that the time could be used for prayer.²¹¹

The Supreme Court held the second statute unconstitutional for lack of a legitimate secular purpose.²¹² To support this conclusion, the Court first looked at the statute's language. The 1981 statute differed in three ways from its predecessor: (1) it allowed one minute of meditation for all grades rather than only grades first through sixth; (2) it stated that schools "may" provide a moment for meditation instead of "shall"; and (3) it specifically stated that the time could be used for "meditation or voluntary prayer" rather than simply "meditation."²¹³ The Court found the inclusion of the words "voluntary prayer" to be an indication that the state intended to characterize prayer as a favored practice.²¹⁴ Moreover, the Court held, because students were free to pray under the language of the first statute, the second statute, which specifically referred to prayer, had the effect of endorsing religion.²¹⁵

engaged in.

472 U.S. at 40.

²¹⁰ Alabama Code § 16-1-20.1 provides:

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

472 U.S. at 40.

²¹¹ *Id.* at 60-61.

²¹² *Id.* at 56. A statute must satisfy all three prongs to withstand an establishment clause challenge. Thus, in this case, the Court's determination that the statute lacked a clearly secular purpose dispensed with the need for consideration of the second and third prongs of the *Lemon* test. *Id.* at 55.

²¹³ *Id.* at 58.

²¹⁴ *Wallace*, 472 U.S. at 60.

²¹⁵ Alabama's governor, George C. Wallace, argued that the second statute was not an establishment of religion, but merely an attempt to accommodate the free exercise of religious beliefs. *Id.* at 57 n.45. The Court rejected this argument, however, because government cannot pass laws to accommodate the free exercise of religion absent a showing that current law burdens the free exercise of one's chosen beliefs. *Id.* at 61. In this case, no statute or rule prevented students from praying during the original moment of silence statute, so the second statute, ex-

Consequently, the statute lacked a legitimate secular purpose.²¹⁶

This analysis, however, is improper under the the *Lemon* test, because it merges the first and second prongs.²¹⁷ The second prong, not the first, should focus on the effect of the statute. Thus, any inquiry into the effect of the statute is irrelevant and improper under the first prong. Yet, the Court concluded in *Wallace* that the statute must have lacked a legitimate secular purpose because it endorsed religion.²¹⁸ The Court also improperly relied on personal motivations of the statute's sponsor to invalidate the act. The Court stated that to ascertain the purpose of the statute, the Court must ask whether the "government's actual purpose [was] to endorse or disapprove of religion."²¹⁹ The *Wallace* Court, however, considered only the personal motivations of the statute's sponsor and that the second statute did not serve "any secular purpose that was not fully served [by the first statute]."²²⁰ It failed to perform any inquiry into possible state interests served by the second statute.²²¹ The Court's entire purpose analysis was

pressly providing that the time could be used for prayer, was not an accommodation of the free exercise of religion, but rather, an advancement of religion. *Id.* at 57 n.45.

This presents an interesting situation. The Court has recognized that a legitimate secular purpose for keeping religion out of schools is to preclude an establishment clause violation. However, there is no converse theory that would allow religion in schools based on the school's accommodation of the free exercise of religion. This system is structured to keep religion out of schools, which violates the neutrality that government is to maintain toward religion. See *Board of Educ. v. Mergens*, 496 U.S. 226, 229 (1990) (acknowledging that an attempt to prevent an establishment clause violation is a legitimate secular purpose); see also *supra* note 137.

²¹⁶ *Wallace*, 472 U.S. at 60.

²¹⁷ See *supra* notes 80-105 and accompanying text (discussing the current first-prong analysis).

²¹⁸ *Wallace*, 472 U.S. at 59.

²¹⁹ *Id.* at 56 n.42 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); see *supra* notes 139-50 and accompanying text (discussing the endorsement test).

²²⁰ 472 U.S. at 59; see also *DRAKEMAN*, *supra* note 32, at 121. Drakeman argues that the Court's concern should not be whether a bill's sponsors proclaimed their religious beliefs on the floor of the legislature but rather what the law itself does and how it is applied. See *supra* note 95 (discussing Drakeman's concerns with a first-prong analysis that relies on personal motivations of the legislators).

²²¹ 472 U.S. at 77 ("In finding that the purpose of [the statute] is to endorse voluntary prayer during a moment of silence, the Court relies on testimony elicited

improper.

2. *Wallace* Properly Decided

When properly analyzed, the meditation statute in *Wallace* would satisfy the *Lemon* test. One legitimate secular purpose for "moment of silence" statutes is the state's interest in maintaining orderly classrooms.²²² The Alabama statute served this purpose by using the moment of silence to calm students at the beginning of the day. Thus, the statute satisfies *Lemon*'s first prong because the legislature had a legitimate secular purpose for enacting the statute and the statutory scheme could serve that purpose.

The Court noted that the second statute lacked a secular purpose because it did not serve any secular purpose not served already by the first statute.²²³ This argument is incorrect. Students were unsure whether the first "moment of silence" statute permitted silent prayer, so the legislature enacted the second statute to clarify that prayer was permissible.²²⁴ Thus another legitimate secular purpose merely could have been to inform students that the time could be used to accommodate their religious desires to pray during the silent period. Second, the earlier statute that served the same secular purpose is irrelevant. Clearly the Court could not have intended to set a precedent that legislatures cannot amend their

from state Senator Donald G. Holmes during a preliminary injunction.").

²²² This interest is only one possible legitimate state interest. Another legitimate secular purpose is that schools should be allowed to provide a few moments of silence to accommodate those who would like to pray during the school day. In *Wallace*, the Court did not evaluate this secular purpose because the original statute, with no reference to prayer, was not challenged by plaintiffs. The Court invalidated the second statute, which mentioned prayer, because it did not serve any secular purpose not already being served by the first statute—whatever this purpose may have been. 472 U.S. at 59-60. Thus, neither the district court, circuit court, nor Supreme Court investigated the purpose served by the first statute. See *Id.* at 38; *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983); *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983).

²²³ 472 U.S. at 57.

²²⁴ *Id.* 472 U.S. at 87 (Burger, C.J., dissenting) ("all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill was to clear up a wide-spread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building").

statutes.²²⁵

The statute also satisfies the second prong of the *Lemon* test. The plaintiffs did not indicate that they were coerced to pray during the meditation statute.²²⁶ In fact, the principle plaintiff, Ishmael Jaffree, stated that the statute was not implemented in a way that had suggested prayer was a favored activity.²²⁷ This does not constitute direct or indirect coercion.²²⁸ A "moment of silence" statute can, however, have a coercive effect. For example, if most students bowed their heads and clasped their hands in prayer during the moment of silence the nonparticipant would realize that others were using the time for religious purposes. While this alone would not be coercive, if the school permitted students to harass the nonparticipant it would constitute indirect coercion. The student would feel as though religion is a favored practice, based upon objective manifestations of this coercion.²²⁹ The Alabama statute, however, did not present this type of situation.

Furthermore, religion did not receive a direct benefit un-

²²⁵ Cf. *id.* at 85 (Burger, C.J., dissenting) ("To suggest that a moment of silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion.").

²²⁶ Justice O'Connor stated that "[i]t is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful school children." *Id.* at 73 (O'Connor, J., concurring).

²²⁷ Indeed, Ishmael Jaffree stated, "I probably wouldn't have brought the suit just on the silent meditation or prayer statute. . . . If that's all that existed, that wouldn't have caused me much concern, unless it was implemented in a way that suggested prayer was the preferred activity." *Id.* at 90 n.5. He brought the action because there was a third statute providing that a prayer may be read in the classrooms each morning. *Id.* at 40-41 n.3. The Supreme Court summarily affirmed the Court of Appeals' holding that this third statute was invalid. Thus, although Wallace is remembered for invalidating a moment-of-silence statute that provided for voluntary prayer, the case may never have been brought but for the legislature's providing for prayers to be read each morning. *Id.* at 62 n.1 (Powell, J., concurring).

Justice White also noted that if the teacher had been asked by a student whether he was allowed to pray, the teacher could constitutionally answer affirmatively. Thus, the legislature merely provided an answer to the question in advance. This prevents the child, who would have had to publicly ask the question, from standing out among his peers, which in turn alleviates the influence of peer pressure that deeply concerned the majority. *Id.* at 91 (White, J., dissenting).

²²⁸ See *supra* notes 168-80 and accompanying text (discussing a proper second-prong analysis).

²²⁹ See *supra* note 168 (discussing a case that presents unconstitutional coercion).

der the statute. For example, religious groups did not receive funding or use state facilities to the exclusion of others.²³⁰ Finally, one faith was not preferred over another. Although prayer is a religious activity, it does not demonstrate a preference for one faith over another.²³¹ Accordingly, the Supreme Court improperly invalidated the statute.

B. *Edwards v. Aguillard*²³²

1. The Supreme Court's Decision

The Louisiana legislature enacted a statute that had forbidden the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of creation-science. The Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act (the "Act") did not require the teaching of either theory unless the other was taught.²³³ The district court granted summary judgment to plaintiffs, holding the Act facially invalid for lack of a clear secular purpose,²³⁴ and the Court of Appeals affirmed.²³⁵ On appeal, the Supreme Court determined that the purpose of the Act was to endorse religion and therefore was unconstitutional.²³⁶

In *Edwards*, Louisiana officials argued that the Act served the legitimate secular purpose of advancing academic freedom by providing a more comprehensive science curriculum.²³⁷

²³⁰ See *supra* notes 176-78 and accompanying text.

²³¹ Although prayer is a religious activity, all prayers should not be precluded from public schools. Prayer is "a reverent petition made to God or another deity." AMERICAN HERITAGE DICTIONARY 976 (2d college ed. 1991). All religions practice some form of prayer. Thus, under appropriate circumstances prayers would be constitutional. For example, a nondenominational prayer, like the one in *Lee*, exposes students to prayer in a noncoercive setting with no preference of one faith over another.

²³² 482 U.S. 578 (1987).

²³³ *Id.* at 581.

²³⁴ 634 F. Supp. 426, 427 (E.D. La. 1985).

²³⁵ 765 F.2d 125 (5th Cir. 1985).

²³⁶ 482 U.S. at 595 (noting that "because the primary purpose of the Creationism Act was to endorse a particular religious doctrine, the Act furthers religion in violation of First Amendment").

²³⁷ *Id.* at 586.

The Court relied on a narrow interpretation of academic freedom to reject this argument. Specifically, the Court adopted the Court of Appeals' view that academic freedom meant flexibility for teachers to exercise their professional judgment in selecting course material.²³⁸ Thus, prohibiting the teaching of evolution or requiring the teaching of creation-science would have limited the teacher's flexibility in curriculum decisions.

Justice Scalia, writing for the dissent, articulated another interpretation of academic freedom that the statute would serve. He suggested that academic freedom meant freedom for students rather than for teachers.²³⁹ He noted that the Act's legislative history gives ample support for this view. Representative Sunderland stated that the students should be presented with scientific data, as part of an unbiased curriculum so that they can make up their own mind as to the origin of humankind.²⁴⁰ Representative Morris asserted that a student could not make an intelligent decision about the origin of life unless he or she is informed of differing theories.²⁴¹ Many legislators were not interested in teaching religion in schools, but in affording students the opportunity to hear more than one theory of the origins of mankind.²⁴² Thus, according to Justice Scalia, academic freedom ensures that students are free to decide for themselves "how life began, based upon a fair and balanced presentation of the scientific evidence."²⁴³

Although Justice Scalia's definition of academic freedom provided a clear secular intent for the Act, the Court refused to adopt it. Indeed, the Court agreed that teaching a variety of scientific theories about the origins of humankind, including creation-science, could be permissible under the First Amendment.²⁴⁴ But, this variety can only be taught, the Court argued, if the basis for teaching the scientific theories is a "clear

²³⁸ 765 F.2d at 1257.

²³⁹ Justice Scalia explained that the legislature "did not care *whether* the topic of origin was taught; it simply wished to ensure then *when* the topic was taught, students would receive 'all of the evidence.'" *Edwards*, 482 U.S. at 627-28 (Scalia, J., dissenting).

²⁴⁰ *Id.* at 631.

²⁴¹ *Id.* at 632.

²⁴² *Id.*

²⁴³ *Id.* at 627-28; see *supra* note 109.

²⁴⁴ *Edwards*, 482 U.S. at 594.

secular intent of enhancing the effectiveness of science instruction.²⁴⁵ Thus, despite the existence of this legitimate secular purpose for the statute, the Court invalidated the Act because some legislators supported the statute for religious reasons.²⁴⁶

As in *Wallace*, the Court incorrectly considered personal motivations relevant to a first-prong inquiry. To uphold the statute, the Court required legislators to manifest a secular purpose, devoid of *any* religious endorsements.²⁴⁷ In this case, some legislators, primarily the bill's sponsors, espoused a religious purpose for supporting the statute. For example, Senator Keith repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution was antithetical to his beliefs.²⁴⁸ The Senator's personal reasons for supporting the Act, however, should not have rendered the Act unconstitutional when the legislature had articulated a legitimate secular purpose.²⁴⁹

²⁴⁵ *Id.*

²⁴⁶ The Court acted contrary to general rules of statutory interpretation when it invalidated the Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act (the "Act"). Where there are two possible interpretations of a statute, one that would render the statute unconstitutional and the other that renders it valid, the Court's duty is to "adopt that which will save the act." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 20 (1937); *see also* *Meuller v. Allen*, 463 U.S. 388, 394-95 (1983) (noting that courts are reluctant to attribute unconstitutional motives to states, particularly when there is a plausible secular purpose for the statute).

²⁴⁷ *Edwards*, 482 U.S. at 587; *cf. id.* at 599 (Powell, J., concurring) (stating that the mere existence of religious purposes for enacting a statute is insufficient to invalidate a statute; only if the religious purpose predominates should a court find a statute unconstitutional).

²⁴⁸ *Id.* at 592.

²⁴⁹ *See supra* note 98. The Court also relied on evidence of alleged discrimination in determining that the statute did not further its secular purpose. The Act required that curriculum guidelines be developed for creation-science, but established no comparable guides for evolution. The Act also forbade school boards to discriminate against anyone who chose to teach creation-science but failed to protect those who chose to teach evolution. Further, only creation-scientists could serve on the panel that provided resource services. *Id.* at 588.

Justice Scalia pointed out, however, that the Court failed to consider the current standards in public education in relying on these factors to make a determination that the Act was unconstitutional. Louisiana teachers who taught creation-science prior to the Act were scorned by most educators. Classrooms had ample evolution materials available, but a lack of similar guides for classroom instruction of creation-science. Thus, in seeking to achieve a balanced curriculum,

2. *Edwards* Properly Decided

When properly analyzed, the statute at issue in *Edwards* satisfies the *Lemon* test. The school argued that the Act ensured academic freedom.²⁵⁰ Academic freedom is a legitimate secular purpose, and a statute that mandates the inclusion of more than one theory on the origin of humankind could further this purpose.²⁵¹ Presenting students with two theories allows them to make an informed choice on this issue and educates them about the diversity of beliefs that exists in society. Thus, the Act would satisfy *Lemon*'s proposed first prong. Further, that schools should be allowed to teach creationism because of the importance of religion in our society provides an additional legitimate secular purpose for the Act. Even if scholars disagree on whether creationism constitutes a valid science that should be included in the science curriculum, it should be included somewhere in the curriculum because schools serve an important role in teaching our children about their society.

The statute in *Edwards* also facially satisfies the second prong of the *Lemon* test. Because the Court affirmed a summary judgment motion to invalidate the Act, a limited amount of

the legislators did not discriminate by protecting only those teachers who were suffering from discrimination. Moreover, ensuring that curriculum guidelines be developed for creation-science did not evidence a bias because teachers had ample material on evolution. *Id.* at 630-31 (Scalia, J., dissenting).

In addition to the improper application of the first prong of the *Lemon* test, the determination that the statute was unconstitutional should not have been made on a motion for summary judgment. The mere existence of two possible interpretations, with legislative history supporting both, presented a genuine issue of material fact which precluded a finding as a matter of law that the statute violated the Establishment Clause. *See* FED. R. CIV. P. 56. In fact, Justice Scalia expressed astonishment at the Court's willingness to grant summary judgment against the state. "*Infinitely less* can we say (or should we say) that the scientific evidence for evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislation's stated purpose must be a lie." *Edwards*, 482 U.S. at 634 (Scalia, J., dissenting).

²⁵⁰ *Edwards*, 482 U.S. at 586.

²⁵¹ *See supra* note 109. To ensure academic freedom, schools could, for example, choose to: (1) merely acknowledge the existence of varying theories on the origins of humankind and leave any in-depth coverage to individual inquiry by the student; or (2) provide a broad overview of competing theories. PFEFFER, *supra* note 30, at 361-62.

facts are available on record.²⁵² Consequently, to determine definitively whether the statute as applied would satisfy the second prong is difficult. Nevertheless, the Act certainly could satisfy the second prong. A science class that includes creationism in its curriculum, without advocating the veracity of the theory, is not coercive. Students do not have to believe the theory, just as students currently do not have to believe the evolutionary theory taught in classrooms throughout the country. If the school permitted students to harass those who disbelieved the theory, however, then this harassment could constitute indirect coercion.²⁵³

Furthermore, in *Edwards*, religion did not receive a direct benefit under the statute. Creationism, which is customarily considered a religious theory, received the same treatment as other theories on the origin of humankind. Moreover, the statute did not prefer one faith over another.²⁵⁴ Thus, the statute satisfied the *Lemon* test and should have been upheld.

C. *Lee v. Weisman*²⁵⁵

1. Supreme Court's Decision

A school board resolution permitted principals in the Providence, Rhode Island public school system to invite members of

²⁵² See *Edwards*, 482 U.S. at 578; *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985); *Aguillard v. Treen*, 634 F. Supp. 426 (E.D. La. 1985).

²⁵³ See *supra* note 169 and accompanying text (providing examples of direct and indirect coercion).

²⁵⁴ Evolution and creationism are widely accepted as the two competing theories on the origins of humankind. If, however, in the future a third theory enters the debate, then schools could determine whether this should also be discussed in the classroom.

Great controversy still rages over the inclusion of creationism and evolution in the school curriculum. For example, in 1993, the school board in Vista, California, voted three to two to include creationism in the school curriculum. The Board President, who voted to include creationism, said that her constituents kept asking why evolution was being taught as fact. A board member who voted against the inclusion stated that teaching creationism is illegal. *Board Allows Teaching of Creationism*, WASH. POST, Aug. 15, 1993, at A4. This illustrates the type of uncertainty and controversy surrounding religion in public education. See *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (dismissing high school biology teacher's claim that school's requirement that he teach evolution while barring discussion of creationism violated the Establishment Clause).

²⁵⁵ 112 S. Ct. 2649 (1992).

the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and high schools.²⁵⁶ Robert Lee, principal of Nathan Bishop Middle School, invited Rabbi Leslie Gutterman to perform graduation prayers. Pursuant to customary school procedures, the principal provided the Rabbi with a pamphlet entitled "Guidelines for Civic Occasions," which recommended that public prayers be composed with "inclusiveness and sensitivity."²⁵⁷ Plaintiffs, fourteen-year-old Deborah Weisman and her father, challenged the school district's policy as a violation of the Establishment Clause.

Defendants, the school principal and the Providence School District, argued that this action was not an establishment of religion but an opportunity for students to participate in a recognition of God on an important occasion.²⁵⁸ The defendants argued that the guidelines for the content of the prayers were a good faith attempt to ensure that the sectarianism which is "often the flashpoint for religious animosity be removed from the graduation ceremony."²⁵⁹ Defendants pointed out that for many people graduation is a significant occasion that requires "recognition, however brief, that human achievements cannot be understood apart from their spiritual essence."²⁶⁰ Moreover, the prayers were merely an exposure to speech and ideas that exist in a pluralistic society.²⁶¹

²⁵⁶ *Id.* at 2652.

²⁵⁷ *Id.* The Court noted that the principal is a school official and as such his actions were imputed to the state for constitutional determinations. *Id.* at 2657.

²⁵⁸ The Court recognized the importance of the occasion, but used this fact to invalidate the prayer. It acknowledged that graduation is a time for "impressing upon the young person the role" that he or she is to assume in the community. *Id.* at 2659. Thus, a student should not be unwillingly exposed to religious exercises. To do so would convey a message that the First Amendment's guarantee against compelled conformity with a religious exercise is not an important principle. *Id.* at 2658-60. It seems odd, however, that the prayers were prohibited because students felt compelled to remain silent during the prayers. The Court expressly recognized that graduation is a time for students to assume their role in the community. *Id.* at 2659. Yet, most members of the community would realize that remaining silent during the prayer merely demonstrated respect for others' beliefs, not a state advancement of religion.

²⁵⁹ *Id.* at 2656.

²⁶⁰ *Id.* at 2659-60.

²⁶¹ *Id.* at 2657. Petitioners explained that "endur[ing] the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of

The district court found that the practice violated the second prong of the *Lemon* test and, therefore, the court did not address the other prongs.²⁶² The Court of Appeals affirmed.²⁶³ The Supreme Court, like the district court, only examined the second prong and concluded that the school's involvement with religion was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in public schools."²⁶⁴ The Court stated that the young graduates who objected to the action felt induced to conform with the religious activity.²⁶⁵

To invalidate the resolution, the Court placed great weight on the alleged coercive nature of prayers at graduation ceremonies to invalidate the resolution. The Court compared the graduation prayers in *Lee* to the legislative prayers upheld in *Marsh v. Chambers*²⁶⁶ and acknowledged various differences that provided a foundation for invalidating the graduation prayers.²⁶⁷ First, in *Lee*, students were exposed to prayer in a setting where they could not comfortably and freely leave. This restriction constituted a greater coercive influence than in *Marsh*, where legislators were free to leave if they wished.²⁶⁸ Second, school officials retained a high degree of control over all aspects of the graduation ceremony, which left students with no real choice but to submit to its content.²⁶⁹ Third, the

a tolerant citizenry." *Id.*

²⁶² 728 F. Supp. 68, 71 (D.R.I. 1990).

²⁶³ 908 F.2d 1090 (1st Cir. 1990).

²⁶⁴ *Lee*, 112 S. Ct. at 2658-60 (what seemed nothing more than a reasonable request that nonbelievers respect believers religious practices appeared to a nonbeliever as an attempt to "employ the machinery of the state to enforce a religious orthodoxy").

²⁶⁵ *Id.* at 2661. The Court's decision would have been correct if students had actually been induced to conform with the prayers. The students, however, were not induced to pray, but merely to remain silent during the short prayers. These circumstances do not constitute coercion and should not be sufficient to invalidate religious activities. See *supra* notes 168-80 and accompanying text (discussing the proper second-prong analysis).

²⁶⁶ 463 U.S. 783 (1983).

²⁶⁷ *Lee*, 112 S. Ct. at 2660; see *supra* notes 162-64 (discussing the inconsistency of the Court's prayer cases).

²⁶⁸ *Lee*, 112 S. Ct. at 2660; see *supra* note 23 (discussing the facts of *Marsh*); cf. *Sherman v. Community Consolidated Sch. Dist.*, 980 F.2d 437, 439 (7th Cir. 1992) (holding that schools may lead students in the Pledge of Allegiance, so long as students are free not to participate), *cert. denied*, 113 S. Ct. 2439 (1993).

²⁶⁹ *Id.* at 2660.

prayers in *Lee* were presented in an atmosphere where fellow students exerted subtle pressures to conform.²⁷⁰

Defendants asserted, and Justice Scalia agreed in his dissent, that in our society standing or remaining silent during prayers does not constitute coerced religious adherence, but merely signifies respect and tolerance for the beliefs of others.²⁷¹ The majority, however, refused to accept this argument and stated:

[F]or the dissenter of high school age, who has a reasonable perception that she is being forced . . . to pray . . . the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.²⁷²

Thus, the Court afforded greater weight to the possibility that a dissenter's silence during a nonsectarian prayer would be viewed as adherence to religion rather than to the desire of some to hear a prayer at the graduation ceremony.²⁷³

The Court correctly determined that a clergy-led prayer at high school graduations violated the Establishment Clause, but utilized a faulty analysis to arrive at this conclusion. The decision was correct because a prayer conducted by a member of a particular faith favors one faith over another.²⁷⁴ The coercion analysis adopted in *Lee*, however, is erroneous because it took too many subjective factors into consideration. Such an analysis renders almost all governmental interaction with religion unconstitutional.²⁷⁵ The Establishment Clause does not re-

²⁷⁰ *Id.* at 2658 (noting that although the coercion was subtle and indirect, to a student faced with peer pressure it was "as real as any overt compulsion"); see *supra* notes 128-38 and accompanying text (discussing the relevance of subjective feelings in a coercion analysis).

²⁷¹ 113 S. Ct. at 2681-82 (Scalia, J., dissenting).

²⁷² *Id.* at 2658.

²⁷³ Once again the Court's analysis failed to strike the proper balance between the competing interests of the Free Exercise and Establishment Clauses. See *supra* notes 78, 100, 111.

²⁷⁴ See *infra* note 280 (providing two recent cases that allow student-led, instead of clergy-led, prayers at graduation ceremonies).

²⁷⁵ See *supra* notes 117-38. Surprisingly, in *Lee* the Court barely performed the

quire this result.

2. *Lee* Properly Decided

When properly analyzed, the school board resolution should be held unconstitutional, but not because the prayers were coercive. The legitimate secular purpose for the resolution was to accommodate those who believed that an important occasion, like graduation, should be acknowledged with at least a brief, nondenominational prayer.²⁷⁶ The resolution in *Lee* serves this purpose.

The resolution as implemented, however would fail the second prong of the *Lemon* test. The principal selected a member of a particular religious faith to conduct the prayers. This selection constituted a preference of one religious belief over another. Thus, on this basis the prayers were unconstitutional. Contrary to the Court's decision, the prayers in *Lee* were not coercive. The resolution did not mandate that students participate in the prayer in order to receive their diplomas. Nor were there any overt coercive factors. Students who challenged the resolution merely disliked feeling compelled to stand in silence during the prayers. They feared that this silence signified to others that they were participating in the activity.²⁷⁷ Subjective feelings of coercion or discomfort alone

endorsement analysis. The Court made a few conclusory statements that the prayers were an endorsement of religion, but failed to explain why the action constituted an endorsement.

²⁷⁶ See *supra* note 258 and accompanying text.

²⁷⁷ Justice Scalia discussed the Court's holding that the graduation prayers were coercive:

According to the Court, students at graduation who want "to avoid the fact or appearance of participation," in the invocation and benediction are psychologically obligated by "public pressure, as well as peer pressure, . . . to stand as a group or at least, maintain respectful silence" during those prayers. This assertion—the *very linchpin of the Court's opinion*—is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. . . . It claims only that students are psychologically coerced "to stand . . . or, at least, maintain respectful silence." The Court's notion that a student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely

should not be sufficient to invalidate the prayers.²⁷⁸ Moreover, religion did not directly benefit. The school received funds for graduation ceremonies, and the prayer constituted only a few minutes of a ceremony that generally lasts a couple of hours. Thus, the prayers in *Lee* would satisfy two of the three requirements of the second prong of the modified *Lemon* test. But all three must be satisfied before a statute may be held constitutional.

The prayers in *Lee* could have satisfied all three requirements. The resolution as implemented, however, impermissibly indicated a preference for a particular faith. Selecting a clergy member from a particular faith did more than expose students to religion and the opportunity to pray at graduation. It demonstrated that a particular faith was preferred. Although the prayers were neutral, the rabbi's recitation of them tainted the state's neutrality.²⁷⁹ The Establishment Clause, however, would permit a neutral speaker leading the prayer. For example, if a student chose to lead the same prayer the action could be constitutional.²⁸⁰ Thus, although the graduation prayers in

"our social conventions," have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence.

Lee v. Weisman, 112 S. Ct. 2649, 2681-82 (1992) (Scalia, J., dissenting).

²⁷⁸ See *supra* notes 128-38 and accompanying text.

²⁷⁹ Rabbi Gutterman stated in the benediction:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future. Help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990).

²⁸⁰ See, e.g., *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). A Clear Creek Independent School District resolution permitted public high school seniors to choose student volunteers to deliver "nonsectarian, nonproselytizing invocations at their graduation ceremonies." *Id.* at 964. The students voted whether to include prayers at the ceremony, voted who would deliver the prayer, and determined the content of the prayers. The Court of Appeals determined that the prayer served the legitimate secular purpose of "solemnization." *Id.* at 966. The court then stated that since "*Lemon* only condemns government actions that have the *primary* effect of advanc-

Lee were unconstitutional, properly implemented graduation prayers should be permitted.

CONCLUSION

The First Amendment guarantees the free exercise of one's chosen religious beliefs while preventing government from coercing religious adherence. These constitutional guarantees present a difficult task for courts that must determine the validity of governmental actions. The Court must be deferential to religious beliefs, while simultaneously ensuring that free expression of religious beliefs does not constitute an establishment of religion. The Court promulgated the three-prong *Lemon* test to assist in its task of drawing the line between free exercise and unconstitutional establishments. The test, however, has failed because of the Court's improper application.

Currently, the Court's application of the first and second prongs of the *Lemon* test leads to invalidation of activities that are actually constitutional. The changes proposed in this Note would properly balance the competing concerns of the Free Exercise and Establishment Clauses and consequently allow for more instances of religion in public education. This corrected balance would prevent our society from continuing to inter-

ing religion[, the test] requires us to compare the Resolution's secular and religious effect." *Id.* at 967 (emphasis added). The court concluded that the primary effect was to solemnize graduation ceremonies, not to advance religion. The court also determined that the statute did not advance religion under both the endorsement and coercion analyses.

See also *Harris v. Joint Sch. Dist. No. 241*, 821 F. Supp. 638 (D. Idaho 1993), where the court upheld a school district's policy allowing high school seniors to vote on whether prayer would be included in graduation ceremonies. Plaintiffs argued that even a vote by the students violated the Establishment Clause because "no minority of students should ever have to be subjected to even the possibility of having prayer included in their public high school graduation ceremonies." *Id.* at 641. The district court in *Harris* relied on *Jones*, even though it was not bound by the Fifth Circuit's decision, and concluded that the policy in this case was consistent with the Supreme Court's decision in *Lee*. The court pointed out that the Supreme Court has had two recent opportunities to ban all prayer at graduation ceremonies, but has declined to do so. *Id.* at 643; see also *Lee*, 112 S. Ct. at 2649; *Jones*, 112 S. Ct. 3020 (1992) (rather than addressing the issue of student-initiated and student-led prayers, remanding the case back to the Fifth Circuit to have the *Jones* court decide it in light of the Court's recent decision in *Lee*).

pret the Constitution as freedom from religion rather than freedom of religion.

*Rena M. Bila*²⁸¹

²⁸¹ The author wishes to thank Mary Shein and Cheryl O'Brien for their invaluable assistance with this Note.