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***NEWDOW CALLS FOR A NEW DAY IN ESTABLISHMENT
CLAUSE JURISPRUDENCE: JUSTICE THOMAS’S
“ACTUAL LEGAL COERCION” STANDARD PROVIDES
THE NECESSARY RENOVATION***

I. INTRODUCTION

Most Supreme Court cases fly under the radar of the national media. Occasionally, however, the media finds a case worthy of being thrust into the spotlight.¹ In 2004, the Supreme Court faced such a case in *Elk Grove Unified School District v. Newdow*.² The question before the Court was whether a public school district policy that required teachers to lead willing students in reciting the Pledge of Allegiance violates the Establishment Clause of the First Amendment because of the inclusion of the words “under God.”³ Instead of addressing this question, the Court “took the easy way out”⁴ and sidestepped the substantive issue⁵ by concluding that the plaintiff, Michael Newdow, did not have standing to bring his claim.⁶ The Court chose this route because of its desire to uphold the Pledge but inability to do so under its current Establishment Clause jurisprudence.⁷ If Establishment Clause

1. See Ali Basye, *Study Shows 9th Circuit Is Nation’s Most Overturned*, CORP. LEGAL TIMES, Jan. 2005, at 54 (stating that the *Newdow* case “created a media and Internet blitzkrieg”).

2. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). See Julia Duin, *Atheist Spars with Skeptical Justices Over Pledge*, THE WASH. TIMES, March 25, 2004, at A3 (referring to *Newdow* as a “landmark court case”).

3. *Newdow*, 542 U.S. at 4.

4. *A Disappointing Ruling on Pledge of Allegiance*, THE NEWS TRIBUNE (Tacoma, Wash.), June 15, 2004, at B6 (characterizing the *Newdow* decision as taking “the easy way out”).

5. Tony Mauro, *Pulling Its Punches*, LEGAL TIMES, July 5, 2004, at Court Watch 1 (referring to the Court’s solution of *Newdow* as “sidestep[ping] a politically charged debate in a presidential election year”).

6. *Newdow*, 542 at 17.

7. See Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 224 (2004) (stating that the Court in *Newdow* faced a situation where it may have been politically impossible to declare the Pledge unconstitutional and legally impossible to uphold the Pledge). Compare *Newdow*, 542 at 45-48 (Thomas, J., concurring) (arguing that the Elk Grove Pledge Policy would be declared unconstitutional under the Court’s rationale in *Lee v. Weisman*, 505 U.S. 577 (1992)), with *Newdow*, 542 at 29-31 (Rehnquist, J., concurring) (arguing that the Elk Grove Pledge Policy should not be

analysis is not conducive to addressing these issues, the Court needs to scrutinize and potentially alter its current approach.⁸

Currently, the Court employs a multi-test, patchwork approach in determining whether a government act violates the Establishment Clause.⁹ Many Supreme Court justices and legal scholars have expressed concerns with the Court's Establishment Clause jurisprudence.¹⁰ Due to its state of "hopeless disarray,"¹¹ it often produces "silly"¹² and "embarrassing"¹³ results.¹⁴ The use of various

declared unconstitutional as a matter of Supreme Court precedent).

8. See *County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., dissenting). ("I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence.")

9. See *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring). Justice O'Connor argues that the Establishment Clause "cannot easily be reduced to a single test." *Id.* "There are different categories of Establishment Clause cases which may call for different approaches." *Id.* See also *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring) ("[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every [Establishment Clause] case."). Justice Scalia aptly characterized current Establishment Clause jurisprudence in his concurring opinion in *Van Orden*. *Id.* at 2864 (Scalia, J., concurring). Scalia stated that he joined the opinion written by Chief Justice Rehnquist because it "accurately reflects [the Court's] current Establishment Clause jurisprudence – or at least the Establishment Clause jurisprudence we currently apply some of the time." *Id.* (emphasis added).

10. See *Newdow*, 542 at 33-43 (O'Connor, J., concurring) (arguing for the inclusion of ceremonial deism as protected government expression under the Establishment Clause); *Newdow*, 124 S. Ct. at 2327-33 (Thomas, J., concurring) (arguing for the "unincorporation" of the Establishment Clause as well as the adoption of the "actual legal coercion" test); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring in judgment) (critiquing the Court's application of the *Lemon* test and refuting the idea that the Establishment Clause prevents the government from supporting religion in general); Ralph W. Johnson III, *Lee v. Weisman: Easy Cases Can Make Bad Law Too – The "Direct Coercion" Test is the Appropriate Establishment Clause Standard*, 2 GEO. MASON IND. L. REV. 123 (1993) (critiquing the *Lemon* test, endorsement test, and indirect coercion test and claiming that the direct coercion test is the appropriate Establishment Clause standard); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140-157 (1992) (critiquing the *Lemon* test and the endorsement test) [hereinafter McConnell, *Crossroads*].

11. *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (noting that "Establishment Clause jurisprudence is in hopeless disarray").

12. *Newdow*, 542 at 45 (Thomas, J., concurring) ("Our jurisprudential confusion has led to results that can only be described as silly.")

13. *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting) ("In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence . . .").

14. See *Allegheny*, 492 U.S. at 601-602, 620. The Court holds that the display of a crèche scene in a county courthouse violates the Establishment Clause. *Id.* at 601-02. However, a display in front of a county building which included a menorah, Christmas tree, and a sign saluting liberty did not violate the Establishment Clause because the combination of symbols "convey[ed] the city's secular recognition of different traditions for celebrating the winter-holiday season." *Id.* at 620.

tests has not produced a clear roadmap to guide lower courts but instead has resulted in “a labyrinth characterized by multiple exit points.”¹⁵ In *Newdow*, Justice O’Connor and Justice Thomas recognize these deficiencies in the Court’s current analysis and advance alternative approaches.¹⁶

The importance of bringing order and continuity to Establishment Clause analysis cannot be overstated.¹⁷ The overextension of this doctrine fosters hostility toward religion,¹⁸ infringes upon state sovereignty,¹⁹ and eviscerates the religious freedom of the majority.²⁰ Conversely, failure to uphold the Clause infringes upon the religious freedom of those who practice “unpopular” or minority religions.²¹ The current multi-test approach is completely inadequate because it cultivates uncertainty and judicial manipulation, allowing judges to overextend or limit its application according to their own personal

15. Donald E. Lively, *The Establishment Clause: Lost Soul of the First Amendment*, 50 OHIO ST. L.J. 681, 685 (1989) (critiquing Establishment Clause jurisprudence and identifying some focal points that might contribute to more principled and meaningful judicial review).

16. See *Newdow*, 542 U.S. at 33-43 (O’Connor, J., concurring); *id.* at 2327-33 (Thomas, J., concurring).

17. See DAVID J. BREWER, *THE UNITED STATES A CHRISTIAN NATION* 12 (1905) (affirming the importance of the Establishment Clause and the restrictions it places on Congress). The plethora of scholarly writings and Supreme Court cases dealing with the Establishment Clause indicates the importance and uncertainty of this area of law. See, e.g., *Newdow*, 542 U.S. at 124 S. Ct. at 44-53 (Thomas, J., concurring) (arguing for unincorporation of the Establishment Clause); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 480 (1991) (criticizing incorporation of the Establishment Clause and the reasoning in *Everson*); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (arguing for the incorporation of the Establishment Clause).

18. See *infra* notes 105-130 and accompanying text (discussing same).

19. See *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting). In *Edwards*, the Court invalidated Louisiana’s Creationism Act which prevented the teaching of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of creation science. *Id.* at 581. This infringed on Louisiana’s ability to govern school curriculum, and “it is well established that education is a traditional concern of the States.” *United States v. Lopez*, 514 U.S. 549, 580 (1995).

20. See *Lee v. Weisman*, 505 U.S. 577, 645-46 (1992) (Scalia, J., dissenting). Justice Scalia recognizes that the Court often fails to consider the majority’s interests in religious expression. *Id.* at 646. See also *Johnson*, *supra* note 10, at 193 (stating that “a brief reference to [the Free Exercise Clause] reveals the discrimination presently imposed upon the majority of Americans by the present standard applied in Establishment Clause jurisprudence”).

21. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 3-5 (Univ. of N.C. Press 2d ed. 1994) (discussing the religious liberty violations that occurred when government-sponsored churches were established in the colonies). Colonial governments with established religions made it a crime to preach without proper ordination. *Id.* at 3. Colonists were also required to attend church and learn the official creed or articles of faith. *Id.* at 4-5. Such practices violate one’s First Amendment right to exercise his or her religious beliefs. See U.S. CONST. amend. I.

preferences.²²

This Comment examines the concurring opinions of Justice O'Connor and Justice Thomas in *Newdow* and explores whether either approach is able to solve the problems inherent in the Court's current analysis.²³ Section II discusses the meaning of the Establishment Clause and explores its historical background.²⁴ Section III outlines current Establishment Clause analysis and its inherent hostility toward religion.²⁵ Section IV introduces O'Connor's ceremonial deism approach and Thomas's "actual legal coercion" test, as outlined in *Newdow*.²⁶ Section V discusses the inability of O'Connor's approach to solve the inherent deficiencies in the Court's current analysis,²⁷ whereas, Section VI argues that Thomas's actual legal coercion test will bring consistency to Establishment Clause jurisprudence and eradicate the religious hostility created by the Court's current approach.²⁸

II. MEANING OF THE ESTABLISHMENT CLAUSE

The Establishment Clause provides that "Congress shall make no law *respecting* an establishment of religion."²⁹ Throughout the years, the Supreme Court has struggled to capture the precise meaning of this phrase.³⁰ The Court has found that, at a minimum, the Establishment Clause must mean the following:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a

22. See *Van Orden*, 125 S. Ct. at 2867 (Thomas, J., concurring) ("The unintelligibility of th[e] Court's precedent raises the further concern that, either in appearance or in fact, adjudication of *Establishment Clause* challenges turns on judicial predilections."); *Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (describing the psychological coercion test as "boundlessly manipulable"); *Newdow*, 542 U.S. at 124 S. Ct. at 45 (Thomas, J., concurring) (stating that the Court has "selectively invoked particular tests"). See also Johnson, *supra* note 10, at 152 (claiming that the "psycho-coercion" test is a tool for judicial activism).

23. See *Newdow*, 542 U.S. at 33-43 (O'Connor, J., concurring); *id.* at 43-54 (Thomas, J., concurring).

24. See *infra* notes 29-57 and accompanying text.

25. See *infra* notes 58-130 and accompanying text.

26. See *infra* notes 131-204 and accompanying text.

27. See *infra* notes 205-49 and accompanying text.

28. See *infra* notes 250-318 and accompanying text.

29. U.S. CONST. amend. I (emphasis added).

30. See *Allegheny*, 492 U.S. at 605. The Court states that "[w]hatever else the *Establishment Clause* may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed." *Id.* (emphasis added). This is an example of the Court acknowledging its struggle to discover the meaning of the Establishment Clause. See *id.*

person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.³¹

In order to properly extract what else lies within the meaning of the Establishment Clause, it is necessary to consider the historical context surrounding its drafting.³²

A. Historical Context of the Establishment Clause

The history and context of the Founding Era are fundamental in evaluating the meaning of the Establishment Clause.³³ America was founded by refugees escaping Europe's tyrannical religious climate.³⁴ However, the religious persecution did not end when the colonists reached the New World.³⁵ Because the British continued to exercise religious dominion over the colonists through the authority of the

31. *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 15 (1947) (upholding a statute which authorized a board of education to reimburse parents for money they spent on busing their children to and from parochial schools).

32. *See infra* notes 33-45 and accompanying text.

33. *Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984) (upholding a crèche scene on public property). In *Lynch*, a majority of the court said that the most effective means of interpreting the Establishment Clause is identifying "what history reveals was the contemporaneous understanding of its guarantees." *Id.* at 673. "Historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied" to contemporaneous practices. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (upholding legislative prayer). More recently in *Lee v. Weisman*, 505 U.S. 577 (1992), Justices Scalia, White, Thomas, and Rehnquist affirmed that historical analysis should be the primary method of interpreting the Establishment Clause. *See* David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 84 (2001) (analyzing the different methods of interpretation involving church/state and religious liberty issues). They believe that the meaning should be determined "by reference to historical practice and understandings." *Id.* *See also* *Van Orden v. Perry*, 125 S. Ct. 2854, 2861-64 (2005) (recognizing that Establishment Clause analysis applied in this case was "driven . . . by our Nation's history").

34. *See Everson*, 330 U.S. at 8.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. In efforts to force loyalty to whatever religious group [was in power], men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

Id. at 8-9.

35. *See* LEVY, *supra* note 21, at 3-5 (discussing the religious oppression created by government-sponsored churches in the colonies).

Church of England, the colonists faced continuing oppression once they settled in America.³⁶ This religious persecution, at least in part, contributed to the American Revolution.³⁷ Such turbulent circumstances illustrate why the Framers were hesitant to address “the subject of religion for fear that the discussion might lead to some form of federal ecclesiastical establishment” similar to the Church of England.³⁸

On the other hand, the Founders were deeply concerned with religion.³⁹ In fact, most of them emphasized the necessary role of religion and morality in a flourishing republican society.⁴⁰ For example,

36. See *Everson*, 330 U.S. at 9-10. The religious persecution of England was “transplanted to and began to thrive in the soil of the new America.” *Id.* The charters granted by the King of England allowed the colonial leaders “to erect religious establishments which all [colonists], whether believers or non-believers, would be required to support and attend.” *Id.* “An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions.” *Id.* at 9-10. See also JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 15 (Westview Press 2d ed. 2005) (“European powers, eager to extend their political and religious regimes, issued charters and privileges to colonial companies that would establish themselves in the New World under the rule of the distant mother country and mother church.”). Modern theocratic regimes or government-run religion are exemplified in Middle Eastern countries, such as Iraq, Egypt, Israel, and Palestine. See generally *RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS* (Eugene Cotran & Mai Yamani eds., 2000).

37. See Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 *BAYLOR L. REV.* 927, 959 (1996) (noting that “some [scholars] argue that the colonists fought the British in part to rid themselves of religious control and establishment by the central government”). “In the early part of the seventeenth century, England was a country of religious intolerance.” GARY DEMAR, *AMERICA’S CHRISTIAN HISTORY: THE UNTOLD STORY* 53 (2000). Due to this intolerance, a group of Separatists left England and settled in Leyden, Holland. *Id.* at 53-54. However, after a few years in Holland, they decided to go to the New World. *Id.* at 54.

38. Dreisbach, *supra* note 37, at 959.

39. See Michael W. McConnell, *The New Establishmentarianism*, 75 *CHI.-KENT. L. REV.* 453, 475 (2000) (“America’s founders appreciated that republican government would require public virtue, and that public virtue requires the underpinnings of religion and morality.”); Amelia J. Uelmen, *Can a Religious Person be a Big Firm Litigator*, 26 *FORDHAM URB. L.J.* 1069, 1087 (1999) (“The history of the founding is replete with examples of the extent to which the founders regarded religion and morality as ‘indispensable supports’ to the public life of the newly born nation.”). *But see* WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 153, 236 (paperback ed. 1986) (claiming that Paine, Jefferson, and Madison viewed Christianity as a “particularly murky section of the swamp of unreason”).

40. See *NORTHWEST ORDINANCE*, 1 *STAT.* at 52. Article III of the Northwest Ordinance states that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *Id.* It is interesting to note that the House of Representatives took up the Northwest Ordinance on the same day that Madison introduced the final draft of the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting). See also THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 219 (1986). Curry quotes the members of the Continental Congress as stating that “true religion and good morals are

John Adams stated that “religion and morality *alone* . . . can establish the principles upon which freedom can securely stand.”⁴¹ George Washington went further and stressed the absolute dependence of morality upon religion when he stated that “reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”⁴²

the only solid foundation of public liberty and happiness.” *Id.* See, e.g., Letter from Patrick Henry to Archibald Blair (Jan. 8, 1799) (“The great pillars of all government and of social life [are] virtue, morality, and religion. This is the armor . . . and this alone, that renders us invincible.”); THE WRITINGS OF BENJAMIN FRANKLIN 569 (Albert H. Smyth ed., 1970) (“ . . . only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.”); THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904) (“To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”); THE SELECTED WRITINGS OF BENJAMIN RUSH 88 (Dagobert D. Runes ed., 1947) (“[T]he only foundation for a useful education in a republic is to be laid in Religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments.”). *But see* Theresa Willingham, *Calling Atheist Un-American Not As True As Some Believe*, ST. PETERSBURG TIMES, August 8, 2004, at North of Tampa 8 (citing quotations by many Founders, including Benjamin Franklin and Thomas Jefferson, which are disparaging toward God and religion); BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1758 ed.) (“Lighthouses are more helpful than churches.”).

41. Letter from John Adams to Zabdiel Adams (June 21, 1776), available at <http://www.founding.com/library/lbody.cfm?id=136&parent=54> (last visited October 25, 2005) (emphasis added).

Statesmen . . . may plan and speculate for liberty, but it is religion and morality alone, which can establish the principles upon which freedom can securely stand. The only foundation of a free constitution is pure virtue; and if this cannot be inspired into our people in a greater measure than they have it now, they may change their rulers and the forms of government, but they will not obtain a lasting liberty.

Id. It is also interesting to note that while serving as the chairman of the Washington D.C. school board, Thomas Jefferson, who is often credited as coining the phrase “separation of church and state,” required “the use of the Bible and the Hymnal to teach reading in the public schools.” Larry Linsin, *Separation Wording Turns Out to be an Elusive Historical Beast*, THE ASHVILLE CITIZEN-TIMES, August 17, 2002, at A7. Jefferson stated that “[t]he reason that Christianity is the best friend of government is because Christianity is the only religion that changes the heart.” *Id.* *Contra* John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free Exercise, Equal Protection, and Establishment Clause Issues Raised by the Peyote Way Church of God Case*, 22 AM. INDIAN L. REV. 475, 499-500 (1998) (stating that Jefferson and Madison were Enlightenment Deists who supported a “severe separation” of church and state).

42. George Washington, Farewell Address (September 17, 1796), available at <http://www.yale.edu/lawweb/avalon/washing.htm> (last modified October 25, 2005).

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports The mere politician, equally with the pious man, ought to respect and to cherish them. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

Id. Compare *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2748-50 (2005) (Scalia, J., dissenting) (outlining historical evidence that indicates the Framers did not intend government

Thus, the Founders faced an unenviable position.⁴³ They had experienced the problems that a government-established church would create, but they were also acutely aware of the necessity of establishing a Nation founded on religious principles.⁴⁴ It was against this backdrop that the Founders adopted the Establishment Clause into the Bill of Rights.⁴⁵

B. Proper Interpretation of the Establishment Clause

It is often said that the Establishment Clause requires complete “separation between church and state.”⁴⁶ However, it is logically inconsistent to conclude that men, who stressed the importance of religion and morality in running an effective republican government, intended to isolate religion from government.⁴⁷ Thus, the Founders did

neutrality in matters of religion), *with id.* at 2743-45 (majority opinion) (outlining historical evidence that indicates the Framers intended the Establishment Clause to require governmental neutrality in matters of religion).

43. See Dreisbach, *supra* note 37, at 959.

44. See *supra* notes 33-42 and accompanying text.

45. The adoption of the Establishment Clause was much debated. See LEVY, *supra* note 21, at 94-111 (discussing the various amendments of the Establishment Clause and the debates surrounding them). The original copy of the Bill of Rights was submitted to the House on June 8, 1789. *Id.* at 94. Originally, the section on religion read: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” *Id.* at 95. After a few alterations and many proposed amendments, Congress finally passed the Establishment Clause on September 25, 1789. *Id.* at 104.

46. See *Everson*, 330 U.S. at 16 (finding that the Establishment Clause erects a “wall of separation between church and state”). Thomas Jefferson coined this phrase in a letter to the Danbury Baptist Association. *Id.* The letter was not an exposition on the meaning of the Establishment Clause; rather, it was “a simple note of courtesy written fourteen years after Congress passed the Bill of Rights.” James E. M. Craig, “In God We Trust,” *Unless We Are A Public Elementary School: Making A Case For Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 532 (2000). Further, the phrase was “a mere metaphor too vague to support any theory of the Establishment Clause.” PETER J. FERRARA, RELIGION AND THE CONSTITUTION: A REINTERPRETATION 34-35 (Free Congress Foundation 1983). Also, it is important to remember that Jefferson was acting as minister to France during this time and did not directly participate in the drafting of the Bill of Rights. *Reynolds v. United States*, 98 U.S. 145, 163 (1879).

47. See Daniel P. Whitehead, *Agostini v. Felton: Rectifying the Chaos of Establishment Clause Jurisprudence*, 27 CAP. U.L. REV. 639, 654 (1999) (noting that “history simply does not support the strict separation of church and state”). Our first Congress set aside federally-owned land to establish religious schools and appropriated money for religious organizations. *Id.* The Continental Congress imported 20,000 Bibles. *Id.* On the day after the First Amendment was adopted by Congress, the House and Senate both adopted a resolution which requested that the President “recommend to the people of the United States a day of public fasting and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of the Almighty God.” *Id.* See also J. Clifford Wallace, *The Framers’ Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755, 764-67 (2001) (discussing actions by the Framers which indicate that they did not

not intend to “level all religions”⁴⁸ or erect a “wall between the church and the state.”⁴⁹ Instead, they were concerned with preventing the problems that had haunted their past – specifically those caused by a national church.⁵⁰

Relying upon the Founders’ intent as well as other practical concerns, the Court has expressly denounced a complete church/state separation approach to Establishment Clause jurisprudence.⁵¹ As a corollary, the Court has rejected an absolutist analysis which would “mechanically invalidat[e] all governmental conduct or statutes that confer benefits or give special recognition to religion in general.”⁵² Instead, the Court has properly held that the “government may (and sometimes must) accommodate religious practices” without fear of violating the Establishment Clause.⁵³

intend to create a complete separation of church and state).

48. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: VOLUME 2 § 1874 (Melville M. Bigelow ed., 5th ed. 1891). Justice Story was the one of the leading constitutional scholars of his time, and he published “the most comprehensive treatise on the United States Constitution that had then appeared.” *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting). According to Story, at the time of the adoption of the Establishment Clause:

[T]he general if not the universal sentiment in America was that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

STORY, *supra* at § 1874.

49. See Craig, *supra* note 46, at 532-34 (arguing that the “wall of separation between church and state” was not intended by the Framers). See generally DEMAR, *supra* note 37, at 145-57 (arguing that the Establishment Clause does not require a secular government entirely separate from religion). The late Chief Justice Rehnquist stated that “[t]here is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation.’” *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

50. STORY, *supra* note 48, at § 1877.

51. See *Lynch*, 465 U.S. at 673.

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the “callous indifference” we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into “war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.”

Id. (citations omitted).

52. *Id.* at 678.

53. *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144-45 (1987)). Short of establishing a government church or infringing on citizen’s free exercise rights, there is ample room for the government to engage in the realm of religion. See *Walz v. Tax Comm’n of the City of New*

The heart of the Establishment Clause, as expressed by its drafter James Madison, is that the government “should not establish a religion and enforce the legal observation of it by law.”⁵⁴ The Framers’ primary goal in adopting the Establishment Clause was to prevent the oppression associated with a government-established church.⁵⁵ Such persecution and maltreatment included mandatory church attendance, taxation for the direct support of a particular religious sect, and punishment of nonbelievers.⁵⁶ Inherent in these problems was the government’s use of actual legal force, or threat of force, to uphold the power of the established church.⁵⁷

III. SUPREME COURT’S CURRENT METHOD OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The Court’s Establishment Clause jurisprudence has two prominent characteristics. First, the multi-test approach has created a lack of certainty which impedes consistent legal analysis.⁵⁸ Second, the tests

York, 397 U.S. 664, 669 (1970). Chief Justice Burger wrote:

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id.

54. LEVY, *supra* note 21, at 97. Madison seemed to indicate that the language of the Establishment Clause was instrumental in preventing the establishment of a national religion. *Id.* at 100. He stated that the Clause was inserted to satisfy the State Conventions who were concerned that Congress “might infringe the rights of conscience and establish a national religion.” *Id.* See *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting). The late Chief Justice Rehnquist summarized the meaning of the Establishment Clause as forbidding both establishment of a national religion and preference among religious sects. *Id.* But see *Everson*, 330 U.S. at 52 (arguing that the heart of the Establishment Clause, as illustrated by Madison’s Remonstrance, is that the state cannot aid nor forbid religious activities).

55. STORY, *supra* note 48, at § 1877. Story expressed the proper meaning of the Establishment Clause:

The real object of the [First Amendment] was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion

Id.

56. See LEVY, *supra* note 21, at 3-5 (highlighting the many problems associated with an established religion).

57. See *Newdow*, 542 U.S. at 50-52 (Thomas, J., concurring) (quoting *Lee*, 505 U.S. at 640-41 (Scalia, J., dissenting)).

58. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring) (“[T]he

have been applied in a manner which prevents the government from addressing religious issues, thus manifesting hostility toward religion in general.⁵⁹

A. Four Approaches to Establishment Clause Analysis

Currently, the Court employs four different approaches in its Establishment Clause analysis.⁶⁰ The greatest deficiency in this multi-test approach is that the Court lacks specified criteria dictating what test, if any, should apply in a given situation.⁶¹ Whenever an Establishment issue arises, the Court must wade through a pool of uncertainty thereby precluding consistent legal analysis.⁶²

1. The *Lemon* Test

The Supreme Court's oldest Establishment Clause test was developed in *Lemon v. Kurtzman*.⁶³ The *Lemon* test sets out three prongs that government action must satisfy in order to avoid violating

very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application." See also *infra* notes 60-104 and accompanying text.

59. See *infra* notes 105-130 and accompanying text.

60. Jennifer Carol Irby, *Santa Fe Independent School District v. Doe: The Constitutional Complexities Associated With Student-Led Prayer*, 23 CAMPBELL L. REV. 69, 70-75 (2000) (providing a brief overview of the four Establishment Clause tests applied by the Supreme Court).

61. See *Lynch*, 465 U.S. at 679. In *Lynch*, Justice Burger discusses how cases have arisen where the Court has not found the *Lemon* test to be "relevant" or "useful" and has thus applied another approach. *Id.* However, the Court provides no guidance as to when *Lemon* should not be used and what alternative approach should apply. *Id.* See also *Newdow*, 542 U.S. at 43 (Thomas, J., concurring) (stating that the Court "selectively invoke[s] particular tests"). But see *id.* at 33 (O'Connor, J., concurring) (stating that the endorsement test should be employed when the Court "confronts a challenge to government-sponsored speech or displays").

62. See Theologos Verginis, *ACLU v. Capitol Square Review and Advisory Board: Is There Salvation for the Establishment Clause? "With God All Things Are Possible,"* 34 AKRON L. REV. 741, 743-48 (2001) (stating that current Establishment Clause jurisprudence utilizes many tests and results in uncertain analysis). See also *Van Orden*, 125 S. Ct. at 2866 (Thomas, J., concurring) ("[T]he incoherence of the Court's decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application."). Furthermore, the "unintelligibility of th[e] Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Id.* at 2867. "The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Id.*

63. 403 U.S. 602, 612-613 (1971). The litigation in this case involved two statutes that provided aid to nonpublic schools. *Id.* at 606. The Pennsylvania statute provided reimbursement to nonpublic schools for salaries, textbooks, and instruction materials involving secular subjects. *Id.* at 606-607. The Rhode Island statute provided a 15% salary increase to teachers at nonpublic schools. *Id.* at 607. The Court held that both statutes were unconstitutional violations of the Establishment Clause because they fostered "excessive and enduring entanglements between state and church." *Id.* at 619.

the Establishment Clause: (1) it must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must avoid “excessive government entanglement with religion.”⁶⁴ Generally, analysis under the *Lemon* standard has treated the three prongs as determinative; however, on at least two occasions, the Court referred to the prongs as “helpful signposts.”⁶⁵ Application of the first prong has proved troublesome due to the perplexity of determining legislative intent⁶⁶ as well as insufficient guidance on what constitutes a “secular purpose.”⁶⁷ Likewise, the Court has failed to adequately define the second and third prongs, thus contributing to *Lemon*’s inconsistent and unpredictable results.⁶⁸ Throughout the years of its use, the *Lemon* test

64. *Id.* at 612-613. Justice Burger claimed that these elements arose from a “consideration of the cumulative criteria developed by the Court over many years.” *Id.* at 612. Interestingly, Burger does not cite authority for the secular purpose prong. *Id.* It is difficult to see how an element that has been “developed by the Court over many years” does not find support in the Court’s prior decisions. *See id.*

65. *See, e.g., Van Orden*, 125 S. Ct. at 2861 (noting that the three prongs of the *Lemon* test are “no more than helpful signposts”); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (same). *See also* Kirk A. Kennedy, *Opportunity Declined: The Supreme Court Refuses to Jettison the Lemon Test in Zobrest v. Catalina Foothills School District*, 73 NEB. L. REV. 408, 431 n.78 (1994) (noting three cases in which “the *Lemon* test was either completely ignored or not determinative to the decision”).

66. *See Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). Legislators can bypass this prong by removing all references to a religious purpose. *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting).

67. *See Edwards*, 482 U.S. at 613-19 (Scalia, J., dissenting). The Court has held that the *Lemon* test does not require an “exclusively secular” purpose, but merely a secular purpose. *See Lynch*, 465 U.S. at 681 n.6. *But see Lynch*, 465 U.S. at 691 (O’Connor, J., concurring) (“[The secular purpose] requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes.”). If the test required “exclusively secular” objectives, then most of the government action approved by the Supreme Court would have to be struck down under *Lemon*. *Id.* at 681 n.6. Traditionally, the Court has bypassed this portion of the inquiry as long as “a plausible secular purpose appears on the face of the challenged statute or policy,” thus rendering it superfluous. Johnson, *supra* note 10, at 158-159. *But see* *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2734-35, 2741 (2005) (reaffirming the importance of inquiring into the purpose for a particular government action and noting that “purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context”). Recently, in *McCreary*, the Supreme Court provided some clarity to the purpose prong by requiring that the “the secular purpose [must] be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 2735.

68. *See* David E. Steinberg, *Alternatives to Entanglement*, 80 KY. L.J. 691, 726-727 (1992). With respect to the second prong, “[t]he Court has failed to clearly identify government conduct that has the primary effect of advancing religion.” Johnson, *supra* note 10, at 160. Likewise in dealing with the excessive entanglement prong, the Court has done little to define the term except to say that it involves regular contacts between government and religion. *Id.* at 165. *See also* Thomas Marvan Skousen, *The Lemon in Smith v. Mobile County: Protecting Pluralism and General Education*, 1997 BYU EDUC. & L. J. 69, 83 (1997) (noting that the Court’s inconsistency in applying *Lemon* implicates the judiciary in its “outcome determinative” behavior). The three poorly-defined prongs “have been manipulated to fit whatever result the Court aimed to achieve.” *McCreary*, 125 S. Ct. 2722, 2757 (Scalia, J., dissenting).

has been used to invalidate government practices which have been in place for a significant portion of our Nation's history.⁶⁹

Despite its historical significance, *Lemon* has lost support among many members of the Court.⁷⁰ However, the Supreme Court has yet to explicitly overrule the test.⁷¹ As it currently stands, *Lemon* remains a “ghoul . . . that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.”⁷² But the Court's heavy criticism and sparse application of *Lemon* has opened the door for the remaining tests to move to the forefront.⁷³

69. See, e.g., Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (holding that a statute requiring the recitation of the Lord's prayer before school was a violation of the Establishment Clause); Stone v. Graham, 449 U.S. 39 (1980) (holding that a Kentucky statute requiring the posting of the Ten Commandments in public classrooms was a violation of the Establishment Clause).

70. See *Allegheny*, 492 U.S. at 656 (Kennedy, J., dissenting) (discussing the use of the *Lemon* test and how a “[s]ubstantial revision of our Establishment Clause doctrine may be in order”); *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting) (stating that the *Lemon* test is “a constitutional theory that has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results”); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing doubts about the entanglement prong of the *Lemon* Test); *Edwards*, 482 U.S. at 636 (Scalia, J., dissenting) (acknowledging that Rehnquist's pessimistic evaluation of the *Lemon* test “is particularly applicable to the ‘purpose’ prong”). Moreover, Justice Souter expressed his dissatisfaction with the *Lemon* test at his confirmation hearings. See Linda Greenhouse, *Supreme Court to Take Fresh Look at Disputed Church-State Boundary*, N.Y. TIMES, Mar. 19, 1991, at A16. But see Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463 (1994) (urging a renewed commitment to the *Lemon* test in Establishment Clause issues).

71. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-400 (1993) (Scalia, J., concurring) (declining to overturn *Lemon*).

72. *Id.* at 398. Justice Scalia comments that “[t]he secret of the *Lemon* test's survival . . . is that it is so easy to kill. It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will.” *Id.* at 399. “Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.” *Id.* For example, when the Court wishes to invalidate an action that the test forbids, it applies the test; however, when the Court wants to uphold an action that the test forbids, it ignores *Lemon* completely. Compare *Aguilar*, 473 U.S. 402 (using the *Lemon* test to invalidate a state remedial education program administered in part in parochial schools), with *Marsh v. Chambers*, 463 U.S. 783 (1983) (ignoring the *Lemon* test and upholding legislative prayer).

73. See Verginis, *supra* note 62, at 744-45 (noting that the Court's migration away from the *Lemon* test allows other tests to replace it). In one of the Supreme Court's most recent Establishment Clause case, it recognized that the *Lemon* test was “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.” *Van Orden*, 125 S. Ct. at 2861. Nevertheless, the Court has shown a willingness to consider the ongoing validity of the *Lemon* test. For example, in *McCreary*, 125 S. Ct. 2722 (2005), one of the certified questions was whether the Court should continue to apply the *Lemon* test. See Nathan Lewin, *Thou Shalt Not Erase God*, LEGAL TIMES, February 28, 2005, at 50 (stating that the argument for the state of Kentucky in the *McCreary* case asked the Court to substantially alter or replace the *Lemon* test). In the end, however, the Court decided not to overturn the *Lemon* test, specifically upholding and strengthening the purpose prong. See *McCreary*, 125 S. Ct. at 2734-35.

2. The Endorsement Test

The next analytical tool, the endorsement test, is used primarily when the Court “confronts a challenge to government-sponsored speech or displays.”⁷⁴ It originally was advocated by Justice O’Connor⁷⁵ and is gaining support from the rest of the Court through more frequent application.⁷⁶ This approach forbids “government endorsement or disapproval of religion.”⁷⁷ It seeks to prevent the government from “mak[ing] a person’s religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred.”⁷⁸ Analysis under the endorsement test takes the perspective of a reasonable observer in the community and considers the overall context of the questioned activity.⁷⁹

Like *Lemon*, “the endorsement test is flawed in its fundamentals and unworkable in practice.”⁸⁰ Justice Kennedy has recognized that

74. *Newdow*, 542 U.S. at 33 (O’Connor, J., concurring). In this context the word “endorsement” is translated to mean “promotion.” *Allegheny*, 492 U.S. at 593. However, one of the largest flaws in this test is the inability to define endorsement or promotion. McConnell, *Crossroads*, *supra* note 10, at 148. Such a definitional deficiency will perpetuate inconsistent legal analysis. *Id.* It is nothing more than an application to the Religion Clauses of the principle: “I know it when I see it.” See William P. Marshall, “*We Know It When We See It*”: *The Supreme Court Establishment*, 59 S. CAL. L. REV. 495 (1986) (noting that Establishment Clause jurisprudence is primarily “symbolic,” implying that it is concerned with eliminating the perception of improper government action).

75. See, e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 772-774 (1995) (O’Connor, J., concurring) (noting that “the purpose or effect of ‘endorsing’ religion [is] a concern that has long had a place in our Establishment Clause jurisprudence”); *Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring) (noting that the “endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to his or her standing in the political community”); *Wallace*, 472 U.S. at 70 (O’Connor, J., concurring) (noting that endorsement infringes upon the religious liberty of the nonadherent); *McCreary*, 125 S. Ct. at 2747 (O’Connor, J., concurring) (identifying a particular government display as unconstitutional because it “conveys an unmistakable message of endorsement to the reasonable observer”).

76. See Verginis, *supra* note 62, at 744-745. The Court has begun to apply the endorsement test with greater frequency and the victim has been the *Lemon* test. *Id.* The Court recently employed a variation of the endorsement test in *McCreary*, 125 S. Ct. 2722 (2005).

77. *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

78. *Newdow*, 542 U.S. at 33 (O’Connor, J., concurring). Endorsement “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Id.*

79. *Id.* at 33-35. Adopting a subjective approach would be unworkable. *Id.* at 33. It would subject any governmental activity to a “heckler’s veto.” *Id.* at 35.

80. *Allegheny*, 492 U.S. at 669 (Kennedy, J., dissenting). Upon close examination, one realizes that the endorsement test is really a combination of the purpose and effect prongs of the *Lemon* test. Daniel Parish, *Private Religious Displays in Public Fora*, 61 U. CHI. L. REV. 253, 257 (1994) (establishing parameters for courts and municipalities confronted with private citizens who

faithful analysis under this test produces results that are inconsistent with history and tradition.⁸¹ Moreover, the application of the endorsement test is biased against religion.⁸² While on its face the test appears even-handed because it expressly condemns both actions that “endorse” religion and actions that “disapprove” of religion, it is one-sided in application.⁸³ By their very nature, actions which disapprove of religion cannot constitute an *establishment* of religion because the term “establishment” connotes actions imbuing government approval or support for religion.⁸⁴ Thus, the endorsement test has never been applied to invalidate government activity which condemns religion.⁸⁵ Another intrinsic problem with the endorsement test is that, carried to its logical end, it requires complete “separation of church and state” in order for the government to avoid the appearance of endorsing religion over “irreligion.”⁸⁶ The Court, however, has expressly denounced a “complete separation” approach to Establishment Clause analysis.⁸⁷

wish to adorn their local parks with crèches, menorahs, or reindeer-drawn sleds). “[The endorsement test] asks explicitly what the *Lemon* test implies: Does the government ‘subjectively’ intend to endorse religion, or could an audience ‘objectively’ interpret the government’s actions as endorsing religion?” *Id.* Because the endorsement test is largely based on two of the three prongs of the *Lemon* test, the endorsement test suffers from many of the same deficiencies as *Lemon*. McConnell, *Crossroads*, *supra* note 10, at 151. Specifically, the endorsement test suffers from at least three fundamental flaws: “(1) uncertainty as to who is the relevant person to judge the effect of the government act, (2) malleability of results reached by the application of the test due to its inherent subjectivity and heavy factual dependence, and (3) inability of the test to account for past decisions of the Court.” *The Supreme Court, 1988 Term: Leading Case: I. Constitutional Law*, 103 HARV. L. REV. 137, 234 (1989).

81. *Allegheny*, 492 U.S. at 670. “The touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like ‘outsiders’ by government recognition or accommodation of religion.” *Id.* “Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.” *Id.*

82. McConnell, *Crossroads*, *supra* note 10, at 152. The endorsement test is not only biased against religion in general, it is also biased against uncommon religions. *Id.* at 154. If a practice is “longstanding” and “nonsectarian,” it is unlikely to “convey a message of endorsement of particular religious beliefs.” *Allegheny*, 492 U.S. at 630-31 (O’Connor, J., concurring). Therefore, messages affirming mainstream, nonsectarian religions are likely to be familiar and seem inconsequential. McConnell, *Crossroads*, *supra* note 10, at 154.

83. McConnell, *Crossroads*, *supra* note 10, at 152.

84. *Id.* “Disapproval of religion is not an ‘establishment’ of religion because the government typically has a secular purpose for its action, and because there is no ‘religion’ that is being ‘established.’” *Id.*

85. McConnell, *Crossroads*, *supra* note 10, at 152.

86. See Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 799 (1998) (acknowledging that the endorsement test is consistent with the principle of “separation between church and state”).

87. See *Lynch*, 465 U.S. at 673. In *Lynch*, Justice Burger states the following: “Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Id.*

Finally, this test implicates vast judicial discretion and yields inconsistent results.⁸⁸

3. The Psychological or Indirect Coercion Test

The Court's newest test is the "psychological coercion test."⁸⁹ It originated with Justice Kennedy in *Lee v. Weisman*⁹⁰ and states that the "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."⁹¹ This test prevents the government from coercing citizens by indirect means, and thus it is also known as the "indirect coercion test."⁹² In contrast to the endorsement test, the psychological coercion test focuses on the subjective effect of the governmental action, not just its objective appearance.⁹³ Currently, the Court has applied the coercion test only in the context of school prayer.⁹⁴

88. See *Allegheny*, 492 U.S. at 601-02, 620. See also Stephen B. Presser, *The Rehnquist Court: Outsiders, Swing Justices, and Original Understanding: Can the Religion Clauses be Saved? A Comment on Greenawalt*, 99 NW. U.L. REV. 177, 181-82 (2004) (stating that the endorsement test "seems to do nothing but leave complete discretion in the hands of the judges, which can hardly be what the rule of law comprehends").

89. See *Lee*, 505 U.S. at 587. It is possible to think of two interpretations of coercion. Gidon Sapir, *Religion and State – A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 591 (1999) (arguing for a new model in order to achieve religious freedom). There is a narrow and broad coercion. *Id.* The narrow view of coercion only recognizes coercion when one is compelled by force or threat of force. *Id.* This is the definition of coercion used by Justice Thomas. See *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). On the other hand, the broad view of coercion includes both persuasion and force. Sapir, *supra* note 89, at 591. This is the view of coercion which forms the basis of Justice Kennedy's psychological coercion test. See *Lee*, 505 U.S. at 587.

90. 505 U.S. 577 (1992).

91. *Id.* at 587.

92. See Johnson, *supra* note 10, at 125 (classifying this approach as the "psycho/indirect coercion test"). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). In *Santa Fe Independent School District*, the Court held that a school policy permitting a student to pray before high school football games violated the Constitution. *Id.* at 317. The Court reasoned that the Establishment Clause prevented the government from "us[ing] social pressure to enforce orthodoxy." *Id.* at 312. It further found that forcing a "nonbeliever [to] respect [one's] religious practices" in this context was a form of unconstitutional coercion. *Id.* The discomfort that a nonbeliever feels when he or she is subjected to prayer at a public school sporting event is an example of indirect psychological coercion. See *id.*

93. Jeremy Speich, *Santa Fe Independent School District v. Doe: Mapping the Future of Student-Led, Student-Initiated Prayer in Public Schools*. 65 ALB. L. REV. 271, 278 (2001) (arguing that student-led, student-initiated prayer is constitutionally permissible in public school).

94. See, e.g., *Lee*, 505 U.S. 577 (invalidating prayer at a public school graduation ceremony); *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (invalidating prayer at a public school football game); *Newdow*, 542 U.S. at 45-48 (Thomas, J., concurring) (applying the psychological coercion test will force the Court to invalidate California's Pledge policy as a violation of the Establishment Clause). The psychological coercion test is applied to school prayer cases due to the "heightened concerns

Scholars have criticized this analytical approach because of the tenuous connection between indirect forms of coercion and Establishment Clause violations.⁹⁵ Moreover, judges are ill-equipped to inquire into matters of psychology and determine whether an individual is unjustly influenced or coerced by social pressure.⁹⁶ Justice Scalia has characterized this test as a “bulldozer of . . . social engineering” which is “boundlessly manipulable” by the Court.⁹⁷ If expanded outside the context of school prayer, this test can be used to further the agenda of activist judges.⁹⁸

4. The *Marsh* Approach

Additionally, the Court has, in some instances, not used any test at all.⁹⁹ In *Marsh v. Chambers*,¹⁰⁰ the Court rejected the Eighth Circuit’s application of the *Lemon* test¹⁰¹ and instead relied on history and tradition to find that congressional prayer is constitutional under the Establishment Clause.¹⁰² The Court inferred from the Founders’ adoption and approval of legislative prayer that it does not violate the Constitution.¹⁰³ Analytical reliance upon tradition and original intent, as

with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” *Lee*, 505 U.S. at 592. This language seems to suggest that application of this test is limited to this context involving young school children. Marilyn Perrin, *Lee v. Weisman: Unanswered Prayers*, 21 PEPP. L. REV. 207, 253 (1993) (analyzing the educational, legislative, judicial, and social impacts of the *Lee* decision).

95. See Mark A. Boatman, *Lee v. Weisman: In Search of a Defensible Test for Establishment of Religion*, 37 ST. LOUIS U. L.J. 773, 824 (1993) (noting that Justice Scalia feels that the psychological coercion test’s causal connection is too tenuous to justify triggering the Establishment Clause).

96. See *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). Justice Scalia sees no reason to “expand[] the concept of coercion beyond acts backed by threat of penalty – a brand of coercion that, happily, is readily discernible to [judges] who have made a career of reading the disciples of Blackstone rather than of Freud.” *Id.*

97. *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). Justice Scalia emphasizes that this test has no grounding in history, and it will be employed to eradicate activities which the Court has traditionally upheld as constitutional under the Establishment Clause. *Id.* at 631-32.

98. Johnson, *supra* note 10, at 152.

99. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that legislative prayer does not violate the Establishment Clause).

100. *Id.* This case challenged the Nebraska legislature’s practice of beginning each session with prayer by a paid chaplain. *Id.* at 784. The Supreme Court, relying on history and tradition, held that legislative prayer did not violate the Establishment Clause. *Id.* at 792.

101. *Id.* at 786. Using the *Lemon* test, the Eighth Circuit Court of Appeals struck down the practice of legislative prayer because it had a religious purpose and invalidated the practice of paying the chaplain because it created entanglement. *Id.* at 786.

102. *Marsh*, 463 U.S. at 786.

103. *Id.* at 790.

displayed in *Marsh*, is exceedingly rare in recent Establishment Clause cases.¹⁰⁴ Because the Court has used this type of analysis in only one case involving extremely limited facts, this approach will be largely ignored throughout this Comment.

B. Hostility Toward Religion in Current Establishment Clause Jurisprudence

Throughout the years, the Court has spoken unconvincingly of the need to avoid enmity toward religion in its Establishment Clause analysis.¹⁰⁵ In *Zorach v. Clauson*,¹⁰⁶ the Court “[f]ound] no constitutional requirement which makes it necessary for government to be hostile to religion”¹⁰⁷ and stated that the Bill of Rights does not embody “a philosophy of hostility to religion.”¹⁰⁸ Despite this lackluster lip service, the Court often manifests opposition toward anything with religious connotation.¹⁰⁹ In the summer of 2000, the late Chief Justice Rehnquist acknowledged this problem when he characterized an Establishment Clause opinion¹¹⁰ as “brist[ing] with hostility to all things religious in public life.”¹¹¹

One can see the inconsistency between the Court’s politically-correct rhetoric and religiously-hostile practice by comparing the current Establishment tests with the pattern of recent decisions.¹¹² For example, the second prong of the *Lemon* test condemns government action which “inhibits religion,”¹¹³ but the Court has never used the test to restrict the

104. See *Lee*, 505 U.S. at 631-32 (Scalia, J., dissenting). Justice Scalia maligned that the majority opinion in *Lee* was “conspicuously bereft of any reference to history.” *Id.* at 631. In response to the Court’s disregard of history and tradition, he emphasized that “our Constitution cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” *Id.* at 632.

105. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952) (noting that there is “no constitutional requirement which makes it necessary for government to be hostile to religion”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (noting that “the Constitution . . . forbids hostility toward any [religion]”).

106. 343 U.S. 306 (1952).

107. *Id.* at 314.

108. *Id.* at 315. The Court has also recognized that hostility toward religion will bring us into “war with our national tradition as embodied in the First Amendment’s guaranty of the free exercise of religion.” *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948).

109. See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318 (Rehnquist, J., dissenting).

110. See *id.*

111. *Id.* at 318 (Rehnquist, J., dissenting). But see *Lee*, 505 U.S. at 598-99 (acknowledging the importance of religion and “precepts of morality” and claiming that the court expresses “no hostility to those aspirations”).

112. See *infra* notes 113-116 and accompanying text.

113. *Lemon*, 403 U.S. at 612.

government in such a manner.¹¹⁴ Likewise, the endorsement test theoretically denounces government “disapproval of religion,”¹¹⁵ but it has never been applied accordingly.¹¹⁶

As manifest by recent decisions, it appears that the Court aspires to erase religion from the governmental arena.¹¹⁷ Current Establishment Clause analysis generally requires government silence regarding religious matters.¹¹⁸ Requiring such silence belittles “religious views by making them seem irrelevant, outdated, or even strange.”¹¹⁹ Demeaning religion conflates the religious animosity that has characterized recent Establishment jurisprudence.¹²⁰ This ill-will toward anything religious

114. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. AND MARY L. REV. 2105, 2208 n. 616 (2003) (“[The Supreme Court] has never invalidated a law under the Establishment Clause on the ground that it ‘inhibits’ religion.”); Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 136 n. 251 (1991) (noting that the Supreme Court has never explained the “inhibits” language of the second prong nor applied it in a holding); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-85 (1981). Professor Laycock believes that the “inhibition” provision of *Lemon* does not fit into the analysis. *Id.* Further, he recognizes that the Court has never applied it in one of its holdings. *Id.* Professor Steven D. Smith believes that such inhibition of religion claims are better dealt with under the Free Exercise Clause. See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 297-98 (1987).

115. *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

116. See McConnell, *Crossroads*, *supra* note 10, at 152-54 (arguing that the endorsement test has never been applied against government disapproval of religion because the religious practice in question is hidden by secular practices).

117. See Gordon Butler, *Cometh the Revolution: The Case for Overruling McCollum v. Board of Education*, 99 DICK. L. REV. 843, 851 (1995) (“[In 1948], the Supreme Court began its effort to remove all traces of the Christian religion from the public school”); Michael D. Baker, *Protecting Religious Speakers’ Access to Public School Facilities: Lamb’s Chapel v. Center Moriches School District*, 44 CASE W. RES. L. REV. 315, 326 (1993) (“In recent years, courts and educators, in alliance with a number of liberal interest groups, have undertaken extensive efforts to remove Christian ideas from the public schools.”).

118. Verginis, *supra* note 62, at 762. An exception to government silence regarding religion seems to be instances of ceremonial deism. *Id.* at 761. However, the only reason that the Court approves of ceremonial deism is because it has lost its religious meaning through historical use. *Id.* Thus, the Court’s requirement of silence only applies to “practices that still retain religious connotations.” *Id.* at 762.

119. E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1200 (1994) (discussing the effects of religious silence by the government). “[I]t is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance.” WALTER MOBERLY, *THE CRISIS IN THE UNIVERSITY* 56 (SCM Press 1949) (arguing that religiously “neutral” education does not expressly reject belief in religion but rather it ignores anything religious). Demeaning religion has the effect of preferring non-religion over religion. Verginis, *supra* note 62, at 761. Both the *Lemon* and endorsement tests state that the government cannot engage in such anti-religious activities. See *Lemon*, 403 U.S. at 612; *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

120. Verginis, *supra* note 62, at 761-62.

has extended from the Court to the government and from the government to society as a whole.¹²¹ Government silence regarding religion contradicts the Founders' intent for the Establishment Clause.¹²² The purpose of the Clause was to remove religion from government control,¹²³ not to prevent the government from engaging in non-coercive religious dialogue.¹²⁴ Furthermore, the Founders certainly did not intend the Establishment Clause to create hostility toward religious matters.¹²⁵ Rather, it was meant to prevent the religious hostility created by a

121. See 141 CONG. REC. S19, 259-60 (daily ed. Dec. 22, 1995) (statement of Sen. Hatch) (noting that hostility toward religion among local, state, and federal governments was spawned by the Court's Religion Clause jurisprudence). See also Shannen W. Coffin, *Can I Get an Amen?*, NATIONAL REVIEW ONLINE, August 9, 2004, at <http://www.nationalreview.com/coffin/coffin200408090832.asp> (last visited February 12, 2005). Not only have courts expressed hostility toward religion, but also the American Bar Association has engaged in a troubling attempt to demand that the government discriminate against the religious practices of health-care providers. *Id.* Such actions evidence the animosity toward religion that exists throughout the many levels of law and politics. See *id.*

122. See Michael W. McConnell, *The Origins of the Religion Clauses of the Constitution: Coercion: The Lost Element of Establishment*, 27 WM. AND MARY L. REV. 933, 936-39 (1986) (arguing that the purpose of the Establishment Clause was to prevent an established church that compelled adherence) [hereinafter McConnell, *Coercion*].

123. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000). See Stephen L. Carter, *The Moral Lawyer: Article: The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 936-37 (1989).

[T]here is good reason to think that "what the religion clauses of the first amendment were designed to do was not to remove religion and religious values from the arena of public debate, but to keep them there." The establishment clause by its terms forbids the imposition of religious belief by the state, not statements of religious belief in the course of public dialogue.

Id. (citations omitted).

124. See Christal L. Hoo, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 PENN ST. L. REV. 683, 698 (2004). "The history of the Religion Clauses dispels any notion that government is forbidden from affirming, through language or symbol, the special status of religion in public life." *Id.* "Government may speak religiously, but in expressing itself, the government must avoid coercing compliance and using the rhetoric of orthodoxy." *Id.* But see Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 221 n.185 (2003) ("Government may not speak religiously, teach that religion or any particular faith is true, or sponsor religious expression; but it may do all those things with respect to secular ideas and perspectives.").

125. Gary C. Furst, *Will the Religious Freedom Restoration Act be Strike Three Against Peremptory Challenges?*, 30 VAL. U. L. REV. 701, 738 (1996) (stating that hostility toward religion is entirely contrary to the intent of our nation's Founders who sought to establish a society based upon the principle of religious tolerance); Andrew R. Cogar, Comment, *Government Hostility to Religion: How Misconstruction of the Establishment Clause Stifles Religious Freedom*, 105 W. VA. L. REV. 279, 291 (2002) (stating that Supreme Court jurisprudence has bred hostility toward religious expression in public forums and acknowledging that the Founders would never have endorsed such a result).

government-established religion,¹²⁶ to uphold religious tolerance,¹²⁷ and to recognize the cherished role of religion in our society by preventing the government from coercing religious beliefs.¹²⁸

Armed with this incoherent and hostile analytical arsenal, the Court faced its decision in *Elk Grove Unified School District v. Newdow*.¹²⁹ As a response to these problems with the Court's current analysis, Justice O'Connor and Justice Thomas used their concurring opinions to present alternative approaches.¹³⁰

IV. SOLUTIONS TO THE PROBLEM: *ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW*

In *Newdow*, the plaintiff brought suit alleging that the school district's pledge policy violated the Establishment Clause.¹³¹ The policy required elementary school teachers to lead willing students in a recitation of the Pledge of Allegiance.¹³² Based upon a novel interpretation of the prudential standing doctrine, the Court held that the

126. See *Engel v. Vitale*, 370 U.S. 421 (1962) (ruling that the use of prayer in public schools was unconstitutional even if students were allowed to opt out with permission from their parents). In *Engel*, the Court noted that "a union of government and religion tends to destroy government and to degrade religion." *Id.* at 431. Moreover, "[t]he history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect[,] and even contempt of those who held contrary beliefs." *Id.* See also LEVY, *supra* note 21, at 3-5. The atrocities associated with established religions brewed religious animosity among nonbelievers because the nonbelievers associated the government actions with religion itself. See *id.* Examples of religious intolerance include legal punishment for preaching without government ordination and imposing civil disabilities on religious dissenters. *Id.*

127. See Furst, *supra* note 125, at 738 (noting that religious tolerance was a principle held in high esteem by the Founders). The Founders recognized that religious tolerance was a political necessity. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 367 (1986) (discussing the unifying role of a civic culture universal to all Americans and central to the idea of American identity). Such tolerance was not only a habit, but also an essential defense against tyranny. *Id.*

128. See *Accommodation of Religion in Public Institutions*, 100 HARV. L. REV. 1639, 1641-42 (1987) (explaining that open hostility toward religion is contrary to the special status of religion in American society).

129. 542 U.S. 1 (2004).

130. See *id.* at 44-53 (Thomas, J., concurring); *id.* at 2321-27 (O'Connor, J., concurring).

131. *Id.* at 5.

132. *Id.* Due to the inclusion of the words "one nation, under God," the plaintiff claimed that the Pledge constitutes religious indoctrination of his child in violation of the Establishment Clause. *Id.* Students are not required to participate in the Pledge. *Id.* A past Supreme Court decision requires a school board to allow "students who object on religious grounds to abstain from the recitation." See *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (holding that a school board cannot require students to participate in the Pledge of Allegiance).

plaintiff was unable to bring suit,¹³³ and the majority did not address the Establishment Clause issue.¹³⁴ Nevertheless, both Justices O'Connor and Thomas disagreed with the majority's holding that the plaintiff lacked standing.¹³⁵ Thus, they authored separate concurring opinions addressing the merits of the case and offering their alternative analytical approaches to Establishment Clause jurisprudence.¹³⁶

A. Justice O'Connor's Approach¹³⁷ – Ceremonial Deism

Justice O'Connor believes that the Establishment Clause "cannot easily be reduced to a single test."¹³⁸ Therefore, she wants to create a

133. *Newdow*, 542 U.S. at 17-18. There are two types of standing that a plaintiff must satisfy in order to bring suit in the U.S. Supreme Court – Article III standing and prudential standing. *Id.* at 11-12. Article III standing enforces the Constitution's "case or controversy" requirement. *Id.* Prudential standing embodies "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Although the Court has not exhaustively defined the dimensions of prudential standing, it encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations" even if the case only involves elements of the domestic relationship. *Newdow*, 542 U.S. at 12. The *Newdow* Court held that it is "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Id.* at 17. "When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law." *Id.*

134. *Newdow*, 542 U.S. at 17.

135. *See id.* at 33 (O'Connor, J., concurring), 44 (Thomas, J., concurring).

136. *See id.* at 33-54 (O'Connor, J., concurring), 44 (Thomas, J., concurring). Despite the fact that O'Connor and Thomas disagree with the Court's procedural holding, they concur with the majority's judgment ruling because they, like the majority, reverse the Ninth Circuit's decision, thereby leaving the Pledge of Allegiance intact. *Id.* at 42 (O'Connor, J., concurring), 53-54 (Thomas, J., concurring). The late Chief Justice Rehnquist also authored a concurring opinion. *Id.* at 18-33 (Rehnquist, C.J., concurring). He argued that the procedural holding of the majority was errantly decided. *Id.* at 16-30. When he reaches the merits of the case, his argument is based primarily on tradition and distinguishing the precedent set by *Lee v. Weisman*. *Id.* at 31-33. He does not pose a new approach to Establishment Clause analysis, and thus his opinion is not relevant for purposes of this article. *Id.*

137. *See* Peter L. Giunta, *Unequalled Among Firsts*, 25 CARDOZO L. REV. 2079, 2082 (2004) (reviewing Kenneth W. Starr's book *First Among Equals: The Supreme Court in American Life*). Kenneth W. Starr refers to O'Connor as a "common-law constitutionalist." *Id.* O'Connor is a moderate in both her social policy and judicial philosophy. *Id.* Nevertheless, she is "ready and willing to create new law." *Id.* Her views are often decisive in determining the outcome of the Court's decision. *Id.*

138. *Newdow*, 542 U.S. at 33 (O'Connor, J., concurring). When facing a challenge to government-sponsored speech, Justice O'Connor prefers the endorsement test. *Id.*

new test for a small category of cases involving “ceremonial deism.”¹³⁹ It is important to understand that the ceremonial deism standard only applies to a subset of particular cases; it does not replace the other tests or create an entirely new analytical approach.¹⁴⁰ Ceremonial deism identifies limited instances where the government may commemorate religion in the public setting.¹⁴¹ According to O’Connor, such expressions are not minor infringements on the Establishment Clause that the Court chooses to ignore.¹⁴² Rather, the character, history, and context of such religious expressions prevent them from violating the Establishment Clause at all.¹⁴³ The rationale for this conclusion is that such religious utterances have traded their religious meaning for a secular purpose.¹⁴⁴ Permissible secular purposes include “solemnizing

139. *Id.* at 42.

140. *See id.* at 33. The ceremonial deism test is a “specific application of the endorsement test [which] examin[es] whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders.” *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring). According to O’Connor, expressions of ceremonial deism not only satisfy the endorsement test, but they also pass analysis under the psychological coercion test. *See Newdow*, 124 S. Ct. at 44 (O’Connor, J., concurring).

Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an *Establishment Clause* matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test.

Id. (emphasis in original).

141. *Newdow*, 542 U.S. at 35. *See, e.g.*, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (involving a private, unattended display of a cross in a public forum opened by the government for private expression); *Allegheny*, 492 U.S. 573 (involving a display of a crèche on the staircase of a government courthouse and a menorah outside a government building); *Lynch*, 465 U.S. 668 (1984) (involving a city’s Christmas display which included a crèche); *Marsh v. Chambers*, 463 U.S. 783 (1983) (discussing the practice of opening legislative sessions with prayer). Other examples of ceremonial deism include symbols, city seals, songs, mottos, and oaths. *Newdow*, 124 S. Ct. at 2322 (O’Conner, J., concurring). Specific examples include our national motto (“In God We Trust”), religious references in the Star-Spangled Banner, and the words with which the Supreme Court Marshal opens each session (“God save the United States and this honorable Court”). *Id.* at 2323.

142. *Newdow*, 542 U.S. at (O’Conner, J., concurring).

143. *Id.* *Contra* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996) (arguing that the Supreme Court can and should declare that most forms of ceremonial deism are unconstitutional); Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court’s Establishment Clause Jurisprudence*, 54 MERCER L. REV. 1669 (2003) (critiquing the Court’s resort to secularization and ceremonial deism in fashioning its Establishment Clause jurisprudence).

144. *Newdow*, 124 S. Ct. at 36-37 (O’Conner, J., concurring). “The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes.” *Id.* Historical use can strip an expression of its original religious purpose. *Id.* at 40. “An act of ceremonial deism is inconsequential, as an *Establishment Clause* matter, because such acts are

public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”¹⁴⁵ O’Connor also recognizes the important secular purpose of commemorating America’s religious history.¹⁴⁶ She believes that such religious references can serve to solemnize an occasion without “invok[ing] divine provenance.”¹⁴⁷

Justice O’Connor highlights four factors to help determine whether a particular religious expression qualifies as ceremonial deism.¹⁴⁸ First, the expression must have been in place for a significant portion of our Nation’s history and must have been practiced by enough people to classify it as ubiquitous.¹⁴⁹ O’Connor is careful to point out that history does not insulate a violation of the Establishment Clause, but “an unbroken practice . . . is not something to be lightly cast aside.”¹⁵⁰ Second, the expression must not involve prayer or worship.¹⁵¹ According to O’Connor, situations where prayer is regarded as

simply not religious in character. *Id.* at 44 (emphasis in original).

145. *Lynch*, 465 U.S. at 692-93 (O’Connor, J., concurring).

146. *Newdow*, 542 U.S. at 35 (O’Connor, J., concurring). Since our nation was founded on religious principles by a group of religious refugees, these same principles will be manifest in our national traditions. *Id.* “Eradicating such references would sever ties to a history that sustains [our] Nation even today.” *Id.*

147. *Id.*

148. *Id.* at 33-43. Steven B. Epstein has identified other characteristics of ceremonial deism. See Epstein, *supra* note 143, at 2095. Other main attributes of ceremonial deism include unlikelihood of indoctrinating the audience and a reference to a generic deity. *Id.* Other incidental characteristics include the fact that ceremonial deism is created, delivered, or encouraged by government officials, it occurs during governmental events, and it is not specifically designed to further the free exercise of religion. *Id.*

149. *Newdow*, 542 U.S. at 35 (O’Connor, J., concurring). Ubiquitous is defined as something that is constantly encountered or widespread. MERRIAM-WEBSTER ONLINE DICTIONARY, available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=ubiquitous> (last visited November 13, 2004). A common reference to religion – such as “In God We Trust” on U.S. currency or “under God” in the Pledge – is likely to be viewed as ceremonial deism. *Newdow*, 542 U.S. at 37 (O’Connor, J., concurring). One obvious ramification of the historical use requirement is that “only the ceremonial deisms that already exist may ever exist because any new religious practices that the government attempts to institute will not have the necessary longevity to constitute ceremonial deism.” Verginis, *supra* note 62, at 761.

150. *Newdow*, 542 U.S. 38 (O’Connor, J., concurring) (quoting *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 678 (1970)). The history of a practice is even more significant when it has not generated significant controversy during the course of its use. *Newdow*, 542 U.S. at 38-39 (O’Connor, J., concurring). Even if a religious expression was originally adopted for the purpose of advancing religion, this improper motivation can be cured by a historical use that has stripped the expression of its original purpose. *Id.*

151. *Newdow*, 542 U.S. at 39-40 (O’Connor, J., concurring). “Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history.” *Id.* at 40.

ceremonial deism are exceedingly rare.¹⁵² Third, the expression must not prefer a particular religious sect over another.¹⁵³ Finally, the expression must include minimal religious content.¹⁵⁴ Applying O'Connor's ceremonial deism analysis, the Pledge of Allegiance does not violate the Establishment Clause.¹⁵⁵ Other prominent examples of ceremonial deism include legislative prayer, the national motto "In God We Trust," and invoking the name of God in a Presidential address.¹⁵⁶

The phrase "ceremonial deism" originated in a 1962 lecture given by former Yale Law School Dean Walter Rostow.¹⁵⁷ He characterized ceremonial deism as a "class of public activity, which could be accepted as so conventional and uncontroversial as to be constitutional."¹⁵⁸ Despite generating some discussion amongst scholars, the phrase

152. *Id.* The only example cited by Justice O'Connor is the upholding of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983). *See id.* (O'Connor, J., concurring). The rationale for upholding legislative prayer was its "extremely long and unambiguous history." *Id.* *See also* Ashley M. Bell, "God Save This Honorable Court": How Current Establishment Clause Jurisprudence Can be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273, 1306-07 (2001) (noting that legislative prayer in *Marsh* was found to be constitutional because the Court determined that it was a mere "acknowledgement[] of religion based on history and tradition"). On the other hand, the Supreme Court has rejected the constitutionality of other forms of public prayer. *See, e.g.,* Lee v. Weisman, 505 U.S. 577 (1992) (holding that prayer at a public school graduation is a violation of the Establishment Clause); Engel v. Vitale, 370 U.S. 421 (1962) (holding that the use of prayer in public schools is unconstitutional).

153. *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Justice O'Connor recognizes that some religions, such as Buddhism, do not believe in a separate Supreme Being. *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring). Her response is that it would be impossible to develop a "brief solemnizing reference to religion" that would adequately represent the religious beliefs of every American. *Id.* Thus a generic reference to God is a sufficient attempt to acknowledge religion without favoring a specific belief. *Id.*

154. *Newdow*, 542 U.S. at 40 (O'Connor, J., concurring). A ceremony cannot bypass the mandates of the Establishment Clause by avoiding a reference to God. *See* *Wallace v. Jaffree*, 472 U.S. 38 (1985) (statute establishing a moment of silence for meditation or prayer violated the Establishment Clause). A minimal amount of religious content is important for three reasons. *Newdow*, 542 U.S. at 42-43 (O'Connor, J., concurring). First, it supports the fact that the expression is being used to solemnize the event and not to promote religion. *Id.* Second, it makes it easier for nonbelievers to opt out. *Id.* Third, it limits the government's opportunity to prefer one religion over another. *Id.*

155. *See Newdow*, 542 U.S. at 43 (O'Connor, J., concurring).

156. Epstein, *supra* note 143, at 2095. Other examples of ceremonial deism include the Thanksgiving and Christmas holidays, oaths of public officers, oaths of participants in judicial proceedings, the invocation "God save the United States and this Honorable Court" prior to judicial proceedings, the use of "in the year of our Lord" to date public documents, religious symbols in government seals, and the National Day of Prayer. *Id.* at 2095-96.

157. *See id.* at 2091.

158. Arthur E. Sutherland, *Book Review*, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1963)).

“ceremonial deism” has only been used by the Supreme Court in three cases.¹⁵⁹ Nevertheless, the Court has “implicitly referred to this concept from the very beginning of its Establishment Clause jurisprudence.”¹⁶⁰

The Court’s opinion in *Lynch v. Donnelly*¹⁶¹ provides constitutional protection for ceremonial deism.¹⁶² Chief Justice Burger held that the inclusion of a crèche in a government holiday display did not violate the Establishment Clause.¹⁶³ In support of this holding, he emphasized the importance of our Nation’s “unbroken history of official acknowledgment . . . of the role of religion”¹⁶⁴ and the fact that “our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.”¹⁶⁵ This history and tradition-based rationale provides precedent with which to defend ceremonial deism from constitutional attack. O’Connor’s view of ceremonial deism emanates from many of the ideas expressed in the *Lynch* opinion.¹⁶⁶

159. See *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (“I would suggest that such practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form a ‘ceremonial deism,’ . . .”); *Allegheny*, 492 U.S. at 630 (O’Connor, J., concurring) (“[C]eremonial deism do[es] not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone.”); *Newdow*, 542 U.S. at 37 (O’Connor, J., concurring) (“This category of ‘ceremonial deism’ most clearly encompasses such things as the national motto . . . , religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions . . .”).

160. Epstein, *supra* note 143, at 2093. An example of an implicit reference to ceremonial deism is found in *Zorach v. Clauson*, 343 U.S. 306, 312-313 (1952). In discussing the futility of complete separation between church and state, Justice Douglas cites examples of references to God that do not violate the Establishment Clause. *Id.* “Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths – these and all other references to the Almighty that run through our laws, our public rituals, [and] our ceremonies” do not violate the Establishment Clause. *Id.*

161. 465 U.S. 668 (1984).

162. Epstein, *supra* note 143, at 2094.

163. *Lynch*, 465 U.S. at 687.

164. *Id.* at 674.

165. *Id.* at 675.

166. Compare *Newdow*, 542 U.S. at 35 (O’Connor, J., concurring) (citing instances where the government may refer to religion in public life and stating that the Court should not deny that our religious history “has left its mark on our national traditions”), with *Lynch*, 465 U.S. at 674-77 (noting examples of traditional government expressions of religion which have been protected under the Establishment Clause, including the national motto and the Pledge of Allegiance, and stating that “our history is pervaded by expressions of religious beliefs”).

*B. Justice Thomas's Approach*¹⁶⁷ – *Actual Legal Coercion*

Like O'Connor, Thomas agreed that the plaintiff had adequate standing to bring his suit, and as a result, he addressed the merits of the case.¹⁶⁸ Unlike O'Connor, however, Thomas perceives an inherent problem with Establishment jurisprudence as a whole, which leads him to critique the Court's current approach and posit an overall solution.¹⁶⁹

There are two parts to Thomas's solution.¹⁷⁰ First, he believes that the incorporation of the Establishment Clause is incorrect.¹⁷¹ He views the Establishment Clause as a federalism provision,¹⁷² and as such, it should not be applied to the states via the Fourteenth Amendment.¹⁷³ He

167. See MARK TUSHNET, *A COURT DIVIDED* 89 (2005). Justice Thomas interprets the Constitution adopted in 1789 without emphasizing the post-Civil War Amendments. *Id.* Thomas's interpretation uses a "rigorously originalist method, but with a twist." *Id.* The twist consists of his reading of the Constitution against its background in natural law. *Id.*

168. See *Newdow*, 542 U.S. at 44-53 (Thomas, J., concurring).

169. See *id.* at 44.

170. See *id.* at 49-53.

171. See *Newdow*, 542 U.S. at 49 (Thomas, J., concurring) (arguing against the incorporation of the Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-80 (2002) (Thomas, J., concurring) (arguing that the Establishment Clause does not qualify for incorporation through the Fourteenth Amendment). See also William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 531 (1998) (arguing that incorporation of the Establishment Clause was incorrect). Under "selective incorporation," the Court enforced many guarantees found in the Bill of Rights against the states through the Fourteenth Amendment. See Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979 (1985). See, e.g., *Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (collateral estoppel); *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (double jeopardy); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (speedy trial); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (unreasonable search and seizure); *Francis v. Resweber*, 329 U.S. 459, 463 (1947) (cruel and unusual punishment); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise of religion); *DeJonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (assembly); *Near v. Olson*, 283 U.S. 697, 707 (1931) (freedoms of speech and press); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (freedom of speech); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedoms of speech and press). Specifically, the Establishment Clause was incorporated in 1947. See *Everson v. Board of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

172. See BLACK'S LAW DICTIONARY 642 (8th ed. 1990). Federalism relates to a system of associated governments with a vertical division of governments into national and regional components having different responsibilities. *Id.*

173. *Newdow*, 542 U.S. at 49 (Thomas, J., concurring). The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Thus, the Fourteenth Amendment was intended to protect individuals from the state, not protect the states from the federal government. *Newdow*, 542 U.S. at 49 (Thomas, J., concurring). *But see* Michael Kent Curtis, *John Bingham and the Meaning of the Fourteenth Amendment: John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause"*, 36 AKRON L. REV. 617, 623 (2003) (recounting the life of John Bingham in the context of America's struggle for liberty). Senator Jacob Howard of Michigan, who introduced the

acknowledges two purposes of the Establishment Clause.¹⁷⁴ The first is to “prohibit[] Congress from establishing a national religion.”¹⁷⁵ The second purpose seeks to uphold federalism and protect states’ rights by preventing congressional interference with state establishments of religion.¹⁷⁶ Conversely, the Fourteenth Amendment only protects individual rights against infringement by state governments.¹⁷⁷ Since neither purpose for the Establishment Clause seeks to protect individual rights,¹⁷⁸ the Establishment Clause does not qualify for incorporation.¹⁷⁹ This portion of Thomas’s view has been ridiculed by many scholars despite its apparent validity from an originalist and textualist perspective.¹⁸⁰

Fourteenth Amendment to the Senate, “clearly said that the Amendment’s ‘privileges or immunities of citizens of the United States’ included the guarantees of the Bill of Rights.” *Id.*

174. *Newdow*, 542 U.S. at 49 (Thomas, J., concurring).

175. *Id.*

176. *Id.*

177. *See* U.S. CONST. amend. XIV. The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The language of the Fourteenth Amendment, which focuses on a person’s privileges, immunities, life, liberty, and property, is concerned with upholding individual rights. *See id.*

178. *Newdow*, 542 U.S. at 49-50 (Thomas, J., concurring). The Founders inserted the Free Exercise Clause to “protect individuals against congressional interference with the right to exercise their religion.” *Id.* The Free Exercise Clause is found in the First Amendment to the U.S. Constitution. U.S. CONST. amend. I. It states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” *Id.* (emphasis added). Thomas concedes that there is an argument that the Establishment Clause protects individual rights. *Newdow*, 542 U.S. at 50 (Thomas, J., concurring). Specifically, it is the right to be free from coercive federal establishments. *Id.* This argument provides minimal support for the incorporation of the Establishment Clause. *Id.*

179. *Newdow*, 542 U.S. at 50. *But see* Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 66-78 (1993) (arguing that history supports the argument that the Privileges or Immunities Clause of the Fourteenth Amendment was designed to incorporate the Bill of Rights against the states).

180. *See* Brian Leiter, *The U.S. Supreme Court Dodges a Bullet*, THE LEITER REPORTS: EDITORIALS, NEWS, UPDATES, <http://webapp.utexas.edu/blogs/archives/bleiter/001452.html> (last visited June 15, 2004). Professor Brian Leiter said, “Thomas . . . solidif[ie]d his status on the lunatic fringe [by] argu[ing] that the Establishment Clause shouldn’t even apply to the states.” *Id.* A majority of scholars and members of the Supreme Court will not even consider Thomas’s “unincorporation” argument. *See, e.g.,* Lash, *supra* note 17, at 1086-87 (stating that the original intent argument against the incorporation of the Establishment Clause is fundamentally flawed and thus cannot be seriously considered). Nevertheless, many well-reasoned articles argue against the incorporation of the Establishment Clause. *See, e.g.,* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990) (arguing against the incorporation of the Establishment Clause); *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) (considering the implications of “unincorporating” the Establishment Clause) [hereinafter

In the second portion of Thomas's opinion, he suggests that the "actual legal coercion test" should be used to replace the multi-test approach.¹⁸¹ Under this approach, government action seeking to coerce religious orthodoxy or financial support "by force of law and threat of penalty" violates the Establishment Clause.¹⁸² It renders the other tests superfluous because it captures the essential purpose of the Establishment Clause.¹⁸³ According to Thomas, the government only violates the Constitution when it uses legal means to directly coerce religious beliefs.¹⁸⁴ Examples of such legal coercion include mandatory church attendance or taxation to fund a particular church's operations.¹⁸⁵

Rethinking Incorporation]; Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998) (arguing that the incorporation of the Establishment Clause was incorrect); Gray, *supra* note 171. The Supreme Court's rationale for the incorporation of the Establishment Clause is extremely sparse. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 254-58 (1963) (Brennan, J., concurring). When the Supreme Court originally incorporated the Establishment Clause, Justice Black failed to provide any rationale. See *Everson*, 330 U.S. at 15. Over fifteen years later in *Schempp*, Justice Brennan's concurring opinion offered support for the Establishment Clause's incorporation. See *Schempp*, 374 U.S. at 254-258 (Brennan, J., concurring). However, Brennan's cursory analysis of the argument was unconvincing. See *Rethinking Incorporation*, *supra* note 180, at 1709-11. Due to the unlikelihood of "unincorporation" by the Supreme Court, this article will focus on the second portion of Thomas's solution as providing necessary renovation to Establishment Clause jurisprudence.

181. *Newdow*, 542 U.S. at 52 (Thomas, J., concurring).

182. *Id.* (emphasis in the original) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). In order to understand the basis of Thomas's view, one must consider the role of government-established religion in England and the Colonies during the founding of America. See *Lee*, 505 U.S. at 640-641 (Scalia, J., dissenting).

Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

Lee, 505 U.S. at 640-641 (citations omitted). One year following the *Newdow* case, Justice Thomas echoed his "actual legal coercion" approach in *Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) (stating that the "Framers understood an establishment 'necessarily [to] involve actual legal coercion'").

183. See *Newdow*, 542 U.S. at 52 (Thomas, J., concurring) (The type of coercion which characterizes this test is the same "coercion that was a hallmark of historical establishments of religion").

184. *Id.* at 51-52.

185. *Id.* Thomas seems to leave open the question of whether support for religion generally through taxation violates the Establishment Clause. *Id.* There is an argument that the Founders would have found no Establishment Clause violation if the government taxes its citizens to support religion in general, as long as the government does not prefer one religion over another when distributing the funds. See Michael Stokes Paulsen, *Religion and the Public Schools After Lee v. Weisman: Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 863 n.211 (1993). Taxation does not

This approach also recognizes that the government may not instill a religion with governmental authority¹⁸⁶ nor may it “delegate its civic authority to a group chosen according to a religious criterion.”¹⁸⁷ Finally, Thomas believes that a government must refrain from giving preference to a particular religious faith.¹⁸⁸ Specifically, he believes that “[l]egal compulsion is an inherent component of ‘preferences’ in this context.”¹⁸⁹

amount to direct coerced support for religion where religion is simply permitted to benefit from a neutral government program of general applicability on the same terms as secular beneficiaries. *Id.* Coerced financial support as understood by the Founders “requires at least some sort of government preferential funding of religion; it is disparate distribution, not the fact of taxation, that might tend to be coercive.” *Id.* (emphasis in original). According to Professor Paulsen, “[r]eligion may receive financial benefits, but there must exist some non-pretexual general category or rule of inclusion that embraces religious beneficiaries [and] is capable of being expressed in non-religious terms.” *Id.* *But see* Flast v. Cohen, 392 U.S. 83, 103 (1968) (“[American] history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.”). A taxation scheme that benefits religion in general would be akin to the current system of taxation for public schooling. Public education fosters a social benefit by producing educated and competent citizens. *See* Linda C. McClain, *Symposium The Constitution and the Good Society: The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1654 (2001) (noting that the development of competent citizens and the inculcation of fundamental values are some of the social benefits of a public education). Likewise, religion is considered to foster a social benefit because it generally encourages morality among its citizens. *See* George Washington, Farewell Address (September 17, 1796), available at <http://www.yale.edu/lawweb/avalon/washing.htm> (last visited October 25, 2005) (stating that “reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle”).

186. *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). A religious organization which carries government authority that can be used coercively resembles a traditional “religious establishment.” *Id.*

187. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 698 (1994) (ruling that a state government cannot create a separate school district for a village containing practitioners of a strict form of Judaism).

188. *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). Thomas believes that the government is not forbidden from giving preferences for religion over irreligion. *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring). Rather, the government is only prohibited from giving preferences for particular religious faiths over others. *Id.* *See also Van Orden*, 125 S. Ct. at 2860 n.3 (containing a statement by a four-justice plurality that they do not “adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion”); *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2751-52 (2005) (Scalia, J., dissenting) (noting that the government may act in a way that improves the position of religion).

189. *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). Thomas acknowledges that James Madison commended the no-preference argument. *Id.* Specifically, Madison’s Memorial and Remonstrance Against Religious Assessments expounds this view. *Id.* The Remonstrance was written in response to a bill of the Virginia legislature entitled “A Bill establishing a provision for Teachers of the Christian Religion.” *Everson v. Bd. of Educ.*, 330 U.S. 15, 63-64 (appendix to dissent of Rutledge, J.). Thus, the arguments found in Madison’s Remonstrance are premised upon coercive taxation used to support an established religion. *Newdow*, 542 U.S. at 52-54 (Thomas, J.,

According to Thomas, the purpose for the enactment of the Establishment Clause was to prevent “one powerful sect or combination of sects [from] us[ing] political or governmental power to punish dissenters whom they could not convert to their faith.”¹⁹⁰ Thus, any government action which does not punish religious dissenters by use of legal force, create a coercive government establishment, or give legal preference to a religious group cannot be said to violate the Establishment Clause.¹⁹¹

Past judicial opinions and scholarly writings supporting the actual legal coercion test are limited.¹⁹² Justice Scalia’s dissent in *Lee v. Weisman* provides the first exposition of this approach.¹⁹³ Scalia’s argument focuses on the Founders’ intent as well as the history and tradition of our Nation.¹⁹⁴ Contrasting the actual legal coercion test with the “psychological coercion test,” he sees no reason to “expand[] the concept of coercion beyond acts backed by threat of penalty.”¹⁹⁵ Further, he recognizes that speech, of its very nature, “is not coercive; the listener may do as he likes.”¹⁹⁶ Thus, the government must engage in

concurring). See generally *Rosenberger*, 515 U.S. at 853-56 (1994) (Thomas, J., concurring) (discussing the Assessment Controversy and arguing that Madison believed the Establishment Clause forbids government preferences for some religious faiths over others, not government preferences for religion over irreligion).

190. *Zorach v. Clauson*, 343 U.S. 306, 319 (1952) (Black, J., dissenting).

191. *Newdow*, 542 U.S. at 53 (Thomas, J., concurring). “It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause, further calling into doubt the utility of incorporating the Establishment Clause.” *Id.*

192. See, e.g., *Lee*, 505 U.S. at 631-46 (Scalia, J., dissenting); Johnson, *supra* note 10, at 178-94.

193. See *Lee*, 505 U.S. at 631-46 (Scalia, J., dissenting).

194. See *id.* at 640-642. Scalia grounds his interpretation of “coercion” in the history of Colonial and Revolutionary America. *Id.* at 641. Moreover, a nonsectarian invocation and benediction is “so characteristically American [that it] could have come from the pen of George Washington or Abraham Lincoln himself.” *Id.* Throughout our nation’s history, these kinds of public prayers have become commonplace. *Id.* at 633-634. George Washington, Thomas Jefferson, James Madison, and George Bush all prayed during their inaugural address. *Id.* Most Presidents have delivered Thanksgiving Proclamations with their prayerful gratitude to God. *Id.* at 635. Likewise, both the legislative and judicial branches have recognized prayer during public events. *Id.*

195. *Id.* at 642. Scalia feels that the psychological coercion test is unworkable for judges who have no expertise in the field of psychology. *Id.* On the other hand, actual legal coercion is “readily discernible to [judges] who have made a career of reading the disciples of Blackstone rather than of Freud.” *Id.* See also *Newdow*, 542 U.S. at 49 (Thomas, J., concurring). Thomas believes that the notion of coercion embraced by the Court in *Lee* has “no basis in law or reason.” *Id.* “Peer pressure, unpleasant as it may be, is not coercion.” *Id.* Instead, “[t]he kind of coercion implicated by the Religion Clauses is that accomplished ‘by force of law and threat of penalty.’” *Id.* (emphasis in original).

196. *Lee*, 505 U.S. at 642 (quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)). Scalia’s view that speech, at least in the manner of

something more than speech to coerce; there must be some governmental authority enforcing action or exacting penalties.¹⁹⁷ Judicial analysis, under the direct legal coercion test, “focus[es] on the actual effects of governmental power and not on mere appearances.”¹⁹⁸

Thomas’s actual legal coercion test is the preferred solution to the Establishment Clause problem.¹⁹⁹ Ceremonial deism only addresses a small category of Establishment cases while leaving the remainder of the doctrine in disarray.²⁰⁰ The underlying rationale of O’Connor’s approach degrades the importance of religion – an importance which has been recognized throughout our Nation’s history.²⁰¹ Ceremonial deism is a meager patch on Establishment Clause jurisprudence.²⁰² With time, this patch will erode and expose the analytical hole lurking beneath.²⁰³ On the other hand, Thomas’s test retains a proper respect for the role of religion in our society, strikes at the heart of Establishment Clause analysis, and is an effective replacement for the Court’s incoherent scheme.²⁰⁴

V. INADEQUACIES OF CEREMONIAL DEISM

A. Ceremonial Deism Illustrates and Ignores the Flaws in the Court’s Current Analysis

Expressions of ceremonial deism are unconstitutional under the Court’s current Establishment Clause analysis.²⁰⁵ Consider the Pledge

nonsectarian prayer, does not coerce is based on the Founders’ approval of nonsectarian prayer at public events. *Lee*, 505 U.S. at 642.

197. *See Johnson, supra* note 10, at 144. *But see Lee*, 505 U.S. at 593-96 (arguing that government speech which creates public pressure and peer pressure to engage in a religious exercise amounts to improper coercion protected by the Establishment Clause).

198. *Johnson, supra* note 10, at 178-179.

199. *See infra* notes 250-318 and accompanying text.

200. *See Newdow*, 542 U.S. at 33 (O’Connor, J., concurring). Ceremonial deism is a specific application of the endorsement test. *Id.* It does not address the problems with the *Lemon* and psychological coercion tests; in fact, the addition of the ceremonial deism standard adds more confusion to the current system. *See infra* notes 205-221 and accompanying text.

201. *See McConnell, Crossroads, supra* note 10, at 152-153 (demonstrating the bias against religion that is inherent in the endorsement test).

202. *See infra* notes 205-249 and accompanying text.

203. *See infra* notes 205-249 and accompanying text.

204. *See infra* notes 250-318 and accompanying text.

205. *See Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting). “Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of [the endorsement test].” *Id.* Justice Kennedy cites a few examples of historical practices that will be declared unconstitutional under the endorsement test, including the statute authorizing a National Day of Prayer, the Pledge of Allegiance, the national motto, and legislative

of Allegiance as an example. Regardless of which test the Court applies, the Pledge will be found unconstitutional.²⁰⁶ According to Justice Thomas, the Court will decide this issue under the psychological or indirect coercion test and conclude that the Pledge violates the Establishment Clause.²⁰⁷ If, however, the Court chooses to apply the *Lemon* test, it will likewise find the Pledge unconstitutional.²⁰⁸ The Pledge might satisfy the secular purpose prong by “foster[ing] national unity and pride in [American] principles.”²⁰⁹ Nevertheless, the inclusion of the words “under God” in the Pledge suggests that an essential element of patriotism includes proclaiming “the dedication of our Nation and our people to the Almighty.”²¹⁰ Such a “religious affirmation”

prayer. *Id.* at 672-73. *See also* Epstein, *supra* note 143, at 2091 (stating that the “Supreme Court can and should hold most forms of ceremonial deism to be unconstitutional”).

206. *See* Respondent’s Brief at 5, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624) (arguing that the words “under God” in the Pledge of Allegiance violates every Establishment Clause test that the Supreme Court has announced). Usually, the Court’s choice of which test to apply is a critical issue in the analysis. *Id.* at 8. However, in dealing with the Pledge, the choice is of little consequence because every test leads to the conclusion that the Pledge violates the Establishment Clause. *Id.* *But see* Marsh v. Chambers, 463 U.S. 783 (1983). If the Court uses a history and tradition-based analysis similar to that found in *Marsh*, the Pledge of Allegiance might be found constitutionally valid. *See id.*

207. *See Newdow*, 542 U.S. at 45-48 (Thomas, J., concurring). “Adherence to [the psychological coercion test] in *Lee* would require [the Court] to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*.” *Id.* at 46. First, students are legally compelled to attend school and thus are required to be present at the morning Pledge routine. *Id.* Second, students who wish to dissent will often participate anyways due to coercion from peers. *Id.* at 47. *See also* Brief of Amicus Curiae Religious Scholars and Theologians in Support of Respondent at 5, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (No. 02-1624) [hereinafter Brief of Religious Scholars] (arguing that the Pledge of Allegiance is unconstitutional under a proper application of *Lee v. Weisman*). *But see Newdow*, 124 S. Ct. 2319-20 (Rehnquist, J., concurring) (arguing that the phrase “under God” in the Pledge does not convert its recital into a “religious exercise” of the sort described in *Lee* and thus upholding the Pledge as a matter of precedent).

208. *See* Respondent’s Brief at 12-15, *Newdow* (No. 02-1624) (arguing that the Pledge violates the *Lemon* test). The inclusion of the words “under God” violates the secular purpose requirement because these words were added in order to distinguish the U.S. from Communist Russia by endorsing monotheism and disapproving atheism. *Id.* at 13. Moreover, “[a] group ‘expression of faith’ – obviously in ‘God’ – has religious effects, and violates *Lemon*’s second prong.” *Id.* at 15.

209. *Newdow*, 542 U.S. at 5. Justice O’Connor acknowledges other secular purposes such as “solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring). Another important secular purpose is seeking to commemorate the religion of our nation’s history. *Newdow*, 542 U.S. at 37 (O’Connor, J., concurring). *But see* Respondent’s Brief at 13-14, *Newdow* (No. 02-1624) (arguing that the purpose prong of the *Lemon* test is violated because the congressional record indicates that Congress inserted the words “under God” into the Pledge for the purpose of acknowledging the dependence of America upon the moral directions of the Creator).

210. 100 CONG. REC. 8617 (1954) (quoting President Eisenhower at the signing of the joint resolution which placed the words “under God” in the Pledge of Allegiance). On June 14, 1954, the words “under God” were added to the Pledge of Allegiance. Brief of Religious Scholars at 3,

causes the Pledge to violate both the “neither advances nor inhibits” prong and the “excessive entanglement” prong of the *Lemon* test.²¹¹ Finally, under a generic application of the endorsement test, the words “under God” prefer monotheistic beliefs over pantheistic or atheistic beliefs, thus improperly endorsing a subset of religions.²¹²

The fact that the Pledge of Allegiance, as well as other historically practiced expressions of ceremonial deism, should be declared unconstitutional illustrates a problem with current Establishment Clause jurisprudence.²¹³ The Court has consistently emphasized the role of history and tradition in Establishment Clause analysis.²¹⁴ “The more

Newdow (No. 02-1624). Congress made this change in response to the Cold War and in defiance of “godless Communism.” *Id.* at 5. These words were added to commemorate the traditional concept that America was founded on a fundamental belief in God. H.R. Rep. No. 1693, 83d Cong., 2d Sess., p 2 (1954). In essence, Congress “incorporate[ed] – as an official element of patriotism – an affirmation of a belief in ‘God’ and loyalty to the ideal of a nation defined by religious devotion.” Brief of Religious Scholars at 5, *Newdow* (No. 02-1624).

211. Brief of Religious Scholars at 5, *Newdow* (No. 02-1624). The Pledge is an expression of personal belief. *Id.* “[T]he campaign to add ‘under God’ to the Pledge was infused with a sectarian religious purpose.” *Id.* at 12. This religious purpose created an endorsement of a particular religious doctrine. *Id.* at 13. Wholly apart from its purpose, the inclusion of “under God” makes the Pledge “an affirmation of religion and an expression of religious belief.” *Id.*

212. See *Allegheny*, 492 U.S. at 672-73 (Kennedy, J., dissenting). In assessing the constitutionality of the Pledge under the endorsement test, Justice Kennedy states that “it borders on sophistry to suggest that the ‘reasonable’ atheist would not feel less than a ‘full member[] of the political community’ every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.” *Id.* Not surprisingly, Michael Newdow is a self-proclaimed atheist. *Newdow*, 542 U.S. at 5. See also Brief of Amicus Curiae Associated Pantheistic Groups at 12, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (No. 02-1624) [hereinafter Brief of Pantheistic Groups] (arguing that “the phrase ‘under God’ conflicts, at a minimum, with the religious viewpoints of polytheistic religions such as Hinduism or paganism, of non-theistic religions such as Buddhism or pantheism, as well as of the religious positions of atheism and humanism”). Pantheism is characterized by the absence of a “God.” *Id.* Thus, the recitation that America is “under” a deity directly conflicts with the beliefs of Pantheists. *Id.* at 13. According to Justice O’Connor, since the endorsement test takes the perspective of a “reasonable observer,” the history and ubiquity of the activity will detract from its religious meaning. *Newdow*, 542 U.S. at 35 (O’Connor, J., concurring).

213. See *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting).

[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.

Id. (citations omitted).

214. See *Lynch*, 465 U.S. at 678. The Court has consistently refused “to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.” *Id.* (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 671 (1970) (emphasis in original)). See, e.g., *Allegheny*, 492 U.S. at 669 (Kennedy, J., dissenting) (noting that “the

longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation²¹⁵ and the more likely it is to be found constitutional.²¹⁶ Yet despite their historical significance and unbroken practice, instances of ceremonial deism will be found unconstitutional under any faithful application of the current Establishment Clause tests.²¹⁷ In order to avoid “invalidat[ing] scores of traditional practices which recogniz[e] the place religion holds in our culture,”²¹⁸ current Establishment Clause analysis “must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past.”²¹⁹ Justice O’Connor’s ceremonial deism approach seeks to erase these aberrational results by creating an additional Establishment Clause test.²²⁰ Rather than creating another extremely limited test, the Court should seek to identify and correct the analytical problems creating such counterintuitive results.²²¹

meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings”); *Marsh*, 463 U.S. at 790 (noting that “historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied [in] practice”); *Walz*, 397 U.S. at 678 (noting that “an unbroken practice . . . is not something to be lightly cast aside”); *Sch. Dist. of Abington Twp.v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (“The line we must draw between the permissible and the impermissible is one which accords with history.”).

215. *Walz*, 397 U.S. at 681 (Brennan, J., concurring).

216. *See, e.g., Walz*, 397 U.S. 664 (holding that the granting of tax-exemptions, which had been allowed for two centuries, does not violate the Establishment Clause); *Marsh*, 463 U.S. 783 (holding that legislative prayer, which had been practiced since the beginning of our nation’s history, does not violate the Establishment Clause); *Lynch*, 465 U.S. 668 (holding that the inclusion of a crèche in a town Christmas display, which had been erected for over forty years without causing controversy, did not violate the Establishment Clause).

217. *See infra* notes 205-212 and accompanying text.

218. *Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting).

219. *Id.* In support of his contention that strict application of the endorsement test will invalidate many traditional practices, Justice Kennedy notes that “Presidential proclamations of days of Thanksgiving, congressional chaplains, the national motto, ‘In God We Trust,’ and the Pledge of Allegiance w[ill] not survive under the endorsement test.” Johnson, *supra* note 10, at 178.

220. *See Newdow*, 544 U.S. at 36-43 (O’Connor, J., concurring). *See also* Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1339 (1995). The Court has refused to invalidate ceremonial deism notwithstanding that such “obvious governmental manifestations of religion cannot be satisfactorily reconciled with . . . the Establishment Clause.” *Id.* Thus, judicial decisions on ceremonial deism “are viewed as exceptions to the establishment clause requirements.” *Id.* Justice O’Connor’s approach seeks to create a formalized “exception” for ceremonial deism under Establishment Clause jurisprudence. *See Newdow*, 542 U.S. at 36-43 (O’Connor, J., concurring).

221. *See Allegheny*, 492 U.S. at 669-70 (Kennedy, J., dissenting) (stating that an Establishment test which reaches results inconsistent with history should be scrutinized). “A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.” *Id.* at 670. Further, a proper Establishment Clause test “must permit not only legitimate practices two centuries old but also any

B. O'Connor's Underlying Rationale Degrades the Religious Sentiment of Ceremonial Deism and Fails to Recognize Its Modern Benefits

Ceremonial deism focuses on the history and tradition of a government action or expression.²²² A legitimate secular purpose for a religious utterance only arises “when a given practice has been in place for a significant portion of the Nation’s history.”²²³ Specifically, Justice O’Connor focuses on the historical practice of ceremonial deism because repeated expression over a long period of time creates familiarity, thereby removing the religious character of an expression.²²⁴

O’Connor’s assumption that ceremonial deism has lost its original religious meaning is dubious and does not comport with reality.²²⁵ One scholar has noted that “under any honest appraisal of modern American society, the practices constituting ceremonial deism have not lost their religious significance.”²²⁶ As a simple illustration of this point, consider

other practices with no greater potential for an establishment of religion.” *Id.*

222. See *Newdow*, 542 U.S. at 36-38 (O’Connor, J., concurring). The “history, character, and context” prevent ceremonial deism from violating the Constitution. *Id.* at 37. But see Epstein, *supra* note 143, at 2163-64. Epstein argues that the fact that a practice was embraced by the Founders or has endured for a long period of time does not “immunize it from constitutional scrutiny.” *Id.* at 2163. “Rather than insulating ceremonial deism from constitutional attack, the longevity of the practices at issue makes their affront to religious minorities even more acute than would otherwise be the case.” *Id.* at 2164.

223. *Newdow*, 542 U.S. at 37 (O’Connor, J., concurring).

224. See *id.* at 44. O’Connor’s reasoning that familiarity removes the religious character of an expression mirrors the reasoning of the Court in *McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (holding that Sunday Closing Laws do not violate the Establishment Clause). In *McGowan*, the Court stated:

Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.

Id. See also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring). Justice Brennan states that there is no violation of the Establishment Clause when dealing with activities which, though religious in origin, have ceased to have a religious meaning. *Id.* at 303. He suggests that the Pledge of Allegiance will fall into this protected category. *Id.* at 304.

225. See Epstein, *supra* note 143, at 2165. See also *Van Orden v. Perry*, 125 S. Ct. 2854, 2866-67 (2005) (Thomas, J., concurring) (“Telling either nonbelievers or believers that the words ‘under God’ have no meaning contradicts what they know to be true.”).

226. *Id.* “[I]t would probably come as a great surprise to most Christians that religion is no longer a significant component of the Christmas holiday. It would likely be equally surprising to the ministers delivering sermons on the floors of Congress . . . that their actions, over time, have lost religious significance.” *Id.* at 2165-66. See also Kelly C. Crabb, *Religious Symbols, American Traditions and the Constitution*, 1984 BYU L. REV. 509, 535 (1984) (proposing that though such symbols as the Pledge of Allegiance and the national motto are readily accepted in the American culture, they have not necessarily lost all of their religious meaning).

the heightened national interest in the *Newdow* case.²²⁷ Most of the public interest can be attributed to the fact that the plaintiff was seeking to remove words with religious sentiment from the Pledge.²²⁸ If these words had lost their religious meaning, the public, specifically religiously-motivated organizations, would not have taken such an interest in the outcome of the case.²²⁹ Further, it seems quite illogical and disingenuous to argue that words which have lost their religious meaning can, at the same time, serve to solemnize a public event.²³⁰

According to Justice O'Connor, the primary rationale for upholding ceremonial deism is that such expressions contain minimum religious content²³¹ and have lost whatever religious meaning they once held.²³²

227. See Charles Lane, *Justices Keep "Under God" in Pledge*, WASHINGTON POST, June 15, 2004, at A1. The *Newdow* decision at the Ninth Circuit Court of Appeals declared the Elk Grove Unified School District's Pledge Policy unconstitutional. *Id.* The ruling "sparked a political uproar." *Id.* "[It] was denounced by the [P]resident and nearly the entire membership of Congress." *Id.* See also *Schempp*, 374 U.S. at 303 (Brennan, J., concurring) (stating that there would likely be intense opposition to the abandonment of the national motto); Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 312 (1994) (proposing that the removal of "In God we trust" from our coins would almost assuredly provoke the anger of religious people); Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 650 n.82 (1995) (stating that one could safely predict that a general outcry would ensue if the Supreme Court declared unconstitutional governmental references to God); Basye, *supra* note 1, at 54 (stating that the *Newdow* case "created a media and Internet blitzkrieg").

228. See Epstein, *supra* note 143, at 2166 (arguing that the words "under God" in the Pledge of Allegiance "pack a powerful religious punch to both the most and the least devout members of the American population"). Sandy Rios, President of Concerned Women for America, stated, "While [the Court] may be under the foolish notion that we have surpassed the need to honor or acknowledge [God], they must not be allowed to force their damnable arrogance on the rest of us." Ted Olsen, *Federal Appeals Court Says "Under God" in Pledge of Allegiance is Unconstitutional*, CHRISTIANITY TODAY, June 27, 2002, available at <http://www.christianitytoday.com/ct/2002/124/41.0.html> (last visited November 13, 2004). Likewise, the President of American Family Association stated, "The Ninth Circuit seems to be on a search and destroy mission to remove any and all vestiges of our religious heritage from the public square." *Id.* Such statements indicate that the words "under God" retain a religious meaning, at least for a portion of American society.

229. See Epstein, *supra* note 143, at 2166. "[T]o better understand the continued religious vitality of ceremonial deism, one need only imagine the reaction of the general public . . . if the Court were to declare that 'under God' in the Pledge of Allegiance or the national motto 'In God We Trust' violates the Constitution." *Id.*

230. See *id.* at 2165 ("If the religious meaning associated with ceremonial deism is 'necessary to serve certain secular functions,' as the solemnization rationale purports, it cannot also be true that these practices have lost whatever religious significance they may once have had.")

231. See *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring).

232. See *id.* at 41 (O'Connor, J., concurring). *But see Van Orden*, 125 S. Ct. at 2867 (Thomas, J., concurring) ("[R]epetition does not deprive religious words or symbols of their traditional meaning. Words like 'God' are not vulgarities for which the shock value diminishes with each successive utterance.").

This reasoning further degrades the role of religion in our society.²³³ It embodies the principle that religious expressions are acceptable as long as they do not contain too much religious content and the content they do contain is no longer recognized as religious.²³⁴ This adheres to the flawed notion, inherent in the Court's Establishment jurisprudence, that the government should not address religious issues and reinforces the message that religious views are "outdated"²³⁵ and "matter[s] of secondary importance."²³⁶

Further, O'Connor's belief that ceremonial deism serves a secular purpose by commemorating the role of religion in America's *history* fails to appreciate the *modern* role of religion in our republican form of limited government.²³⁷ In contrast to O'Connor's view, expressions of ceremonial deism serve the primary secular purpose of protecting our fundamental rights.²³⁸ The Founders established a system of republican self-government dependant upon religion.²³⁹ Religion fosters a virtuous

233. See 141 CONG. REC. S19, 259-60 (daily ed. Dec. 22, 1995) (statement of Sen. Hatch) (noting hostility toward religion among local, state, and federal governments spawned by the Court's Religion Clause jurisprudence). See also Butler, *supra* note 117, at 851 (noting the Supreme Court's effort to remove all traces of the Christian religion from public schools).

234. See *Newdow*, 542 U.S. at 42 (O'Connor, J., concurring).

235. Wallace, *supra* note 119, at 1200.

236. MOBERLY, *supra* note 119, at 56.

237. See *generally* Brief of Amici Curiae Christian Legal Soc'y, The Ctr. for Pub. Justice, Concerned Women for Am, and Christian Educators Ass'n Int'l, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (No. 02-1624) [hereinafter Brief of Christian Legal Soc'y] (stating that the "inalienable rights" concept, embodied in the Declaration of Independence, is the foundation of the fundamental rights of all Americans and the basis for our concept of limited government).

238. See Brief of Christian Legal Soc'y at 2-7, *Newdow* (No. 02-1624) (arguing that the phrase "under God" in the Pledge of Allegiance represents a proposition that all individuals are "endowed by their Creator with certain inalienable rights" and this principle is the basis for America's concept of limited government); Brief of Amicus Curiae The Claremont Inst. Ctr. for Constitutional Jurisprudence at 11-24, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (No. 02-1624) [hereinafter Brief of Claremont Inst.] (arguing that the Pledge of Allegiance fosters an appreciation for the principles upon which America was founded, including the principle that the government is instituted to protect citizen's inalienable rights).

239. Brief of Claremont Inst. at 13, *Newdow* (No. 02-1624). A "republic" is defined as "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law." MERRIAM-WEBSTER ONLINE DICTIONARY, available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=republic> (last visited November 17, 2004). James Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." JAMES MADISON, THE FEDERALIST NO. 39, at 251 (Jacob E. Cooke ed., 1961). The procedures for ratification, structure of the legislature, limits on legislative power, and provisions for amendment of the Constitution indicate whether a government is truly a republic. *Id.* at 253-57.

citizenry which is an essential component of a flourishing republic.²⁴⁰ More importantly, American government was founded on the principles that “all [people] are created equal” and that “they are endowed, by their Creator, with certain unalienable rights” which the government must secure and not infringe.²⁴¹

The Founders correctly recognized that the government or Supreme Court does not grant our rights, but rather they originated from “our Creator.”²⁴² Thus, the “scope of governmental authority over individuals is inherently limited with respect to their exercise of inalienable rights given by God.”²⁴³ Government expressions of ceremonial deism acknowledge that the Creator is the source of all fundamental rights.²⁴⁴ If Americans forget this foundational principle and wrongly believe that the government or the people are the ultimate source of our rights, such ignorance will place our rights on shaky ground.²⁴⁵ Without

240. See Brief of Claremont Inst. at 12-13, *Newdow* (No. 02-1624). “[O]ur nation’s Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful.” *Id.* at 12. One example of this includes the Massachusetts Constitution of 1780 which states that “the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality” MASS. CONST. of 1780, pt. 1, art. 3. James Madison recognized the importance of virtue when he stated that a “[r]epublican government presupposes the existence of [virtue] in a higher degree than any other form [of government].” JAMES MADISON, THE FEDERALIST NO. 55, at 346 (Clinton Rossiter and Charles Kesler eds., 1999). See also *supra* notes 39-42 and accompanying text.

241. The Declaration of Independence, P2 (U.S. 1776), available at <http://www.law.indiana.edu/uslawdocs/declaration.html> (last visited November 17, 2004).

242. See The Declaration of Independence, P2 (U.S. 1776), available at <http://www.law.indiana.edu/uslawdocs/declaration.html> (last visited November 17, 2004). “[T]he very idea that people have rights that precede and are superior to government is based on the self-evident truth articulated in the Declaration of Independence that human beings ‘are endowed, by their Creator, with certain unalienable rights,’ including the rights to life, liberty, and the pursuit of happiness.” Brief of Claremont Inst. at 19, *Newdow* (No. 02-164). In his Memorial and Remonstrance Against Religious Assessments, James Madison recognized that one’s duty to the Creator transcends one’s duty to society thereby implying that the rights from the Creator transcend the rights granted by the government. See *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.).

It is the duty of every man to render to the Creator such homage . . . as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id.

243. Brief of Christian Legal Soc’y at 5, *Newdow* (No. 02-1624).

244. See *id.* at 3-4. The phrase “under God” in the Pledge of Allegiance reinforces that our form of government is “grounded in the concept that individuals are endowed by God with certain inalienable rights.” *Id.* Such expressions acknowledge that the government is not the highest authority in human affairs. *Id.* at 4.

245. See Brief of Claremont Inst. at 19, *Newdow* (No. 02-1624). “If our liberties are to be preserved against the encroaching tendencies of government, it is imperative that the next generation be educated with an appreciation of [the principle that human beings are endowed, by

appreciation for the source of our rights, the courts will have no rationale for upholding them, and Americans will be in danger of losing them.²⁴⁶ Thus, O'Connor is incorrect when she states that instances of ceremonial deism are constitutionally protected because they have lost their religious sentiment,²⁴⁷ and she fails to appreciate the full societal benefit of such expressions when she states that they serve to commemorate the role of religion in our Nation's founding.²⁴⁸ Rather, ceremonial deism is constitutionally permissible, indeed profitable, because it acknowledges that the Creator, not the government, is the basis of our rights.²⁴⁹

VI. THE SUPREME COURT SHOULD ADOPT THE ACTUAL LEGAL COERCION TEST

A. Adoption of the Actual Legal Coercion Test Will Bring Clarity and Consistency to Establishment Clause Jurisprudence

The adoption of Justice Thomas's actual legal coercion test will "provide Establishment Clause jurisprudence with clarity and predictability."²⁵⁰ Generally, application of an objective standard provides greater predictability than use of a subjective standard.²⁵¹

their Creator, with certain unalienable rights]." *Id.*

246. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 223-25 (1991) (arguing that our right to religious freedom will be shaken if the courts undermine the rationale for the right). Smith argues:

[W]ithout a plausible rationale for the commitment to religious liberty[,] we cannot understand what that commitment entails. It is commonplace that legal enactments should be interpreted to effectuate their purposes. But a law's "purpose" arises out of, and is a projection of, its justification. Therefore, if we cannot articulate a convincing justification for the commitment to religious freedom[,] then we cannot know its purpose, and we are accordingly paralyzed in our efforts to interpret the commitment. In addition, it is unrealistic to expect a commitment to retain its vitality merely because it is written into the Constitution.

Id. at 223-24.

247. See *supra* notes 225-230 and accompanying text.

248. See *Newdow*, 542 U.S. at 35 (O'Connor, J., concurring). O'Connor acknowledges that one secular purpose for ceremonial deism is "to commemorate the role of religion in our history." *Id.* However, she seems unwilling to commemorate the role of religion for its positive value, but only because "references to religion in public life and government are the inevitable consequence of our Nation's origins." *Id.* See also *supra* notes 237-246 and accompanying text.

249. See Brief of Claremont Inst. at 19, *Newdow* (No. 02-1624).

250. Johnson, *supra* note 10, at 178.

251. See *id.* Objective standards generally bring greater predictability and consistency to legal analysis. See, e.g., David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 ALB. L.J. SCI. & TECH. 517, 526 (2003) (arguing that an objective standard for what constitutes "expertise" on a particular subject would likely bring greater predictability to mass tort cases).

Analysis under the actual legal coercion test focuses on the concrete effects of the questioned government action.²⁵² This objective analysis provides greater consistency and renders judicial manipulation more difficult.²⁵³

The actual legal coercion test will replace the current multi-test approach.²⁵⁴ The use of a single standard eliminates the need to determine which Establishment test should apply in a given situation, thus increasing analytical uniformity.²⁵⁵ In the past, Justice O'Connor has recognized that "[i]t is always appealing to look for a single test, a Grand Unified Theory that [will] resolve all the cases that may arise under a particular Clause."²⁵⁶ Such a unifying test must consider the

252. See Johnson, *supra* note 10, at 178. On the other hand, the psychological coercion standard focuses on the appearances surrounding such governmental action. *Id.* at 178-79. Activist judges can use such a subjective standard to achieve desired results by interpreting cases in an outcome-oriented fashion. *Id.* at 179.

253. Johnson, *supra* note 10, at 179.

254. See John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 372, 432 (1996) (arguing that the Court must strive towards a more unified approach to Establishment Clause jurisprudence).

255. See *Lee v. Weisman*, 505 U.S. 577 (1992). As this case progressed through the appeals process, the courts applied three of the four Establishment Clause tests in addressing the issue. See *id.* at 584-87. The case involved a non-sectarian prayer at a middle school graduation. *Id.* 580-81. The district court relied on the *Lemon* test in holding that the principal's practice of including prayer at a public school graduation violated the Establishment Clause. *Id.* at 584-85. The First Circuit upheld the district court's ruling. *Id.* at 585. Circuit Judge Campbell's dissent relied on the *Marsh* approach in his decision to uphold graduation prayer. See *Weisman v. Lee*, 908 F.2d 1090, 1098 (1st Cir. 1990) (Campbell, dissenting) *aff'd*, 505 U.S. 577 (1992). He interpreted the *Marsh* decision as applying to prayer at all public meetings, not merely legislative prayer. *Id.* Interestingly, when the case reached the Supreme Court, the reasoning of the First Circuit's majority and dissenting opinions were abandoned in favor of Justice Kennedy's "psychological coercion test." *Lee*, 505 U.S. at 587. The *Lee* case demonstrates how discarding the multi-test approach will provide greater clarity for lower courts and consistency in analyzing these cases throughout the federal court hierarchy. See *id.* at 584-87.

256. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring). O'Connor recognizes that "setting forth a unitary test for a broad set of cases may sometimes do more harm than good." *Id.* She believes that "[a]ny test that must deal with widely disparate situations risks being so vague as to be useless." *Id.* Trying to analyze a new issue using a broad test, which does not reflect the special concerns raised by that particular issue, "tends to deform the language of the test." *Id.* at 719. Courts often try to fix the problems inherent in a broad test, eventually making it more vague and distorted. *Id.* at 720. According to O'Connor, experience has shown that multiple tests are needed to adequately evaluate Establishment cases. *Id.* She further believes that a multi-test approach provides a better structure for analysis. *Id.* at 721. However, she acknowledges that one day the Court may identify a unified Establishment Clause test. *Id.* See also Matthew S. Steffey, *Symposium: Voting Rights after Shaw v. Reno: Article: The Establishment Clause and the Lessons of Context*, 26 RUTGERS L. J. 775, 777 (1995) (arguing in support of O'Connor's position that a less unitary approach provides a better analytical structure.) *But see Grumet*, 512 U.S. at 750-51 (1994) (Scalia, J., dissenting). Justice Scalia argues that Establishment analysis should be driven by one unifying principle – fidelity to the longstanding traditions of our people. *Id.* at 751.

special interests inherent in the different categories of Establishment Clause cases.²⁵⁷ There are at least three broad categories of cases which implicate Establishment Clause issues: (1) government action that grants special benefits or powers to religious organizations; (2) government speech and displays implicating religion; and (3) government decisions regarding religious doctrines.²⁵⁸ The actual legal coercion test must address each category in a manner that reflects the intent and meaning behind the Establishment Clause.²⁵⁹ Thus, the test must encapsulate the very essence of the Establishment Clause²⁶⁰ and embrace “the longstanding traditions of our people.”²⁶¹

1. Situations Where the Government Grants Money, Power, or Other Benefits to a Religious Organization

The actual legal coercion test effectively addresses situations where the government grants funding to a religious group.²⁶² The language of the test specifically prohibits government action involving coercion of financial support for a particular religious organization “by force of law

257. See *Grumet*, 512 U.S. at 718-21 (O’Connor, J., concurring). Justice O’Connor acknowledges that there are at least four different categories of Establishment cases. See *id.* at 720-21. One category involves government actions that grant special duties or benefits upon religious groups or individuals. See, e.g., *id.* (holding that a state government cannot create a separate school district for a village containing practitioners of a strict form of Judaism). Another category includes government speech involving religion. See, e.g., *Lee*, 505 U.S. 577 (1992) (involving a public school graduation prayer); *Allegheny*, 492 U.S. 573 (1989) (involving a crèche scene and menorah on public property). A third category involves situations where the government makes decisions about religious doctrines. See, e.g., *Serbian Eastern Orthodox Diocese for United States and Can. v. Milivojevich*, 426 U.S. 696 (1976) (holding that an Establishment Clause violation occurs when a state supreme court addresses allocation of power issues within a church). A fourth category of cases deal with government delegations of power to a religious organization. See, e.g., *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982) (holding that a statute conferring to a church with a veto power over the liquor licensing authority violated the Establishment Clause).

258. See *Grumet*, 512 U.S. at 718-21 (O’Connor, J., concurring); *supra* note 257 and accompanying text.

259. See *Lynch*, 465 U.S. at 673-74 (1984) (emphasizing the importance of history and the Founders’ contemporary understanding of the Establishment Clause). See also *supra* notes 29-57.

260. See *Newdow*, 542 U.S. at 50-52 (Thomas, J., concurring) (The type of coercion which characterizes this test is the same “coercion that was a hallmark of historical establishments of religion”).

261. See *Witte*, *supra* note 254, at 432 (quoting *Grumet*, 512 U.S. at 751 (Scalia, J., dissenting)). Justice Scalia believes that “our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” *Lee*, 505 U.S. at 632 (Scalia, J., dissenting).

262. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589, 611 (1988) (involving a statute providing funding to sectarian and secular institutions on a neutral basis); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (involving a government program providing tuition aid for students to attend a public or private school of the parent’s choosing).

and threat of penalty.”²⁶³ Thus, Thomas’s test corresponds with the Court’s prevailing rule that the Establishment Clause “prohibit[s] government–financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”²⁶⁴ Currently, the Supreme Court allows the granting of financial aid to religious schools on a neutral basis.²⁶⁵ Similarly, the actual legal coercion test would allow such funding because the government is not forcing individuals to submit to religious indoctrination or coercing the financial support of a particular religious group.²⁶⁶ Another important funding issue is whether the government can fund religiously–based social reform groups.²⁶⁷ Under the actual legal coercion test, these social programs are constitutionally permissible as long as the funds are distributed indiscriminately and the government does not actually coerce participation in the religiously-

263. *Newdow*, 542 U.S. at 52 (Thomas, J., concurring) (quoting *Lee*, 505 U.S. 640-41 (Scalia, J., dissenting)).

264. *Bowen*, 487 U.S. at 611 (holding that a statute providing funding to sectarian and secular institutions on a neutral basis did not violate the Establishment Clause). *See also* Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. ANN. SURV. AM. L. 33, 46 (2000) (emphasizing that the government must not finance, encourage, or support religious indoctrination). *Compare* *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (holding that an educational program which financed classes for nonpublic school students violated the Establishment Clause), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a federally funded program providing instruction to disadvantaged children on a neutral basis was valid under the Establishment Clause when such instruction was given on the premises of sectarian schools by government employees), *and* *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that the distribution of federal funds to pay the salaries of public teachers who taught in parochial schools violated the Establishment Clause).

265. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In *Zelman*, the Court upheld a program providing education choices to families residing in the Cleveland School District. *Id.* at 643-44. The program provides tuition aid for students to attend a participating public or private school of the parents’ choosing and tutorial aid for students who choose to remain in the public school. *Id.* at 645. The Court found that “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.” *Id.* at 652. Analysis under the actual legal coercion test would reach the same result because the government is not seeking to legally coerce the religious education or indoctrination of any student. *See id.* at 680 (Thomas, J., concurring).

266. *See id.* at 680 (Thomas, J., concurring).

267. *See* Green, *supra* note 264 (arguing that Charitable Choice funding of faith-based organizations creates a grave risk of government-financed indoctrination); Elizabeth Tobin, *Blurring the Line Separating Church and State: California Exposes the Inherent Problems of Charitable Choice*, 86 MINN. L. REV. 1629 (2002) (arguing that the Charitable Choice Act violates the religion clauses and creates obstacles for states with laws requiring contraception coverage); Michelle Dibadj, *The Legal and Social Consequences of Faith-Based Initiatives and Charitable Choice*, 26 S. ILL. U. L.J. 529 (2002) (exploring the constitutionality of President Bush’s faith-based initiative to implement the existing charitable choice provision).

based programs.²⁶⁸

The actual legal coercion test is also capable of addressing those rare instances where the government bestows its power upon a specific religious group.²⁶⁹ The test prohibits the granting of legal authority to members of a particular faith.²⁷⁰ This coincides with the current rule that the Establishment Clause prohibits the government from delegating its power to a religious group or a group chosen according to religious criterion.²⁷¹ Further, the government cannot require a religious oath to obtain government office or benefits because such a requirement creates a legal benefit for members of that faith.²⁷² Because these actions resemble the creation of a coercive state establishment, the actual legal coercion test also prevents the government from conferring legal power or legal benefits upon a religious group.²⁷³

2. Situations Involving Government Speech and Displays Implicating Religion

Because speech is not inherently coercive, most instances of government speech will be upheld as constitutional under the actual legal coercion test.²⁷⁴ Many scholars will find this to be a tremendous

268. See *Newdow*, 542 U.S. 51-52 (Thomas, J., concurring).

269. See, e.g., *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (a statute, in effect, granted a church veto power over the liquor licensing authority).

270. See *Newdow*, 542 U.S. at 51-52 (Thomas, J., concurring).

271. See, e.g., *Larkin*, 459 U.S. 116 (1982) (holding that a statute conferring a church with a veto power over the liquor licensing authority violated the Establishment Clause); *Grumet*, 512 U.S. 687 (1994) (a state statute carving out a separate school district for a religious village violated the Establishment Clause). A statute or other government action cannot substitute “the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications.” *Larkin*, 459 U.S. at 127. “[A] [s]tate may not delegate its civic authority to a group chosen according to a religious criterion.” *Grumet*, 512 U.S. at 698. Authority belonging to the state cannot be delegated in order to grant political control to a religious group. *Id.*

272. See *Torcaso v. Watkins*, 367 U.S. 488 (1961) (ruling that a state constitution cannot require persons who qualified for any office of profit or trust in the state to declare their belief in the existence of God). “Neither a state nor the federal government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’” *Id.* at 495.

273. See *Newdow*, 542 U.S. at 51-52 (Thomas, J., concurring). Thomas acknowledges that under his test the government would be prohibited from “establishing” a religion “by imbuing it with governmental authority or by ‘delegating its civic authority to a group chosen according to a religious criterion.’” *Id.* at 52 (citations omitted). “A religious organization that carries some measure of the authority of the State begins to look like a traditional ‘religious establishment,’ at least when that authority can be used coercively.” *Id.*

274. See *Lee*, 505 U.S. at 642 (quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)).

flaw with the implementation of the actual legal coercion test;²⁷⁵ however, this actually strengthens the argument in favor of its use. First, it more accurately reflects the Founders' intent because they were concerned with governmental compulsion and coercion, not speech.²⁷⁶ Second, offended citizens are not directly harmed or prevented from believing and acting as their conscience dictates.²⁷⁷ Third, an individual's ability to practice his or her religious beliefs is protected by the Free Exercise Clause.²⁷⁸ Fourth, courts can use the Equal Protection

275. See Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. TEX. L. REV. 101 (1997) (arguing that an isolated display of the Ten Commandments in a courtroom conveys a message of impermissible religious endorsement and thus violates the Establishment Clause); Harry Simon, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L.J. 499 (1986) (discussing the need for substantial Establishment Clause guarantees against state-sponsored religious displays). *But see* Wallace, *supra* note 119, at 1187 (stating that government religious speech is analytically different from other forms of government support of religion and arguing that the Court should employ a unique approach to assessing its constitutionality).

276. See McConnell, *Coercion*, *supra* note 122, at 936-39 (arguing that compulsion is the essence of an establishment). James Madison stated that the colonists "feared [that] one [religious] sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 1 ANNALS OF CONG. 730 (J. Gales ed. 1834). Thus according to Madison, compulsion is the essence of an establishment of religion. McConnell, *Coercion*, *supra* note 122, at 937. The Establishment Clause was not intended to protect "individuals from mere feelings of exclusion." *Allegheny*, 492 U.S. at 673 (Kennedy, J., dissenting). See also Wallace, *supra* note 119, at 1226-54 (summarizing the Founders' views regarding government religious speech and the use of government religious speech in the Founding era). "The founders did not believe that disestablishment foreclosed the government from recognizing the providence of God in national affairs or from acknowledging the value of religion to the republic." *Id.* at 1254. They believed that "official religious speech generally did not entail the imposition of religion by the state so long as it was nonpreferential and noncoercive." *Id.*

277. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (discussing the essence of the First Amendment). "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* The Free Exercise Clause guarantees that an individual will be allowed to worship and believe in accord with his conscience. John Locke, *A Letter Concerning Toleration* (1685), reprinted in MAIN CURRENTS OF WESTERN THOUGHT 355 (Franklin Le Van Baumer ed., 1978). Further, the Free Speech Clause prevents government action which seeks to coerce or prevent individual speech. See *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). The First Amendment not only prevents the government from silencing individual speech, it also prevents the government from compelling individuals to express certain views. *Id.* See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a public school may not require students to salute the American flag or recite the Pledge of Allegiance). *But see Lee*, 505 U.S. at 593 (arguing that offended citizens suffer an injury when exposed to government speech which involves religion).

278. See U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* (emphasis added). Justice Thomas argues that "[i]t may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause." *Newdow*, 542 U.S. at 53 n.4. This is further evidence against the incorporation of the Establishment Clause. *Id.*

Clause of the Fourteenth Amendment to prevent the government from intentionally giving preferential treatment to one religious sect.²⁷⁹ Fifth, upset citizens can seek redress through political means – such as voicing their displeasure with the government’s religious speech, petitioning the government with their concerns, or electing other officials who represent their views.²⁸⁰ Finally, Thomas’s test will nevertheless prohibit extreme government speech that is backed by “force of law or threat of penalty.”²⁸¹

Excluding most government speech and display cases from Establishment Clause jurisprudence solves the aberration of ceremonial deism.²⁸² Completely devoid of legal coercion, expressions of ceremonial deism fall far short of violating Justice Thomas’s test.²⁸³ As

279. See Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 706 (1992) (“The logic of the Religion Clauses requires that accommodations be extended to all comparable religious practices unless the government has sufficient justification for differential treatment.”); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 982-87 (1989) (arguing that Equal Protection Clause must be invoked to prevent religious discrimination). *But see* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1542-44 (1999) (arguing that democratic process properly may set policies that have differential effects on different religions).

280. See U.S. CONST. amend. I. The First Amendment provides that “Congress shall make no law . . . abridging . . . the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances. *Id.* See also Lori J. Rankin, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right’s Campaign Against Lesbians and Gay Men* 62 U. CIN. L. REV. 1055, 1099-1100 (1994) (discussing citizen participation in the political process).

Indeed, exercising the fundamental right to vote is but one means of participating in the political process. Other participatory rights are explicitly guaranteed by the Constitution, such as the right of free speech and the right to petition the government for redress of grievances. These rights “spring from a common root. . . . At their core [these] rights are rights to participate in [the political] process.” One purpose for recognizing these rights is to protect the most basic of all rights in a democratic system: the right to participate in the processes. The right to vote, the right to speak, and the right to petition the government are vehicles through which citizens participate in their own governing.

Id.

281. *Newdow*, 542 U.S. at 49 (Thomas, J., concurring). Government acts that create or maintain “a sort of coercive state establishment” violate the actual legal coercion test. *Id.* It remains unclear how the test will be applied in situations involving excessive government speech which is not backed by “force of law or threat of penalty.” See *id.* An example of such questionable government speech includes speech advocating attendance at a specific church.

282. See *Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., dissenting). Kennedy acknowledges that the Court’s current Establishment jurisprudence cannot explain why ceremonial deism such as “Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and [the Supreme] Court . . . constitute practices that the Court will not proscribe.” *Id.* See also *supra* notes 205-221 and accompanying text.

283. See *Newdow*, 542 U.S. at 53 (Thomas, J., concurring). “It is difficult to see how government practices which have nothing to do with creating or maintaining [a] coercive state establishment” violate the Establishment Clause. *Id.*

long as the government does not force an individual to affirm a religious expression, ceremonial deism does not violate the actual legal coercion test.²⁸⁴ The test also reconciles the dichotomy between legislative and graduation prayer.²⁸⁵ Under the Court's current approach, legislative prayer is constitutional²⁸⁶ while graduation prayer violates the Establishment Clause.²⁸⁷ The Court has repeatedly attempted to explain this inconsistency²⁸⁸ but none have satisfied.²⁸⁹ Under the actual legal coercion test, both legislative and graduation prayer are constitutionally valid.²⁹⁰ Finally, this test restores the constitutionality of other practices which have been recognized for a significant portion of our Nation's history – including displays of the Ten Commandments²⁹¹ and crèche

284. See Hillary A. Webber, *Equal Justice Under the Law: Why IOLTA Programs Do Not Violate the First Amendment*, 53 AM. U. L. REV. 491, 505-08 (2003) (discussing compelled speech cases and noting that the government may not force an individual to affirm a belief).

285. See Penny J. Meyers, *Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U.L. REV. 231, 242-43 (1999) (stating that the Court has used the psychological coercion test to invalidate graduation prayer while using the separate *Marsh* approach to uphold legislative prayer). *But see* Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409-10 (6th Cir. 1987) (finding graduation prayers analogous to legislative prayers but holding that the graduation prayer at issue did not meet the *Marsh* standard because it expressed preference for Christianity).

286. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (upholding legislative prayer as constitutional).

287. *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (invalidating graduation prayer as an Establishment Clause violation).

288. See Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1593-94 (1995) (discussing Kennedy's attempt in *Lee* to explain the differences between legislative and graduation prayer). Kennedy provided three reasons for treating legislative and graduation prayer differently. *Id.*

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

Id. See also *Edward v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). The Supreme Court has also found that graduation prayer is not similar to legislative prayer and cannot be justified under the *Marsh* approach because "free public education was virtually nonexistent at the time the Constitution was adopted." *Id.*

289. See Steven G. Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 460 n. 247 (2000) (stating that the Supreme Court's dealing with legislative prayer seems to be inconsistent with its analysis of graduation prayer). See also Robert K. DuPuy, *Religion, Graduation, and the First Amendment: A Threat or a Shadow?*, 35 DRAKE L. REV. 323 (1985-86) (arguing that graduation prayer, like legislative prayer, should be declared constitutional).

290. See *Newdow*, 542 U.S. at 47 (Thomas, J., concurring). Many instances of public prayer such as Presidential Inaugurations will be found constitutional under this test. See *id.*

291. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (holding that a Kentucky statute requiring the posting of the Ten Commandments in public classrooms was a violation of the Establishment

scenes on government property.²⁹²

3. Situations Involving Government Decisions Regarding Religious Doctrines

Government participation in church affairs violates the actual legal coercion test.²⁹³ This result is consistent with the Court's current approach toward these issues.²⁹⁴ Government involvement in internal church dealings, especially church doctrines, is one of the hallmarks of an established religion.²⁹⁵ Indeed, one of the functions of a government-established church is to protect and uphold the uniformity of church doctrines.²⁹⁶ Thus, government entwinement in the intricacies of internal church affairs begins to resemble a traditional establishment.²⁹⁷ Furthermore, a judicial decision regarding church matters, either doctrinal or organizational, is by definition a government command backed by "threat of penalty."²⁹⁸

Clause). See also Julia Duin, *Top Court to Consider Commandment Cases*, WASHINGTON TIMES, October 13, 2004, at A1. On October 12, 2004, the Supreme Court agreed to hear two cases addressing the issue of whether the Ten Commandments can be posted in public buildings or public lands. *Id.* Under the actual legal coercion test, such displays would be constitutional. See *Newdow*, 124 S. Ct. at 2331-32 (Thomas, J., concurring).

292. See, e.g., *Allegheny*, 492 U.S. 573 (1989) (striking down a holiday display of a crèche on government property while upholding a holiday display including a menorah, Christmas tree, and sign).

293. See *Newdow*, 542 U.S. at 52 (Thomas, J., concurring).

294. See *Serbian Eastern Orthodox Diocese for United States and Can. v. Milivojevich*, 426 U.S. 696 (1976) (holding that an Establishment Clause violation occurs when a state supreme court addresses allocation of power issues within a church). "Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them." *Id.* at 710. The Establishment Clause also limits "the role that civil courts may play in resolving church property disputes." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969).

295. See LEVY, *supra* note 21, at 3-5. Government-established churches in colonial America each had an official creed or articles of faith. *Id.* at 5. The government was instrumental in determining who was ordained as a minister of the church. *Id.* at 3. In order for a man to become an ordained member of the clergy, the government demanded that he accept the doctrines of the church. *Id.* at 4.

296. See Wallace, *supra* note 119, at 1227-28 (stating that one of the purpose behind religious establishments in the colonies was maintaining the purity of church doctrine).

297. See *Newdow*, 542 U.S. at 52 (Thomas, J., concurring).

298. See *id.* When a person engages in conduct that defiles the authority or dignity of a court, he or she is said to be in contempt of court. BLACK'S LAW DICTIONARY 336 (8th ed. 1990). Because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment. *Id.* Thus a judgment will be classified as coercion backed by "threat of penalty or force of law." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring). See also *Milivojevich*, 426 U.S. at 710 (finding that questions of church discipline or doctrine should not be addressed by civil courts).

B. The Actual Legal Coercion Test Restores a Proper Respect for Religion

The actual legal coercion test removes the religious hostility inherent in the Court's current analysis.²⁹⁹ Above all, the test allows the government to speak about religion.³⁰⁰ Removing the religious gag order on the government dispels the notion of an entirely secular state.³⁰¹ When the government speaks about religion in a noncoercive and nonsectarian manner, it is viewed as encouraging both religious and secular views, instead of preferring the secular over the religious.³⁰² Accepting government religious speech on equal footing with secular issues will begin to erode the stigma that religion has acquired in the public arena.³⁰³ In time, this will transform religion from "something so private that it is . . . irrelevant to public life"³⁰⁴ to something that holds a treasured role in our society.³⁰⁵

Specifically, the actual legal coercion test will restore respect for majority religions.³⁰⁶ "It is intellectually fashionable and mainstream to read the [Establishment Clause] as only protecting the liberties of minorities and not those of the majority."³⁰⁷ Current Establishment

299. See *infra* notes 300-318 and accompanying text.

300. See *Lee*, 505 U.S. at 642 (1992). In discussing the actual legal coercion test, Justice Scalia recognizes that "speech is not coercive; the listener may do as he likes." *Id.*

301. Wallace, *supra* note 119, at 1256.

302. See *id.*

303. See McConnell, *Crossroads*, *supra* note 10, at 193. According to Judge McConnell, if government speech concerning religion reflected the views of the culture as a whole, this would effectively achieve "neutrality" in a pluralistic society. *Id.* Allowing the government to speak on religious topics will reverse the degradation of religion that government silence creates. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 978 (1987) (religious neutrality and government silence will eventually result in the diminution of religious beliefs so that it "will ultimately become a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes") [hereinafter Carter, *Evolutionism*].

304. Carter, *Evolutionism*, *supra* note 303, at 978.

305. See Charles J. Russo, *The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in American Schools?*, 2004 BYU EDUC. & L. J. 301, 329-30 (2004). The decision of the Court whether to remove all references to God from government speech will ultimately "reveal whether Americans still cherish the underlying values of freedom of religion . . . that contribute so greatly to the Nation's history." *Id.* at 329.

306. See Johnson, *supra* note 10, at 191-94 (arguing that the direct coercion standard, which is another name for the actual legal coercion test, guarantees religious freedom for members of majority religions).

307. *Id.* at 191. For example, if a person criticizes the beliefs of a Muslim or Buddhist, he or she will face persecution by those in academia. See, e.g., Rob Dreher, *Damned If You Do*, NATIONAL REVIEW ONLINE, October 29, 2002, available at <http://www.nationalreview.com/dreher/dreher102902.asp> (last visited February 12, 2005) (stating that historians who dare to discuss the religious persecutions that Jews and Christians endure as a result of Islamic *dhimmitude* face a great deal of criticism at Georgetown). However, if another person berates the beliefs of a Roman

analysis inhibits the free exercise rights of those in the religious majority in order to protect members of religious minorities from unease.³⁰⁸ Such discriminatory treatment of the majority believer inherently favors the beliefs of the minority.³⁰⁹ Thus, current Establishment standards expect tolerance from the majority while failing to require it from the minority as well.³¹⁰ Conversely, the actual legal coercion test recognizes and respects government recognition of the beliefs and practices of the religious majority so long as the government does not support such beliefs by “force of law or threat of penalty.”³¹¹

The consistency and objectivity of the actual legal coercion test will limit the hostility that activist judges are able to infiltrate into their decision-making.³¹² The test provides a consistent approach with which to address Establishment issues.³¹³ The use of one standard for all Establishment cases prevents activist judges from arbitrarily choosing between multiple tests in order to achieve desired results.³¹⁴ Further, by ignoring perceived or psychological coercion, the actual legal coercion

Catholic as being “out of step” with the modern world, he or she is applauded for seeing through the flaws of this religious faith. *See, e.g.,* Janet Kalven, *Fifteen Years of Ferment: Religious Feminists*, MONTHLY REVIEW, July 1984, at 73 (discussing feminist criticism of Vatican II and other Roman Catholic doctrines).

308. *See Lee*, 505 U.S. at 645-46 (Scalia, J., dissenting). Justice Scalia recognizes that the *Lee* majority takes great pains to consider the rights of the religious minority. *Id.* at 645. However, the Court often fails to consider the majority’s interests in religious expression. *Id.* at 646. Such an analytical focus indicates that “the Court has begun to subscribe to the view that avoiding establishment is the goal of the First Amendment, and free exercise is but an exception.” Johnson, *supra* note 10, at 191.

309. *See* Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 25-27 (2004) (discussing majority and minority issues involving Establishment jurisprudence). *See also* Johnson, *supra* note 10, at 193 (stating that “a brief reference to [the Free Exercise Clause] reveals the discrimination presently imposed upon the majority of Americans by the present standard applied in Establishment Clause jurisprudence”).

310. *See* Roy, *supra* note 309, at 40-44 (arguing that the Supreme Court has left behind the idea of tolerance in Establishment analysis). *See also* Justice Antonin Scalia, Transcript of Oral Argument at 16-17, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005)(No. 03-1500) (p. 16, line 25 and p. 17, lines 1-9). In the oral argument of the *Van Orden* case, Justice Scalia acknowledged a lack of tolerance for majority religious views when he stated that “[America is] a tolerant society religiously, but just as the majority has to be tolerant of minority views in matters of religion, it seems to me the minority has to be tolerant of the majority’s ability to express its belief that government comes from God.” *Id.* Just as is expected from the majority believer, the minority religious adherent can “turn [his or her] eyes [from a religious display] if it is such a big deal.” *Id.*

311. *See Newdow*, 542 U.S. at 52 (Thomas, J., concurring).

312. *See* Johnson, *supra* note 10, at 178-79.

313. *See id.* at 178. *See also supra* notes 250-298 and accompanying text.

314. *See* Richard A. Epstein, *Property: Why is This Man a Moderate*, 94 MICH. L. REV. 1758, 1774 (1996) (“The invocation of multiple standards of review increases the number of opportunities for judicial discretion – and judicial confusion.”).

test is an objective analysis.³¹⁵ Objective legal analysis serves to limit judicial discretion.³¹⁶ Establishment analysis will focus on “the actual effects of governmental power”³¹⁷ thus limiting a judge’s ability to infuse his or her religious hostility into a decision.³¹⁸

VII. CONCLUSION

Justice Thomas’s actual legal coercion test provides a preferable alternative to Establishment Clause analysis. O’Connor’s ceremonial deism approach adds an additional test to an already perplexing area of constitutional law. Further, this additional test demeans the religious importance of expressions of ceremonial deism and serves as evidence of a deeper flaw in Establishment analysis. Rather than degrade religion and further complicate this area of the law, Justice Thomas’s actual legal coercion test brings well-needed clarity and consistency. By allowing the government to speak religiously, this test also serves to reverse the debasement of religion in our society.

Due to its recent hostility toward religion, the Court is not likely to jump at the opportunity to adopt a new test which serves to alleviate this animosity. However, many of the Justices agree that the Establishment Clause’s analytical framework needs heavy renovation.³¹⁹ More than being just a step in the restoration process, the actual legal coercion test erects an entirely new structure. Its consistency and objectivity alone are sufficient reasons to adopt this test as a means of rectifying Establishment Clause jurisprudence.

In *Newdow*, the Court missed an opportunity to remedy Establishment Clause analysis. It cannot continue to ignore this problem because difficult Establishment Clause cases are certain to arise. In fact, Michael Newdow has already refiled his lawsuit in federal court naming eight other parents and children as plaintiffs.³²⁰ The Supreme Court

315. See Johnson, *supra* note 10, at 178-79.

316. See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making – How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. OF WOMEN & L. 1, 59 (1998) (noting that “one of the main purposes [of implementing] an objective, rule-based standard is to limit judicial discretion and uncertainty”).

317. Johnson, *supra* note 10, at 178.

318. See generally Blake D. Morant, *Lessons from Thomas More’s Dilemma of Conscience: Reconciling the Clash Between a Lawyer’s Beliefs and Professional Expectations*, 78 ST. JOHN’S L. REV. 965 (2004) (analyzing the fundamental differences between personally held moral beliefs and professional expectations).

319. See *supra* notes 10-13, 70.

320. Kiran Krishnamurthy, *Spotsylvania: Students Can Sit During Pledge*, RICHMOND TIMES DISPATCH, January, 11, 2005, at B1. Michael Newdow’s decision to have different plaintiffs bring

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should use one of its upcoming Establishment Clause cases to acknowledge the insufficiency of its current approach and adopt a superior test in its place.

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the suit corrects the standing deficiency that the Court used to dismiss *Newdow's* first case. *See Newdow* 542 U.S. at 17.