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Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test

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Establishment Clause Jurisprudence: The Souring of *Lemon* and the Search for a New Test

Kristin M. Engstrom*

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Mr. President, in an effort to restore something of a spiritual balance to our public schools . . . I am today introducing a joint resolution to propose an Amendment to the Constitution clarifying the intent of the Constitution with regard to public school prayer.

Senator Robert Byrd, addressing the Senate¹

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1. 141 CONG. REC. S18 (daily ed. Jan. 4, 1995).

On the eve of a vote to amend the United States Constitution to allow for prayer in school,² the Republican Party, led by Speaker of the House Newt Gingrich and the Christian Coalition,³ fans the fire under a controversy that has burned since prayer in school was ruled unconstitutional in 1963.⁴ This debate, and the proposal for change, calls into question the Supreme Court's treatment of cases involving the Establishment Clause of the First Amendment.⁵

For more than twenty years the United States Supreme Court has purported to rely on the test established in *Lemon v. Kurtzman*⁶ to determine the constitutionality, under the Establishment Clause, of government action which involves religion.⁷ However, opinions in recent cases reflect disagreement on the Court as to the usefulness of the *Lemon* test.⁸ Many times, to the chagrin of litigators and lower courts who rely on the test to formulate their arguments and opinions, the Court has disregarded *Lemon*, deciding cases instead on fact specific criteria.⁹

Additionally, legislators are forced to read the Court's mind with respect to the constitutionality of legislation. In an area where predictability is needed, this is an unfortunate situation for everyone.

Part I of this Comment will discuss the historical background and formation of the *Lemon* test, how the test has been applied to Establishment Clause cases, and the Court's retreat from the *Lemon* test. Part II will address recent Establishment Clause adjudication and the Court's apparent rewriting of the *Lemon* criteria. Part III will examine modifications of the *Lemon* test that have been used

2. See *supra* note 1 (referring to Senator Byrd's plea to amend the Constitution).

3. See Joan Lowy, *GOP Leaders Embrace Agenda*, DAYTON DAILY NEWS, May 18, 1995, at 7A (describing how the Republican Party has apparently embraced the Christian Coalition's social agenda).

4. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) (affirming invalidation of a Pennsylvania statute which called for the reading of the "Holy Bible" at the beginning of the school day).

5. See U.S. CONST. amend. I, § 1 (precluding the Federal Government from establishing a national religion). This prohibition also applies to state governments. See *infra* note 14. The constitutionality of an amendment to the U.S. Constitution would not be reviewable by the Supreme Court, because amendments to the Constitution have the same force as the Constitution. However, it is unlikely that the provision will survive the amendment process, and will more likely be passed as a bill. See Robert L. Spaeth, *Law Professor Details Attempts to Amend U.S. Constitution*, STAR TRIB., Sept. 12, 1993, at 12F (describing the difficulty in amending the Constitution and that over 10,000 amendments have been proposed).

6. 403 U.S. 602 (1971).

7. See *infra* notes 28-37 and accompanying text (discussing cases in which practices involving religion or religious preference have been held to violate the Establishment Clause).

8. See *infra* notes 28-48 and accompanying text (addressing cases in which the Supreme Court seemingly contradicts itself when applying the *Lemon* test to various fact patterns).

9. See *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2450 (1995) (holding that religious expression does not violate the Establishment Clause when (1) the expression is purely private and (2) it occurs in a traditional public forum that is publicly announced and is open to all on public terms, despite the fact that the Court of Appeals for the 6th Circuit attempted to decide the case using the *Lemon* criteria); *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2494 (1994) (holding the formation of a school district unconstitutional, based on the lack of neutrality with which legislators could grant special powers to distinct groups rather than on the *Lemon* criteria, even though the parties argued on the basis of *Lemon* and lower courts decided the case based on *Lemon*).

or suggested by the Court and will discuss novel approaches to Establishment Clause adjudication.

The purpose of this Comment is to inject some predictability into Establishment Clause analysis. If the Court clings to *Lemon* as its primary test, the examination of the Court's current application of *Lemon* hints at ways practitioners can use *Lemon* in a more calculated manner.¹⁰ Should the Court modify or abandon *Lemon*, Part III suggests approaches the Court might take, and in doing so, clarifies some of the consistent goals pursued in Establishment Clause adjudication.¹¹ These approaches, first coined by Justices Brennan and O'Connor, seek to resolve Establishment Clause cases through adherence to standards rather than the straight application of a bright-line rule.¹² In this way, they avoid the pitfalls of a static rule¹³ and retain the flexibility needed to interpret a dynamic Constitution.

I. HISTORICAL BACKGROUND

In 1947, the U.S. Supreme Court ruled that the Establishment Clause of the First Amendment was applicable to the states.¹⁴ In *Everson v. Board of Education*,¹⁵ the Court announced that States may not make laws that further any or all religions.¹⁶ Although the Court upheld a statute that provided parochial school children with public transportation, its dictum is regarded as demanding a strict separationist view of the Establishment Clause.¹⁷ In dicta, Justice Black acknowledged that the statute approached "the verge" of constitutionality under

10. See *infra* notes 78-168 and accompanying text (discussing the Court's current vocabulary).

11. It is important to understand the goals that drive the individual Justices regardless of the particular test the Court uses, for it is these goals that will propel the Justices in their determination.

12. See *infra* notes 215-305 and accompanying text (discussing the approaches taken by Justices Brennan and O'Connor); see also *infra* notes 198-213 (comparing the use of standards and rules).

13. See *infra* notes 208-211 (discussing the advantages of standards over rules).

14. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). The Court determined that the Free Exercise Clause was applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

15. 330 U.S. 1 (1947).

16. *Everson*, 330 U.S. at 1, 15 (1947); see *id.* at 18 (holding that publicly funded transportation for parochial school students does not violate the Establishment Clause).

17. *Id.* at 16; see *id.* (quoting Jefferson in his demand for "a wall of separation between church and state"); see also NORMAN REDLICH, THE SEPARATION OF CHURCH AND STATE: THE BURGER COURT'S TORTUROUS JOURNEY, in THE BURGER YEARS 57-58 (H. Schwartz, ed., 1987) (describing how the Court mandated the separation of church and state in *Everson*); Donald L. Beschle, *The Conservative As Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 152-53 (1987) (discussing *Everson* as the foundation for modern analysis of the Establishment Clause, and *Everson's* dictum as one of the most influential in constitutional law); Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 546 (1994) (referring to the view taken by Justice Black in *Everson* as that of a strict separationist).

the Establishment Clause, which commanded a “wall of separation between church and state,” but was nevertheless permissible.¹⁸

In 1952, however, the Court stated that “[we] are a religious people whose institutions pre-suppose a Supreme Being.”¹⁹ Given this proclamation, the Court needed a test which would not only provide the requisite separation, but one which would also provide the essential neutrality that the Founding Fathers intended.²⁰

In 1963, the Court found a more workable test in *School District of Abington Township v. Schempp*.²¹ In order to maintain neutrality with respect to religion, yet not be its adversary, the Court noted that any statute pertaining to religion must have a “secular legislative purpose and a primary effect that neither advances nor inhibits religion.”²²

In 1970 the Court expanded the *Schempp* two-pronged test in *Walz v. Tax Commission*.²³ This case added “excessive entanglement” with religion to the list of prohibited government conduct and formulated²⁴ what would become the third prong of the *Lemon* test, the first two prongs coming from *Schempp*.

The modern era of Establishment Clause jurisprudence thus began with the Court’s decision in *Lemon v. Kurtzman*.²⁵ The Court held that in order to pass constitutional muster under the Establishment Clause, a statute must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits reli-

18. *Everson*, 330 U.S. at 16 (internal quotations omitted). Admittedly, the wall was very narrow. While separation was the command, neutrality with respect to religious believers and non-believers was required, and as the state was not to be an adversary, the charge of hostility was a constant threat. *Id.* at 18. However, there were four dissenters who, while recognizing that the state may not secure the free exercise of religion by any means, believed that constitutional policy acknowledged the value of religious observance. *Id.* at 52 (Rutledge, J., dissenting).

19. *Zorach v. Clauson*, 343 U.S. 306, 314-15; *see id.* (upholding a program that allowed the temporary release of students from class in order to receive religious instruction elsewhere).

20. *See* Robin W. Lovin, *Rethinking the History of Church and State*, 76 CAL. L. REV. 1185, 1193 (1988) (reviewing JOHN T. NOONAN, JR., *THE BELIEVER AND THE POWERS THAT ARE* (1987), and stating that the Framers “doubtless” thought that their precepts of free exercise and non-establishment reflected a neutral position); *see also* *Abington School Dist. v. Schempp*, 374 U.S. 203, 214-15 (1963) (quoting *Minor v. Board of Education of Cincinnati*, unreported but discussed in *THE BIBLE IN THE COMMON SCHOOL* (Cincinnati, Robert Clarke & Co. 1870), which discussed the neutral position that the government must take under the Establishment Clause).

21. 374 U.S. 203 (1962); *see id.* at 226 (invalidating a Pennsylvania statute which required that verses from the Holy Bible be read at the opening of every school day).

22. *Id.* at 222.

23. 397 U.S. 664 (1970); *see id.* (upholding state tax exemptions for religious property and property held by secular organizations for non-profit purposes).

24. 397 U.S. at 674. The Court felt that for state agents to distinguish, for tax purposes, those activities which were purely religious from those that were secularly charitable, would involve “excessive entanglement” with religion. They also noted that, throughout history, hostility toward religion has taken economic form. *Id.* at 673.

25. 403 U.S. 602, 612-13 (1971); *see id.* (invalidating a Rhode Island statute that provided a salary supplement to teachers at non-public schools).

gion, and (3) not excessively entangle the government in religion.²⁶ For the past two decades the Court has used this test to invalidate a host of statutes.²⁷

A. *Lemon in Action*

*Aguilar v. Felton*²⁸ is a prime example of the application of the *Lemon* test. In *Aguilar*, Justice Brennan for the majority opinion, declared that a New York statute, which provided a salary supplement to public employees who taught in parochial schools, violated the third prong of the *Lemon* test, excessive entanglement.²⁹ The petitioners sought to differentiate their case from *Grand Rapids School District v. Ball*,³⁰ where the Court invalidated a similar salary supplement program, based on the fact that the program had the primary effect of advancing religion.³¹ The petitioners argued that unlike *Ball*, there was a procedure to supervise the instructors to ensure that they did not advance religion through their teachings.³² The Court held that despite the fact that the program might not have a primary effect of advancing religion, as in *Ball*, the supervisory provision involved an “excessive entanglement of church and state.”³³

Foreshadowing the future problems with the *Lemon* test, Chief Justice Burger, the author of *Lemon*, dissented in *Aguilar*, arguing that the Court’s “obsession with the criteria identified in *Lemon* has led to results that are contrary to the long-range interests of the country.”³⁴ To the Chief Justice, the goal was to preserve the underlying values of the Establishment Clause, not to demand the separation of church and state in every respect.³⁵

26. *Id.* at 612-13.

27. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 597 (1987) (finding no secular purpose for teaching creationism); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 397 (1985) (holding that the primary effect of publicly paid teachers instructing private school children is that it advances religion); *Aguilar v. Felton*, 473 U.S. 402, 409-14 (1985) (finding excessive entanglement with religion when public school teachers teach in parochial schools at public expense); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (finding no secular purpose for a moment of silence at the beginning of the school day).

28. 473 U.S. 402 (1985).

29. *Id.* at 414.

30. 473 U.S. 373 (1985).

31. *Id.* at 397.

32. *Aguilar*, 473 U.S. at 409.

33. *Id.*

34. *Id.* at 419 (internal quotations omitted).

35. *Id.* at 419-20 (Burger, C.J., dissenting); *see Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (upholding federal construction grants to church affiliated colleges for secular, educational facilities); *see also Besche*, *supra* note 17, at 170 n.114 (describing Chief Justice Burger’s dismissal of *Lemon* as a “naive preoccupation with an easy, bright-line approach for addressing constitutional issues”); Norman Redlich, *The Burger Court’s Torturous Journey*, 60 NOTRE DAME L. REV. 1094, 1146 (1985) (explaining that Chief Justice Burger dissented in *Aguilar* because the program at issue did not threaten the values underlying the Establishment Clause); Comment, *The Second Circuit and the Establishment Clause: Shoring Up a Crumbling Wall*, 51 BROOK. L. REV. 642, 701-02 (1985) (discussing how Chief Justice Burger characterized the majority’s opinion in *Aguilar* as evincing hostility toward religion).

Justice O'Connor, in a dissent joined by Justice Rehnquist, questioned the usefulness of the entanglement prong.³⁶ In her view, its application lead to anomalous results when a statute passed the first two prongs, yet was invalidated because of excessive entanglement.³⁷

B. *The Retreat from Lemon*

In recent years, criticism has been leveled at the Court for its seemingly selective use of the *Lemon* test, when application of the three-criteria would result in invalidating statutes that the Court wished to leave intact.³⁸

For example, in *Zobrest v. Catalina Foothills School District*³⁹ the Court upheld an Arizona statute that, pursuant to the Individuals with Disabilities Education Act,⁴⁰ provided a deaf parochial school student with a sign language interpreter.⁴¹ Chief Justice Rehnquist held that since public funds aided the sectarian schools only as a result of the choice of the parents, rather than the State, to send their child to the parochial school, the indirect aid was permissible.⁴² The difference between direct and indirect aid, rather than the *Lemon* criteria, seemed to be the determining factor.⁴³

36. *Aguilar*, 473 U.S. at 427-30.

37. *Id.* (O'Connor, J., dissenting); *see id.* (comparing *Everson v. Board of Educ.*, 330 U.S. 1 (1947), where the Court upheld public transportation for parochial school children to and from school, with *Wolman v. Walter*, 433 U.S. 229 (1977), which invalidated a statute that provided public transportation for field trips to parochial school children because the supervision necessary to ensure that the second prong of *Lemon* was not violated, itself violated the excessive entanglement prong).

38. Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 522-23 (1994) (discussing how, although judges are forbidden from deciding cases on the basis of political concerns or "personal idiosyncrasies," these may in fact drive decisions, which are then justified by an accepted doctrine); Carl H. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 543 (1990) (stating that the *Lemon* test is one of the most criticized legal doctrines); Kenneth W. Starr, *The Establishment Clause*, 41 OKLA. L. REV. 477, 487 (1988) (discussing the dangers of a rigid test that fails to consider the values that the religion clauses of the First Amendment seek to protect). *See e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993) (upholding a provision that authorized a state-financed interpreter for a deaf child in a parochial school); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring) (stating that "[w]hen we wish to strike down a practice [*Lemon*] forbids, we invoke it, . . . when we wish to uphold a practice it forbids, we ignore it" . . .); *County of Allegheny v. ACLU*, 492 U.S. 573, 620-21 (1989) (concluding that a Chanukah display of a Menorah on public property is not an endorsement of religion); *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (holding that a legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions is proper under the Establishment Clause).

39. 509 U.S. 1 (1993).

40. 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1995).

41. *Zobrest*, 113 S. Ct. at 2469.

42. *Id.* at 2467.

43. *See id.* at 2466-67 (highlighting cases in which Establishment Clause challenges were rejected because the aid flowed through a private citizen, rather than directly to the religious institution). The Court did give brief acknowledgment to the *Lemon* criteria, stating that the secular purpose was the education of the

Aguilar and *Zobrest* both purport to apply *Lemon*, but with conflicting results. The significant difference in the fact patterns of the two cases is that in *Aguilar*, the state provided aid directly to the parochial school.⁴⁴ In contrast, the aid in *Zobrest* went to the parents, by providing them with an interpreter at a parochial school.⁴⁵ This supposed difference between direct and indirect aid to parochial schools left one program intact, while invalidating the other.⁴⁶ The opposing outcomes of *Aguilar* and *Zobrest* appear to be the anomalous results of which Justice O'Connor speaks.⁴⁷

The conflicting results in *Aguilar* and *Zobrest* are difficult to reconcile.⁴⁸ In each, the Court strove to find a secular purpose and permissible primary effect. In regard to the entanglement prong of the *Lemon* test, however, the Court seemed eager to find the violation in *Aguilar*, yet anxious to avoid it in *Zobrest*.

C. The Souring of *Lemon*

Among the criticisms⁴⁹ of the *Lemon* test have been calls for its abandonment.⁵⁰ In fact, five of the current Justices have called for its modification or

child, and the primary effect was the facilitation of that education. *Id.* at 2469. Since the interpreter would only be translating, rather than teaching, there was little fear that the publicly provided interpreter would import a religious meaning to the lesson (at least no more so than was in the basic instruction). *Id.* at 2468. Accordingly, no supervision would be necessary and the entanglement prong would not be implicated. *Id.* The Court also emphasized that the state was only providing that which it would provide if the student went to a public school. *Id.*

44. *Aguilar*, 473 U.S. at 404 (1985); *see id.* (stating that the New York statute provides for the salaries of public employees who teach in parochial schools).

45. *Zobrest*, 113 S. Ct. at 2464.

46. What the Court disregarded in *Zobrest* was that by providing an interpreter to the parents, regardless of the school their child attended, the government relieves the parochial school of a service which it would otherwise have to provide. *See Meek v. Pettenger*, 421 U.S. 349, 365-66 (1975). Without such aid, the parents might not be able to afford to send their child to the parochial school, and the parochial school would either have to provide the interpreter, or forgo the tuition for that child. In this context, the difference between direct and indirect aid dissipates, and the holdings of *Aguilar* and *Zobrest* clearly conflict. Additionally, the Court's belief that providing the means through which the sectarian instruction is received (*Zobrest*) is less ominous than actually providing the instruction (*Aguilar*), is irrational. Regardless of who formulates the religious message, that message is being transmitted to the child as a direct result of state action. *See Zobrest*, 113 S. Ct. at 2474 (Blackmun, J., dissenting) ("[i]f petitioners receive the relief they seek, it is beyond question that state-employed sign-language interpreter would serve as the conduit for petitioner's religious education, thereby assisting (the parochial school) in its mission of religious indoctrination").

47. *See supra* notes 44-46 and accompanying text (setting forth contradictory results when *Lemon* was applied in similar fact patterns).

48. *See Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2505 (1994) (Kennedy, J., concurring) (conceding that the decision in *Aguilar* may have been erroneous).

49. *See supra* note 38 and accompanying text (discussing how the Court has been criticized for its recent Establishment Clause jurisprudence).

50. *See Grumet*, 114 S. Ct. at 2499-500 (O'Connor, J., concurring) (calling for more precise tests dependent upon the factual setting of the case); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2150 (1993) (Scalia J., concurring) (declining to apply *Lemon* whether it validates or invalidates state action);

demise,⁵¹ and the seeds of its ruin have been planted in recent decisions.⁵² For example, although the Court could not squeeze a majority to forsake the *Lemon* test in one of its most recent Establishment Clause cases, *Board of Education v. Grumet*,⁵³ the test was demoted in importance. The Court purportedly relied upon the *Lemon* test, but only referred to it in two “see also” cites.⁵⁴

Grumet involved New York’s enactment of a special statute that formed a new school district.⁵⁵ The Kiryas Joel School District was formed so that handicapped children of the Village of Kiryas Joel, a religious enclave of Satmar Hasidim with boundaries coterminous to the school district, could attend a school where the students shared a common dress code and language particular to their religion.⁵⁶ The special statute creating the school district was challenged as a violation of the Establishment Clause because the school district was drawn along religious boundaries.⁵⁷

Justice Souter wrote the opinion for a highly divided Court, which held that the special statute violated the Establishment Clause because there was no mechanism with which to ensure neutrality when it came to other groups applying for a school district of their own.⁵⁸ While recognizing that the Constitution does

Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting) (refusing to apply a test that invalidates traditional policies of accommodation); *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (refusing to be confined to a singular test); *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting) (refusing to apply *Lemon* where it would lead to invalidation of statutes that benefit the long-range interests of the country); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting) (same).

51. See *supra* note 38 and accompanying text (discussing cases in which *Lemon* has been criticized).

52. See *Rosenberger v. Rector of Univ. of Va.*, 115 S. Ct. 2510, 2525 (1995) (failing to even once mention *Lemon* in the majority opinion); see also *supra* note 38 and accompanying text (discussing how recent cases have suggested a movement away from the *Lemon* test).

53. 114 S. Ct. 2481 (1994).

54. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2515 (Scalia, J., dissenting) (1994). While both parties based their briefs on the *Lemon* test, and the district, appellate, and state supreme courts decided the case on that basis, 579 N.Y.S.2d 1004, 1007 (1992), 592 N.Y.S.2d 123, 126 (1992), 618 N.E.2d 94, 99 (1993), the U.S. Supreme Court based its holding primarily on case specific criteria. *Grumet*, 114 S. Ct. at 2493-94. See *Zobrest*, 113 S. Ct. at 2464-69 (acknowledging the Court of Appeals’ reliance on *Lemon* but failing to further cite *Lemon* in its own analysis).

55. *Grumet*, 114 S. Ct. at 2484-85. See 1989 N.Y. Laws, ch. 748 (establishing the Kiryas Joel Village School District). The Village of Kiryas Joel is a religious enclave of Satmar Hasidim which was incorporated in 1977. See also N.Y. VILLAGE LAW, art. 2 (McKinney 1973 & Supp. 1995) (providing for the incorporation of a specific geographic area and its inhabitants).

56. *Grumet*, 114 S. Ct. at 2485; see *id.* (stating that the children would face “panic, fear and trauma” in a public school). Prior to the passage of the statute creating the school district (through the Individuals With Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1995)) the handicapped children of Kiryas Joel had been provided public services at an annex to one of the private religious schools that all of the children of Kiryas Joel attended. *Grumet*, 115 S. Ct. at 2485. This arrangement was invalidated by the Court’s decision in *Aguilar*, 473 U.S. at 414.

57. *Grumet*, 114 S. Ct. at 2486.

58. *Id.* at 2491; see *Review of Supreme Courts Term, Free Speech, Individual Rights, Procedure*, 63 U.S.L.W. 3051, 3057 (1994) (discussing how Justice Souter characterized the statute which created the school district as “special and unusual,” giving rise to concerns that the legislature may not provide the same service

not prohibit a state from accommodating religious needs by relieving unique religious burdens,⁵⁹ Justice Souter emphasized that favoritism between religions was clearly impermissible.⁶⁰

Justice Kennedy concurred in the judgment, stating that the special statute was unconstitutional because it drew boundaries along religious lines.⁶¹ However, he believed that the New York Legislature could be trusted to be neutral when parceling out school districts.⁶²

Justice O'Connor's concurrence also expressed the view that the accommodation in *Aguilar* was permissible.⁶³ However, most of her opinion was devoted to repudiating the *Lemon* test and suggesting a new framework for the Court to use when deciding Establishment Clause cases.⁶⁴ This framework will be analyzed later in this Comment.⁶⁵

Justice Blackmun also concurred in the judgment, but wrote separately solely to debunk the notion that the Court was abandoning the criteria set forth in *Lemon*.⁶⁶ He looked to the fact that Justice Souter had relied on a similar case, decided under *Lemon*.⁶⁷ What Justice Blackmun failed to note, however, was that the portion of Justice Souter's opinion which relied on the prior case was supported by only a plurality of the Court.⁶⁸

to other groups).

59. *Grumet*, 114 S. Ct. at 2492; see also *Supreme Court Ruling Voids Hasidic School District; Decision Cites Church-State Separation; Excerpts From Opinions*, FACTS ON FILE WORLD NEWS DIGEST, June 30, 1994, at 455 A3 (stating that a majority of the Justices challenged the opinions in *Aguilar* and *Ball*, and suggesting that in the future, the Court may be willing to accommodate special demands made by religious groups).

60. *Grumet*, 114 S. Ct. at 2493; see *id.* (stating that "neutrality as among religions must be honored"); see also *Lee v. Weisman*, 112 S. Ct. 2649, 2676 (1992) (Souter, J., concurring) (stating that the principle against favoritism has become the foundation of Establishment Clause jurisprudence); *Board of Educ. v. Mergens*, 496 U.S. 226, 269 (1990) (Marshall, J., concurring) (stating that the Court must be sensitive to the various ways government can show favoritism to particular beliefs); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 40 (1989) (Scalia, J., dissenting) (noting the difficulty of determining when neutrality turns into impermissible favoritism). Because a legislature's failure to enact a special statute is passive and unreviewable, there was no assurance that the New York Legislature would act with neutrality when determining which groups to provide special school districts, nor any redress for those who were improperly denied. *Grumet*, 114 S. Ct. at 2491.

61. *Grumet*, 114 S. Ct. at 2504 (Kennedy, J., concurring).

62. *Id.* at 2503 (Kennedy, J., concurring). Justice Kennedy also attacked, and called for the reconsideration of, the Court's ruling in *Aguilar*, which made the New York statute necessary. *Id.* at 2505.

63. *Id.* at 2498 (O'Connor, J., concurring).

64. *Id.* at 2499-500 (O'Connor, J., concurring); see *id.* (identifying different categories of Establishment Clause cases and calling for different approaches).

65. See *infra* notes 265-305 and accompanying text (discussing Justice O'Connor's suggested approach to Establishment Clause cases).

66. *Grumet*, 114 S. Ct. at 2494 (Blackmun, J., concurring).

67. *Id.* at 2494-95 (Blackmun, J., concurring); see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (holding that a grant of discretionary power to religious entities to determine the issuance of liquor licenses is excessive entanglement with religion).

68. Justices Stevens, Blackmun, and Ginsburg joined in Part II-A of the opinion, in which the comparison was made. *Grumet*, 114 S. Ct. at 2484.

Chief Justice Rehnquist and Justice Thomas joined in Justice Scalia's dissenting opinion in *Grumet*. Scalia stated that the accommodation by the New York Legislature was perfectly permissible.⁶⁹ Rather than address the threat of a possibly impartial legislature, he focused on the neutral criteria used by the Legislature when creating the statute.⁷⁰ Justice Scalia also addressed the Court's lack of reliance on the *Lemon* criteria, reiterating the Court's selective use of it.⁷¹ While criticizing the approach taken by Justice O'Connor,⁷² he failed to elucidate a test of his own, preferring only to rely on "fidelity to the longstanding traditions of our people" to guide in his determination of Establishment Clause cases.⁷³

While it is unclear whether the Court will hold onto the *Lemon* test, it is obvious that some predictability is needed. As Justice Scalia noted, it is unfair to litigants and lower courts who, when writing their briefs and opinions, respectively, rely on the Court to use the test it purports to use.⁷⁴ The bedlam within Establishment Clause jurisprudence⁷⁵ is exacerbated by the Court's deviation from the jargon that typically accompanies *Lemon* analyses.⁷⁶

II. THE CHANGE IN VOCABULARY

In some recent cases, the U.S. Supreme Court has professed adherence to *Lemon*, but has strayed away from the language used in the original test.⁷⁷ As

69. *Id.* at 2506 (Scalia, J., dissenting).

70. *Id.* at 2510-11 (Scalia, J., dissenting). Justice Scalia also chastised Justice Souter for failing to recognize the difference between granting authority to the officers of a religious institution, as in *Larkin*, and the granting of authority to a group of taxpayers who shared the same religion. *Id.* at 2511. According to Justice Scalia, Justice Souter's resolution would dictate that granting authority to various groups of citizens is proper as long as they do not all share the same religion. *Id.* at 2507.

71. *Id.* at 2515 (Scalia, J., dissenting). Justice Scalia also noted the unfairness to lower courts, who are not as free as the U.S. Supreme Court to disregard precedent. *Id.*

72. *See infra* notes 265-305 and accompanying text (discussing Justice O'Connor's approach).

73. *Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting). Surprisingly, while Justice Scalia claims to revere tradition, at least one constitutional scholar has noted his disregard for precedence. David Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1713-15 (1991). However, these seemingly contradictory approaches can be reconciled by viewing Justice Scalia's desire to return to historical times as a commentary on the current state of society and the law that has been made within it. *Id.*

74. *See Grumet*, 114 S. Ct. at 2515 (Scalia, J., dissenting) (discussing reasons to abandon the *Lemon* test).

75. *See Rosenberger v. Rector of Univ. of Va.*, 115 S. Ct. 2510, 2532 (1995) (Thomas, J., concurring) (stating that "our Establishment Clause jurisprudence is in hopeless disarray").

76. *See infra* notes 77-84 and accompanying text (discussing how the Court's vocabulary has changed in recent years).

77. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 n.7 (1993) (stating that *Lemon* is not overruled, but basing the evaluation of the statute under the Establishment Clause on whether there is a realistic danger that the community will conclude that the government was endorsing religion); *see also Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (refusing to reconsider *Lemon*, but basing its invalidation of public graduation benedictions on the premise that the government may not coerce any one to support or participate in religion); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (invalidating a tax exemption to religious periodicals because the exemption lacked a secular purpose *and* because the exemption

most law students learn, when engaged in legal writing, using a different word connotes a different idea, even if the word is a synonym to the one previously used.⁷⁸ In the last two decades, the Court has relied more on the words “accommodation,” “endorsement,” and “coercion,” rather than “secular purpose,” “primary effect,” and “entanglement,” to define permissible and impermissible laws involving religion.⁷⁹ Although the Court is in general agreement that some accommodation of religion is permissible,⁸⁰ the extent of the accommodation is the contentious concern.⁸¹ While some of the Justices believe that an accommodation is permissible as long as it falls short of endorsing religion,⁸² others feel that unless the accommodation involves coercion of participants, it is permissible.⁸³

To some, this change in vocabulary has signaled a breakdown of the supposed wall separating church and state.⁸⁴ Regardless of the meaning attached,

effectively endorsed religious beliefs).

78. LAUREL CURRIE OATES ET AL., *THE LEGAL WRITING HANDBOOK* 635 (1993).

79. See *Rosenberger*, 115 S. Ct. at 2522 (stating that the government program at issue respected the difference between government speech *endorsing* religion, and private speech which does so); Board of Educ. v. Grumet, 114 S. Ct. 2481, 2492 (1994) (stating that “we do not deny that the Constitution allows the state to *accommodate* religious needs . . . [but] it is clear that neutrality as among religions must be honored”); *Lamb’s Chapel*, 113 S. Ct. at 2148 (finding no realistic danger of *endorsement*) (emphasis added); *Lee*, 112 S. Ct. at 2678 (Scalia, Rehnquist, Thomas, JJ., dissenting) (holding that a graduation benediction does not *coerce* attendants into adhering to a religious creed); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (recognizing that whether or not a practice has the effect of *endorsing* religion is important in Establishment Clause jurisprudence); *id.* at 660 (Scalia, J., concurring in part and dissenting in part) (describing activities forbidden by the Establishment Clause as those which compel or *coerce* participation); *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (acknowledging that the government can, and sometimes must, *accommodate* religion, citing *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144 (1987)).

80. See *Grumet*, 114 S. Ct. at 2494 (stating that the statute at issue crosses the line between permissible accommodation and impermissible establishment); *id.* at 2501 (Kennedy, J., concurring) (stating that government accommodations of religion are an accepted part of our heritage); *id.* at 2511 (Scalia, J., Thomas, J., and Rehnquist, C.J., dissenting) (stating that government can, and sometimes must, accommodate religious practices without violating the Establishment Clause). While Justice Breyer was not on the Court when *Grumet* was decided, he concurred with the judgment and the concurrence of Justice O’Connor in *Capitol Square Review & Advisory Bd. v. Pinette*, which allowed the Ku Klux Klan to place a cross on public property. 115 S. Ct. 2440, 2451 (1995).

81. See *infra* notes 85-116 and accompanying text (outlining the debate on the meaning of permissible accommodation).

82. See *infra* notes 117-152 and accompanying text (describing the use of endorsement as a limit to accommodation).

83. See *infra* notes 153-168 and accompanying text (describing the use of coercion as a test for impermissible accommodation).

84. See David Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 405 (1989) (stating that *accommodation*, as a doctrinal viewpoint, arose because devotion to strict separation hindered principled decision making); Donald E. Lively, *The Establishment Clause: Lost Soul of the First Amendment*, 50 OHIO ST. L.J. 681, 689 (1989) (asserting that the origin of the accommodation principle was *Marsh v. Chambers*, 463 U.S. 783 (1983), where, had the Court applied *Lemon*, the congressional prayer would have been invalidated); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 267

practitioners formulating arguments to the Court on alleged Establishment Clause violations should be aware of this difference in vocabulary, lest they miss the opportunity to frame their best contention.

A. Accommodation

Currently, all of the Justices maintain that the government may accommodate religious institutions.⁸⁵ The differences between the Justices can be seen by looking at where each one draws the line between “permissible accommodation [and] impermissible establishment.”⁸⁶ However, the word *accommodation* is not easily defined.⁸⁷

Accommodation is a word that the Court has used in Free-Exercise-Clause⁸⁸ as well as Establishment-Clause adjudication.⁸⁹ It is a word which the Justices use to express what the government can, and sometimes must, do to avoid a violation of the Free Exercise Clause.⁹⁰ For example, in *Hobbie v. Unemployment Appeals Commission of Florida*,⁹¹ the Court held that the State must pay unemployment compensation to a woman who had been fired for refusing to work on Friday evenings and Saturday mornings, her Sabbath, after her recent conversion to the Seventh-day Adventist religion.⁹² The Court stated that by denying unemployment compensation, the State was forcing the plaintiff to choose between her religion and her job, a burden against which the Free Exercise Clause was to

(1987) (suggesting that scholars believe that Justice O'Connor's “no endorsement” test signals a move toward neutrality).

85. See *supra* note 80 and accompanying text (sketching the Court's agreement on the permissibility of accommodation).

86. *Grumet*, 114 S. Ct. 2481, 2494 (1994).

87. See *infra* notes 88-116 and accompanying text (discussing the difficulty in defining, for Establishment Clause jurisprudence purposes, the word “accommodation”).

88. See U.S. CONST., amend. I (stating that the Free Exercise Clause of the First Amendment guarantees that the government may make no law which prohibits the free exercise of religion). The Clause was made applicable to the States in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Generally, the Court uses the strict scrutiny standard of review when deciding whether a law violates the Free Exercise Clause. *Grumet*, 114 S. Ct. at 2487; see *id.* (noting how the Court applies strict scrutiny to any statute that imposes a burden on religion). This means that there must be a compelling state interest before the State can infringe on the exercise of a particular religion. See *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (invalidating a state law which denied unemployment benefits to an employee who was discharged for refusing to work on the Sabbath because the imposition on the free exercise of religion was not justified by a compelling state interest). The Court, however, also uses a generally applicable neutral standard to decide some Free Exercise cases. *Employment Division v. Smith*, 485 U.S. 660, 673 (1988). But, under the Religious Freedom Restoration Act, Congress has dictated that only strict scrutiny be used. 42 U.S.C. § 2000bb-4 (1994).

89. See *supra* note 80 and accompanying text (discussing how the Court has used the word *accommodation* in deciding Establishment Clause cases).

90. See *Hobbie v. Unemployment Appeals Comm'n. of Fla.*, 480 U.S. 136, 144-45 (1987) (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause”).

91. 480 U.S. 136 (1987).

92. *Id.* at 146.

protect.⁹³ In such an instance, the State must *accommodate* religion by allowing such persons to collect unemployment even though they were discharged for refusing to work—typically not grounds to collect unemployment.⁹⁴

The Appeals Commission argued that distributing unemployment compensation to those who were discharged because of a refusal to work on their Sabbath violated the Establishment Clause because the practice entangled the state and religion, thus violating the third prong of *Lemon*.⁹⁵ The Court rejected this notion, stating that “such an accommodation would not violate the Establishment Clause,”⁹⁶ reasoning that the government was merely exercising neutrality in the face of conflicting religious practices.⁹⁷ Thus, *accommodation* is a notion which the Court uses to recognize the importance that religion has in some people’s lives and to alleviate special burdens which the government may inadvertently place on the exercise of that religion, while at the same time remaining neutral in the appropriation of relief.⁹⁸

There is a fine line between acceptable accommodation of religion and violating the Establishment Clause. “[I]mpermissible establishment” occurs when, in its attempt to accommodate religious principles, the government disregards the neutrality principle.⁹⁹ This occurs when the government confers special treatment on a specific religious sect, to the exclusion of another sect.¹⁰⁰ Thus, even when the government seeks to accommodate religion, neutrality remains the paramount principle to uphold.¹⁰¹

The stark contrast in the Justices’ views concerning when accommodation becomes establishment (with the exception of Justices Ginsburg and Breyer, who

93. *Id.* at 140; *see id.* (comparing the present case with *Sherbert v. Verner*, 374 U.S. 398 (1963), where a woman was wrongfully denied unemployment compensation after being discharged for refusing to work on Saturdays, her Sabbath).

94. *Id.* at 146; *see also* FLA. STAT. ANN. § 443.021 (West 1981) (stating that unemployment benefits are obtainable by those who become unemployed “through no fault of their own”).

95. *See Hobbie*, 480 U.S. at 144-45 (rejecting the Appeals Commission’s contention that granting unemployment compensation would violate the Establishment Clause, and stating that the action “does not represent the involvement of religion with secular institutions which it is the object of the Establishment Clause to forestall,” quoting *Sherbert*, 374 U.S. at 409).

96. *Id.* at 145 n.10.

97. *Id.* at 145.

98. *See Grumet*, 114 S. Ct. 2481, 2492 (1994) (discussing the government’s role in enabling the free exercise of religion, while avoiding the establishment of a religion); *see also* *County of Allegheny v. ACLU*, 492 U.S. 573, 631-32 (1989) (O’Connor, J., concurring) (stating that in particular cases, the Free Exercise Clause may command that the government accommodate religion by lifting certain government-imposed burdens on religion).

99. *Grumet*, 114 S. Ct. at 2493 (stating that an otherwise unconstitutional assignment of authority to a religious group cannot be said to be constitutional because it is an accommodation of religion).

100. *Id.*; *see id.* (discussing how the proposed accommodation, which would allow a religious community to comprise its own school district, is a violation of the Establishment Clause because it is provided only to a specific religious group).

101. *Id.*; *see id.* (stating that “it is clear that neutrality as among religions must be honored”).

were not on the Court at the time) is evidenced in *Lee v. Weisman*,¹⁰² a case that involved a benediction at a public junior high school graduation ceremony. The majority opinion, authored by Justice Kennedy, held that the non-denominational prayer was a violation of the Establishment Clause because, while participation was voluntary, it effectively coerced the students to participate in the prayer.¹⁰³

Coercion is the word Justice Kennedy chose to define exactly when an accommodation had exceeded its limit, and had become an impermissible establishment.¹⁰⁴ Coercion is present when a person is placed under public pressure or peer pressure to take part in a religious activity that is sponsored by the state.¹⁰⁵

Although joining in the opinion, Justice Souter, in a concurrence joined by Justices Stevens and O'Connor, stated that a practice does not have to go so far as to coerce to be an impermissible establishment of religion.¹⁰⁶ According to these Justices, to do so would make the Establishment Clause superfluous, because coercing one to participate in a religious activity effectively violates his or her right to free exercise of religion.¹⁰⁷ Thus, these Justices believe that the government may accommodate religion only up until the point that it is endorsing that religion, and need not go so far as to coerce the populous to be impermissible.¹⁰⁸

In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, found that the benediction was a permissible accommodation of religion.¹⁰⁹ While subscribing to the *coercion* test, Justice Scalia defines the word in a very strict sense, expressing that if not "backed by threat of penalty," there is no coercion.¹¹⁰ He also eschewed Justice Souter's claim of an impermissible establishment by saying that practices founded in our nation's history should not

102. 112 S. Ct. 2649 (1992).

103. See *Lee*, 112 S. Ct. at 2658; see also Paula S. Cohen, *Psycho-Coercion, A New Establishment Clause Test: Lee v. Weisman And Its Initial Effect*, 73 B.U. L. REV. 501, 501 (1993) (stating that while the Court did not expressly overturn *Lemon*, it used the coercion test to invalidate a high school graduation benediction); Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 559 (1994) (recounting how the coercion test was first used in *Lee*, although the phrase was coined in a separate opinion of County of Allegheny v. ACLU, 492 U.S. 573 (1989)).

104. *Lee*, 112 S. Ct. at 2655; see *id.* (stating that although the government may accommodate religion through the Free Exercise Clause, the Establishment Clause bars the government from coercing anyone to join in a religious activity).

105. *Id.* at 2658 (stating that students are coerced to participate when a benediction is given at a high school graduation). However, the Court declined to address whether coercion would have been present had mature adults been the participants. *Id.*

106. *Id.* at 2671-72 (Souter, J., concurring).

107. *Id.* at 2673 (Souter, J., concurring).

108. See *infra* notes 117-152 and accompanying text (discussing the *endorsement* test).

109. *Lee*, 112 S. Ct. at 2678-79 (Scalia, J., dissenting).

110. *Id.* at 2683 (Scalia, J., dissenting).

be challenged as unconstitutional, because this would not reflect the intentions of the Founding Fathers.¹¹¹

The Justices' various views on when an accommodation becomes an establishment of religion can be visualized on a line with accommodation on the left, endorsement in the center, and coercion on the right. While all believe that accommodation is permissible, Justices Souter, Stevens, O'Connor, Ginsburg and Breyer believe that accommodation must end when the government begins to endorse a particular religion.¹¹² Justice Kennedy believes that the government can accommodate religion up to the point that it begins to coerce people to join in religious activities.¹¹³ Justices Scalia and Thomas, as well as Chief Justice Rehnquist,¹¹⁴ agree with Justice Kennedy, but interpret coercion in a very strict sense, as that which is supported by the peril of punishment.¹¹⁵ What follows is an in-depth analysis of each of the views.¹¹⁶

B. Endorsement

Five of the current Justices on the Court—Souter, Stevens, O'Connor, Breyer, and Chief Justice Rehnquist—have used, or acquiesced in the use of, the endorsement test.¹¹⁷ According to Justice O'Connor, the Establishment Clause forbids government from preferring religious participants over non-participants, as well as preferring one religion over another.¹¹⁸ Justice O'Connor first coined the endorsement test in her concurrence in *Wallace v. Jaffree*.¹¹⁹ In *Wallace*, the

111. *Id.* at 2679 (Scalia, J., dissenting).

112. See *infra* notes 117-152 and accompanying text (discussing the endorsement test); see also *infra* notes 175-181 and accompanying text (discussing Justice Ginsburg's and Justice Breyer's views on the Establishment Clause).

113. See *supra* note 105 and accompanying text (discussing Justice Kennedy's boundary at coercion).

114. Chief Justice Rehnquist has also joined in the use of the endorsement test. See *infra* note 117 and accompanying text.

115. *Lee*, 112 S. Ct. at 2683.

116. See *infra* notes 117-168 and accompanying text (examining the use of endorsement and coercion in Establishment Clause jurisprudence).

117. See *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2451 (1995) (O'Connor, J., with whom Souter, J., and Breyer, J., join, concurring) (stating that the endorsement test asks the right question when a government practice is challenged on Establishment Clause grounds); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (Rehnquist, C.J., for the majority, Souter, J., Stevens, J., and O'Connor, J., concurring) (holding that allowing District property to be used to show religiously-oriented films, when the property was considered a limited public forum, does not violate the Establishment Clause because there is no realistic danger that the community would think that the State was endorsing a particular religion or creed); *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (Stevens, and O'Connor, JJ., concurring in part) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) in (framing the endorsement as the essential issue under the Establishment Clause, that "government must not make 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'").

118. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring); see *id.* (setting forth the endorsement test).

119. *Id.*

Court invalidated an Alabama statute which called for a “moment of silence” at the beginning of each school day.¹²⁰ Although the statute did not encourage the students to pray to any particular deity, it was enacted for the sole purpose of declaring the State’s “endorsement” of prayer in general.¹²¹

Justice O’Connor expanded on the endorsement test in *County of Allegheny v. ACLU*,¹²² in which she concurred with the judgment of the Court that a creche displayed in a public courthouse violated the Establishment Clause, while a menorah displayed outside a city-county building did not.¹²³ Here, Justice O’Connor decided that the “essential command” of the Establishment Clause is that government not make one’s religious beliefs relevant to that person’s standing in the community. When government communicates a meaning that one religion is preferred over another, or that religion in general is preferable to secular notions, it effectively endorses religion, thus making one’s religious beliefs pertinent to his or her community standing.¹²⁴ Justice O’Connor also stated that the endorsement test avoids the inflexibility of the *Lemon* test by recognizing that accommodating religion, to a certain extent, furthers the Free Exercise Clause.¹²⁵ *Lemon*, on the other hand, “disregards the protected status that the Free Exercise Clause bestows on religious exercise.”¹²⁶

Justice O’Connor agreed with the majority of the *Allegheny* Court that the menorah display did not violate the Establishment Clause, but for somewhat different reasons.¹²⁷ In her view, the menorah display did not convey a message of endorsement because it included, and was indeed dwarfed by, a large, decorated Christmas tree—a secular symbol.¹²⁸

120. *Id.*

121. *Id.* at 60; see *Constitutional Law Conference*, 54 U.S.L.W. 2196, 2196 (1985) (discussing how the author of the Alabama statute made detailed references to its religious purpose); *Charitable Contributions—Church of Scientology Member Can’t Deduct Payments For “Auditing” Services*, DAILY REP. FOR EXECUTIVES, June 9, 1987, at H-5 (comparing the impermissible purpose of the Alabama statute, to promote prayer in school, with the permissible purpose of exemptions in the tax code to encourage gifts to charitable organizations).

122. 492 U.S. 573 (1989).

123. *Id.* at 637.

124. See *id.* at 627 (O’Connor, J., concurring).

125. *Id.* at 632 (O’Connor, J., concurring); see *supra* notes 90-97 and accompanying text (discussing *Hobbie* and how accommodation is used in Free Exercise Clause adjudication). The Free Exercise Clause may mandate accommodation of religion, but only when the government action lifts a discernable burden on the free exercise of religion. *Allegheny*, 492 U.S. at 632. In *Allegheny*, the city did not place the creche and menorah on public property to lift a discernable burden on the free exercise of religion, thus the accommodation was impermissible. *Id.*

126. Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147, 1159 (1987).

127. *Allegheny*, 492 U.S. at 633. The majority felt that to disallow the menorah, a symbol of Chanukah, while allowing the public celebration of Christmas, would be to discriminate against Jewish people. *Id.* at 615.

128. *Id.* at 632 (O’Connor, J., concurring); The majority held that the menorah did not violate the Establishment Clause because the message was not exclusively religious, but was a symbol of another holiday, Chanukah, which demonstrates the United States’ cultural diversity. *Id.* at 613-15; see Daniel Parish, *Private*

Four years after *Allegheny*, Justice White, joined by Rehnquist, Blackmun, Stevens, O'Connor and Souter, used the endorsement test to uphold the use of public schools buildings for after hours recreational and civic purposes—including the showing of religiously oriented films.¹²⁹ According to the majority, because the film would be shown after school hours, would be open to the public, and was not being sponsored by the school, it would not convey to the community a message that government was endorsing the film's religious message.¹³⁰

In *Capitol Square Review and Advisory Board v. Pinette*,¹³¹ Justices Souter and Breyer agreed with Justice O'Connor that the endorsement test "captures the fundamental requirement of the Establishment Clause."¹³² In this case, the Court held that the Ku Klux Klan could erect an unattended display of a cross in an area next to a public building that was used as a traditional public forum, without violating the Establishment Clause.¹³³ While Justice Stevens agreed with the use of the endorsement test, he disagreed with the notion that a "reasonable observer" would not think that the state was endorsing religion by allowing a cross to be placed on an adjacent lawn.¹³⁴ Thus, while it appears that a majority of the Court may turn to the endorsement test, it remains to be seen whether they will be able to agree on the definition of a "reasonable observer."¹³⁵

The most fervent critic of the endorsement test is Justice Kennedy. In *Allegheny*, Justice Kennedy, dissenting in part with Justice Scalia, declared that while the *Lemon* test had been applied to reflect unwarranted hostility towards religion,¹³⁶ he could not join in the use of the endorsement test.¹³⁷ In his opinion,

Religious Displays in Public Fora, 61 U. CHI. L. REV. 253, 253 (1994) (noting that when no one decided to sponsor a Christmas tree display at the public park in the City of Burlington, Vermont, the city prohibited a menorah from being displayed); Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1765 (1993) (commenting on Justice O'Connor's proposal that the Establishment Clause be viewed as a prohibition on government action that endorses religion).

129. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993).

130. *Id.* at 2148.

131. 115 S. Ct. 2440 (1995).

132. *Id.* at 2452 (O'Connor, J., concurring).

133. *Id.* at 2450.

134. *Id.* at 2469-70 (Stevens, J., dissenting). Justice Stevens attached to his opinion photos of the crosses on the public lawn. *Id.* at 2463, 2464, 2474.

135. *See id.* at 2454-55 (O'Connor, J., concurring) (stating that the fundamental difference between her view and Justice Stevens' view is the definition of a reasonable observer).

136. *See County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989); *see also* Dina A. Keever, *Public Funds and the Historical Preservation of Churches: Preserving History or Advancing Religion?*, 21 FLA. ST. U.L. REV. 1327, 1339 (1994) (stating that Justice Kennedy's concurring/dissenting opinion in *Allegheny* reflected his view that "a nonendorsement mandate" would project hostility towards religion); Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 329 (1993) (asserting that because *Lemon* has effectively driven religion out of the public sector, many people feel that the Court is hostile towards religion). *But see Developments in the Law—Religion and the State: V. Free Exercise Accommodation of Religion*, 100 HARV. L. REV. 1703, 1719 (1987) (stating that "*Lemon* is hostile to accommodations whose purpose or effect is to advantage *one religion over another*") (emphasis added).

137. *Allegheny*, 492 U.S. at 668-69.

using such a test would lead to the invalidation of many national historical traditions, such as the congressional prayer and the President's Thanksgiving Proclamation.¹³⁸ Any reading of the Establishment Clause which would invalidate traditions which began during the Framers' era would not, in his view, be consistent with the Framers' intent.¹³⁹

Justice O'Connor's rebuttal to Justice Kennedy's argument is that one needs to look closely at the tradition to see if it does indeed contain a message of endorsement.¹⁴⁰ Contrary to Justice Kennedy's assertion, not all religious practices which involve the government will fail this test.¹⁴¹ In Justice O'Connor's view, many longstanding traditions are accepted by the citizenry as commonplace, having no relevance to one's standing in the community, and thus not conveying a message of endorsement.¹⁴² An example of this can be seen in *Marsh v. Chambers*,¹⁴³ where the Court upheld the practice of legislative prayer.¹⁴⁴

In *Marsh*, at issue was the Nebraska Legislature's legislative prayer, held at the opening of each session.¹⁴⁵ In its decision, the Court first discussed how a legislative prayer, *per se*, did not violate the Establishment Clause, noting that prayer was adopted by the Continental Congress, and that the drafters of the First Amendment considered it no threat to the Establishment Clause.¹⁴⁶

However, contrary to Justice Kennedy's interpretation of the Establishment Clause, history alone should not serve to validate a government practice.¹⁴⁷ Justice O'Connor analogizes that to so hold would be tantamount to immunizing from

138. *Id.* at 671 (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy also feels that "diversity and pluralism" are historic traditions worthy of preserving. *See id.* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 492 (stating that its proponents feel that the coercion test furthers what Justice Kennedy calls "our Nation's historic traditions of diversity and pluralism") (internal quotations omitted). Although Justice Kennedy eschews any test that would invalidate historical traditions, he ignored the "longstanding tradition" of graduation benedictions in *Lee*. Amy L. Weinhaus, *The Fate of Graduation Prayers in Public Schools After Lee v. Weisman*, 71 WASH. U. L.Q. 957, 969 (1993); *see also infra* notes 153-168 and accompanying text (discussing the coercion test and its respect for national traditions).

139. *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part, dissenting in part).

140. *Id.* at 630 (O'Connor, J., concurring).

141. *Id.*; *see id.* at 636-37 (O'Connor, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984), a case which upheld a Christmas display in a privately owned park, in the center of a shopping district). Justice O'Connor also claimed that government could accommodate religion by lifting government-imposed burdens on religion, a factor not present in the case. *Id.* at 631-32.

142. *Id.* at 630-31.

143. 463 U.S. 783 (1983).

144. *Marsh*, 463 U.S. at 795.

145. *Id.* at 784.

146. *Id.* at 786-92. The opinion went on to discuss the specifics of the Nebraska prayer. It found that the fact that the same minister had been giving the prayer for 16 years did not affect its validity, reasoning that the minister's tenured position was due to his estimable style. *Id.* at 792-94. The Court also found that the fact that the minister was paid out of public funds was also a practice utilized by the Framers, and thus not a threat to the Establishment Clause. *Id.* at 794. Finally, the content of the prayer was not determinative to the Court, as it apparently did not proselytize or disparage any distinct faith or belief. *Id.* at 794-95.

147. *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

scrutiny racial and gender discrimination, because these practices have a historical basis.¹⁴⁸

The endorsement test used by Justice O'Connor and her cohorts not only examines history, but also looks into the consequences a government action has on the populace.¹⁴⁹ If that action conveys a message of endorsement of religion, then Justice O'Connor would invalidate the action under the Establishment Clause.¹⁵⁰ Despite the criticism by Justices Kennedy and Scalia, five of the reigning Justices approve of the endorsement test.¹⁵¹ However, Justice Kennedy has also nearly garnered a majority with the coercion test.¹⁵²

C. Coercion

While Justice Kennedy rejected the endorsement test, he has subscribed to the coercion test.¹⁵³

In *Lee v. Weisman*,¹⁵⁴ Justice Kennedy wrote the majority opinion and focused on the subtle coercion attributable to the State in its financing of benedictions at public junior high school graduations.¹⁵⁵ Contrary to Justice Scalia's definition, Justice Kennedy found coercion to be state action that "places public pressure, as well as peer pressure" on those attending the public function.¹⁵⁶

Justice Kennedy distinguished the facts in *Lee* from those in *Marsh*.¹⁵⁷ The legislative practice of nondenominational prayer before beginning a session

148. *Id.* at 630 (O'Connor J., concurring).

149. *Id.* at 627 (O'Connor J., concurring); *see id.* (expressing that if the accommodation conveys a message that one religion is favored over another, or that religion generally is preferred to secular beliefs, then it endorses religion and is thus impermissible).

150. *Id.* (stating that a practice which conveys a message of endorsement violates the Establishment Clause).

151. *See supra* note 117 and accompanying text (indicating which Justices have used, or agreed with the use of, the endorsement test).

152. *See infra* notes 153-168 and accompanying text (discussing cases and Justices who have supported the coercion test).

153. *See Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992) (holding that a benediction at a public junior high school is a violation of the Establishment Clause because students are effectively coerced to participate); *County of Allegheny v. ACLU*, 492 U.S. 573, 664 (1989) (Kennedy and Scalia, JJ., concurring in the judgment in part and dissenting in part) (rejecting the conclusion that the public displays of a creche and a menorah were a violation of the Establishment Clause, partly because no one was compelled to look at them). Although Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented in *Lee*, they agreed with the use of the coercion test. *Lee*, 112 S. Ct. at 2678 (Scalia, J., dissenting). Regardless of the test used, Justice Scalia rebukes any test which would invalidate national traditions. *Id.* at 2678-79.

154. 112 S. Ct. 2649 (1992).

155. *Id.* at 2655 (stating that, at a minimum, the Constitution requires that the government not coerce one to participate in a religious exercise).

156. *Id.* at 2658. *But see id.* at 2683 (Scalia, J., dissenting) (defining coercion as that backed by threat of penalty).

157. *Marsh*, 463 U.S. at 783; *see Lee*, 112 S. Ct. at 2660 (discussing the "obvious" differences between a graduation benediction and a legislative prayer).

involves only adults who are free to come and go, making the custom carry less force and leverage over the legislature than the graduation benediction extends over the adolescent school children.¹⁵⁸

Justice Kennedy specifically dispelled the notion that all state action implicating religion was invalid if one or a few citizens found it insulting.¹⁵⁹ Some amount of conformity could be required; the necessary line drawing that must occur to determine when a dissenter's right of religious freedom has been infringed is what forms the boundaries of the Establishment Clause.¹⁶⁰ In *Lee*, however, where children were compelled to attend and participate in the graduation ceremony, the conformity exacted was too high to be permissible.¹⁶¹

Justice Kennedy dissented in part and concurred in part in *Allegheny*.¹⁶² In his view, neither the creche nor the menorah displays violated the Establishment Clause.¹⁶³ He agreed with the Court's use of *Lemon*,¹⁶⁴ and was content to remain within its framework.¹⁶⁵ However, he did not feel that *Lemon* should be the sole test for deciding Establishment Clause cases, but should serve as a "helpful signpost."¹⁶⁶

While decrying the use of a single test in this sensitive area, Justice Kennedy defined two principles that limit the accommodation of religion: Government may not coerce anyone to support or participate in any religion or its exercise, and it may not give direct benefits to religion under the guise of avoiding hostility towards religion.¹⁶⁷ Direct benefits that violate Kennedy's principles are those which are more explicit and substantial than the practices that are sanctioned in national traditions.¹⁶⁸

158. *Lee*, 112 S. Ct. at 2660; see also *Engel v. Vitale*, 370 U.S. 421, 442 (1962) (Douglas, J., concurring) (stating that "[f]ew adults, let alone children, would leave . . . while those prayers [were] being given," referring to teacher-led prayers at the beginning of the school day).

159. *Lee*, 112 S. Ct. at 2661.

160. *Id.*

161. *Id.*; see Allan Gordus, Casenote, *The Establishment Clause and Prayers in Public High School Graduations: Jones v. Clear Creek Independent School District*, 47 ARK. L. REV. 653, 686 (1994) (recounting the Court's argument in *Lee* that adolescents are particularly apt to succumb to peer pressure towards conformity).

162. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

163. *Id.*

164. Although, in this author's opinion, *Lemon* was not heavily relied upon in the majority opinion.

165. *Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

166. *Id.* at 656 (Kennedy, J., concurring in part and dissenting in part). Indeed, Chief Justice Burger, the author of *Lemon*, suggested in *Lynch v. Donnelly* that the test should only be regarded as one of several possible approaches to Establishment Clause adjudication. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

167. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part).

168. *Id.* at 662-63 (Kennedy, J., concurring in part, dissenting in part).

D. Summary

In short, this is what can be extrapolated from the chaos of concurrences and dissents in the last few years: Justices O'Connor, Souter, Stevens, Breyer, and, at times, Rehnquist use the endorsement test to decide Establishment Clause cases.¹⁶⁹ If a State practice does not give the impression that the State is backing a certain religion or religion in general, then the practice passes muster under the Establishment Clause.¹⁷⁰

Justice Kennedy and, at times, Chief Justice Rehnquist use the coercion test to decide such cases.¹⁷¹ As long as the State practice does not coerce citizens to participate in or support religious practices, it is constitutional under the Establishment Clause.¹⁷² Justices Scalia and Thomas disagree with the endorsement test, yet have not whole-heartedly embraced the coercion test.¹⁷³ However, when Justice Scalia has analyzed a statute as coercive, he uses the word in its strict sense: coercion occurs when government action is backed by threat of penalty for non-participation.¹⁷⁴

Justice Ginsburg has indicated that she finds accommodation permissible¹⁷⁵ but has not explicitly expressed a preference for one approach over another.¹⁷⁶ However, in *Capitol Square Review & Advisory Board v. Pinette*,¹⁷⁷ where the

169. See *supra* note 117 and accompanying text (discussing cases in which the Justices used, or supported, the endorsement test).

170. See *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2451 (1995) (O'Connor, J., concurring) (contending that because a reasonable observer would not believe that a cross displayed on a public lawn signified government endorsement of religion, it was permissible); *Allegheny*, 492 U.S. at 632-33 (O'Connor, J., concurring) (stating that a Christmas display which included a Christmas tree and a menorah did not endorse religion, and thus were permissible under the Establishment Clause).

171. See *supra* notes 153-168 and accompanying text (discussing Justice Kennedy's use of the coercion test); see also *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (Scalia, J., dissenting) (illustrating the Chief Justice's acquiescence in the use of the coercion test, although reaching the opposite conclusion of the majority).

172. *Lee*, 112 S. Ct. at 2655.

173. See *supra* note 153 (noting Justice Scalia's dissent in *Lee*, and his disapproval of tests which would invalidate traditional practices).

174. See *supra* note 156 (noting Justice Scalia's use of *coercion* in the strict sense).

175. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2492-500 (1994) (Souter, J., plurality opinion) (stating that the Constitution allows the state to accommodate religious needs). Justice Ginsburg joined the plurality opinion. *Id.* at 2484.

176. Justice Ginsburg was confirmed to the Supreme Court in August, 1993. See *Ginsburg Joins Supreme Court*, THE INDEPENDENT, Aug. 4, 1993, at 11. As of this writing, Justice Ginsburg has heard only three Establishment Clause cases. In *Grumet*, Ginsburg indicated that accommodation of religion was acceptable. See *supra* note 175 and accompanying text. In the most recent cases, Justice Ginsburg has dissented from the majority's validation of government and religious interaction. See *Rosenberger v. Rector of Univ. of Va.*, 115 S. Ct. 2510, 2533 (1995) (Souter, J., and Ginsburg, J., dissenting) (stating that a Student Activities Fund cannot disperse money directly to a religious organization without violating the Establishment Clause); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2474-75 (1995) (Ginsburg, J., dissenting) (stating that allowing a cross to be displayed on public property, without a notable disclaimer by the government, violates the Establishment Clause).

177. 115 S. Ct. 2440 (1995).

Court held that a cross could be displayed in a public forum, Justice Ginsburg dissented and said that without a disclaimer stating that the government was not endorsing the cross, the practice violated the Establishment Clause.¹⁷⁸ This indicates that she may consent to the use of the endorsement test, although she may apply it more conservatively than Justice O'Connor.

Justice Breyer has only been on the Court long enough to hear two recent Establishment Clause cases.¹⁷⁹ In *Pinette*, Justice Breyer concurred with the judgement of the Court and joined in Justice O'Connor's concurring opinion.¹⁸⁰ This is some indication that Breyer agrees with the use of the endorsement test.¹⁸¹

III. THE FUTURE OF ESTABLISHMENT CLAUSE ADJUDICATION

Despite *Lemon*, there is no test which a majority of the Court faithfully uses.¹⁸² Thus, it is difficult to determine how the Court will decide any particular case under the Establishment Clause. While the present formulation of *Lemon* is disagreeable to a number of Justices,¹⁸³ there is an indication that the test could be modified to accommodate the views of the various justices. If the Court decides to abandon *Lemon*, the endorsement test could be modified to clinch a majority opinion.¹⁸⁴

A. *Lemon Without Entanglement*

One option for the Justices to pursue, in an effort to consolidate their views on the Establishment Clause, is to use the first two prongs of the *Lemon* test—finding a secular purpose, and a primary effect that neither advances nor inhibits religion—and disregard the third entanglement prong.¹⁸⁵ Indeed, much

178. *Id.* at 2475 (Ginsburg, J., dissenting).

179. Justice Breyer was confirmed by the Senate in July, 1994. See *Breyer Wins Confirmation to High Court*, ORLANDO SENTINEL, July 30, 1994, at A3.

180. *Pinette*, 115 S. Ct. at 2451. Justice Breyer also joined in Justice Souter's concurrence. *Id.* at 2457.

181. The remaining Establishment Clause case over which Justice Breyer presided, *Rosenberger v. Rector Univ. of Va.*, 115 S. Ct. 2510 (1995), did not focus on the endorsement test and therefore does not indicate where Justice Breyer stands with respect to the test.

182. See *supra* notes 117-181 and accompanying text (discussing how different Justices use different tests to decide Establishment Clause cases).

183. See *supra* note 50 and accompanying text (discussing cases in which the Justices have taken exception to *Lemon*).

184. See *infra* notes 185-193 and accompanying text (discussing how the *Lemon* test could be modified).

185. See Mark A. Boatman, *Lee v. Weisman: In Search Of A Defensible Test For Establishment of Religion*, 37 ST. LOUIS U. L.J. 773, 828 (1993); see *id.* (arguing that if the *Lemon* test is to remain the primary Establishment Clause test, the entanglement prong should be stricken); see also Mardi L. Blissard, Note, *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993): *An Answered Prayer to Students with Disabilities in Religious Schools*, 16 ARK. L. REV. 449, 473 (1994) (predicting a *Lemon* test without the entanglement prong); *The Supreme Court, 1982 Term: Constitutional Law*, 97 HARV. L. REV. 70, 154 (1983) (forecasting a redefining of the entanglement prong which will minimize its significance for future

of the criticism from the Court on the use of *Lemon* has been based on the third prong.¹⁸⁶ Using such a test, the Court would have no problem upholding the statute in *Aguilar*, where public funds paid for public school teachers to teach in parochial schools, as the statute was invalidated because it triggered excessive entanglement between church and state.¹⁸⁷ The conflict between *Zobrest* and *Aguilar* previously discussed¹⁸⁸ would be resolved. Both of the statutes at issue would be valid, as the Court ostensibly found that both had a secular purpose, and neither had a primary effect that advanced religion.¹⁸⁹

Using this modified formulation of the *Lemon* test, the Court would only have to find a secular purpose which had a primary effect of neither advancing nor inhibiting religion. While it is true that the Justices may differ on what constitutes a secular purpose and primary effect, at least litigants would have an idea about the criteria upon which to formulate their arguments, and the lower courts could write opinions based on an established yardstick.

B. Endorsement with Historical Recognition

It appears that the endorsement test has nearly garnered a majority of the Court. To ensure this result, the test could be modified to address some major concerns.

Justice Kennedy's only dilemma concerning the endorsement test is that it could lead to the invalidation of practices which existed at the time the Framers wrote the Constitution, and that this could not have been the Framers' intent.¹⁹⁰

Establishment Clause cases).

186. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 43-44 (1989) (Rehnquist, C.J., Scalia, J., and Kennedy, J. dissenting) (criticizing the majority's invalidation of a tax exemption for a religious publication, and stating that the government may, and sometimes must, accommodate religion even when it involves excessive entanglement); *Aguilar v. Felton*, 473 U.S. 402, 419-20 (1985) (Burger, C.J., dissenting) (stating that strict adherence to the *Lemon* criteria is contrary to the well-being of the nation, and that some entanglement between government and religious entities is unavoidable).

187. *Aguilar*, 473 U.S. at 409; see *supra* notes 28-37 and accompanying text (addressing the Court's use of the *Lemon* test to invalidate a New York statute because it prompted excessive entanglement between church and state).

188. See *supra* notes 38-48 (discussing the peculiar outcomes of two cases which purportedly relied on the *Lemon* test).

189. See *Aguilar*, 473 U.S. at 409 (stating that even if the primary effect does not advance religion, the statute forces excessive entanglement between religion and government); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2467 (1993) (finding that the Court of Appeals erred when it ruled that the statute violated the second prong of the *Lemon* test, and holding that the statute did not run afoul of the Establishment Clause). Granted, the Court in each case failed to address the "secular purpose" prong of *Lemon*. As it is the first prong, the Court need not address either the second or third prongs of *Lemon* if it found that the statutes at issue had sectarian purposes. Therefore, it is logical to assume that the Court acquiesced to the fact that each statute had a secular purpose.

190. See *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that an Establishment Clause test should not invalidate practices two centuries old); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., dissenting)

Although Justice O'Connor counters this argument by requiring a close look at whether the practice truly endorses a religious belief, a further accommodation could be made. Perhaps when looking at governmental practices that are rooted in history, the Court could give more deference to the Framers' intent by requiring a higher standard of endorsement to invalidate such practices.

Indeed, some cases would turn out differently under this type of test. For example, in *Allegheny*, where the Court upheld the display of a menorah but invalidated the display of the creche, the Court could have looked at whether displays of creches have traditionally been a part of Christmas displays. If so, the Court could have given it more deference when it determined whether the display amounted to an endorsement of religion.

Of course, historical significance would not be enough to uphold all government practices concerning religion. A case where applying this standard would probably not change the outcome is *Lee*.¹⁹¹ Even if the Court found that graduation benedictions had a place in national traditions, the conformity exacted from school children to join in the prayer would be too high to allow this practice to stand. This prediction is based on the Court's special regard for children, who are especially impressionable,¹⁹² and the Court's general treatment of prayers at public functions (excluding legislative prayers).¹⁹³

C. A New Approach to Establishment Clause Adjudication

It may well be that *Lemon* has seen its day. Whether the Court modifies *Lemon* or abandons it completely, several suggestions have been made that the Court not confine itself to a singular test.¹⁹⁴ Indeed, Justices Brennan and O'Connor have categorized cases for different analysis under the Establishment Clause,¹⁹⁵ seemingly urging the adoption of standards, rather than a bright line

(disapproving of a test which is inconsistent with precedent and tradition).

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

192. *See Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding the Congressional prayer, in part because the participants were adults).

193. *Lee*, 112 S. Ct. at 2661; *see id.* (invalidating high-school graduation benediction); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985) (invalidating a moment of silence at the beginning of the day in public schools); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (invalidating prayer exercises in public schools); *cf. Marsh*, 463 U.S. at 784-85 n.1 (setting forth the Nebraska provision for the legislative prayer, Rules of the Nebraska Unicameral, Rules 1, 2 and 21).

194. *See Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2452 (1995) (O'Connor, J., concurring) (stating that the Establishment Clause cannot easily be confined to a single test); *Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part) (referring to Establishment Clause cases, and (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) in that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area").

195. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296-304 (1963) (Brennan, J., concurring) (separating Establishment Clause cases into categories); *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2499-500 (1994) (O'Connor, J., concurring) (calling for different approaches to distinctive categories of Establishment Clause cases).

rule.¹⁹⁶ As their individual approaches are similar, credence may be given to the notion that the use of flexible standards is not an outrageously radical idea. Likewise, the similarity of the two approaches lead themselves to a tidy coalescence.¹⁹⁷

1. Standards Versus Rules

Both Justice Brennan's and Justice O'Connor's approaches, as later discussed, lend themselves to the task of formulating standards to reach the desired goal, rather than bright line rules.¹⁹⁸ Although this is not a foreign concept in the realm of judicial decisionmaking,¹⁹⁹ there are competing arguments over the utility of each of these forms of adjudication. At the threshold, however, some definitions are appropriate.

It is useful to imagine decisionmaking on a continuum of discretion.²⁰⁰ The level of discretion allowed depends on whether the decisionmaker is relying on a rule or a standard.²⁰¹ A rule, having absorbed the policy implications, binds a decisionmaker to respond in a predictable manner, determined by the triggering facts.²⁰² Decisionmaking according to standards, on the other hand, leads to the direct application by a judge, of policy to the specific fact pattern.²⁰³

There are those who argue that rules are much more appropriate than standards in decisionmaking.²⁰⁴ There is a certain fairness in formal equality, as well as freedom from arbitrary and biased decision making.²⁰⁵ Furthermore, rules are more predisposed to certainty and predictability than are standards.²⁰⁶ Proponents of rules are likely to criticize the use of standards in decisionmaking because of their uncertainty and chilling effect on socially productive behavior.²⁰⁷

196. See *infra* notes 198-213 and accompanying text (describing the use of rules and standards).

197. See *infra* notes 306-324 and accompanying text (suggesting a combination of the two approaches).

198. See *infra* notes 214-305 and accompanying text.

199. See Kathleen M. Sullivan, *The Supreme Court 1991 Term: Forward, The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (describing how various Justices use either rules or standards to adjudicate cases).

200. *Id.* at 57.

201. *Id.*

202. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381-83 (1986); see *id.* (contrasting fast rules with flexible standards).

203. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976) (giving some examples of standards, such as "due care" and "fairness," and contrasting them with rules).

204. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* 149-55 (1991) (arguing that rules reduce arbitrary and biased decisionmaking); Sullivan, *supra* note 199, at 62.

205. Sullivan, *supra* note 199, at 62 (citing SCHAUER, *supra* note 204, at 104 n. 35).

206. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 591 (1988) (stating that "crystalline" rules tend to prevent "rent seeking," selling a decision to the highest bidder).

207. See Sullivan, *supra* note 199, at 62-63 (stating that standards have the effect of limiting worthwhile behavior because people do not know exactly where the bounds of the law lie, and are afraid to cross them).

On the other hand, there are those who argue that the use of standards in decisionmaking is more equitable.²⁰⁸ Standards take into account the similarities and differences of different situations, while remaining dynamic and flexible.²⁰⁹ Additionally, standards force Justices to be accountable for their decisions, rather than allowing them to claim that their hands were tied by a rule.²¹⁰ Finally, standards can be said to be preferable to rules because they are dynamic, whereas the stagnancy of rules can make them obsolete.²¹¹ Both Justice Brennan's and O'Connor's approaches to the Establishment Clause consider standards to be upheld, rather than adhering to a bright-line rule.²¹² This may be preferable from a practitioner's point of view. Adherence to *Lemon* has not brought predictability,²¹³ and practitioners are better off arguing standards that the Court indeed uses, rather than a rule that the Court only purports to use.

2. Justice Brennan's Approach

Long before the present controversy over how to decide Establishment Clause cases, indeed long before *Lemon* was written, Justice Brennan had the idea of evaluating Establishment Clause cases according to the issues that were raised in each distinctive situation.²¹⁴ Rather than lay down a bright-line rule to cover every instance of Establishment Clause confrontation, Justice Brennan approached the subject with flexibility—taking into account the conflicting concerns underlying free exercise and establishment.²¹⁵

In *Abington School District v. Schempp*,²¹⁶ the case from which the first two prongs of the *Lemon* test originated, Justice Brennan concurred with the majority opinion, but wrote a lengthy opinion of his own.²¹⁷ The opinion set forth the history of the Religion Clauses of the First Amendment, and the conflict that arose when, in prohibiting the establishment of religion, the government actually infringed on the free exercise of religion.²¹⁸ The opinion also set forth categories

208. *Id.* at 66.

209. See Kennedy, *supra* note 203, at 1741-42 (giving a concrete example of the benefit of using standards).

210. Sullivan, *supra* note 199, at 67; see *id.* (noting that by using standards, a judge cannot absolve himself by saying "sorry, my hands were tied").

211. Sullivan, *supra* note 199, at 66.

212. See *infra* notes 214-305 and accompanying text (illustrating how Justice Brennan's and Justice O'Connor's approaches appraise the use of standards).

213. See *supra* notes 77-168 and accompanying text (discussing how, while the Court claims to be following *Lemon*, in reality it is using other criteria).

214. See *infra* notes 216-264 and accompanying text (setting forth the categories described by Justice Brennan in *Abington*).

215. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296-97 (1963) (Brennan, J., concurring) (discussing the conflict between the Free Exercise Clause and the Establishment Clause).

216. 374 U.S. 203 (1963).

217. *Id.* at 230 (Brennan, J., concurring).

218. *Id.* at 228 (Brennan, J., concurring).

of cases to be treated distinctly with regard to the level of accommodation permissible under the Constitution.²¹⁹ These categories, which touch upon areas that the Court frequently discusses, while purporting to rely on *Lemon*, may be useful in drafting a more predictable formula for the Court to use.

Justice Brennan first discusses cases in which there is a conflict between the Free Exercise Clause and the Establishment Clause; where permitting the practice might run afoul of the Establishment Clause, but prohibition of the practice violates the Free Exercise Clause.²²⁰ These cases include provisions for churches and chaplains in the military and chaplains in penal institutions.²²¹ Under ordinary circumstances, providing a chaplain and/or place of worship might violate the Establishment Clause.²²² However, in these situations, the accommodation should be permissible because the government has deprived individuals of their opportunity to practice their faith by removing them from civilian life.²²³ School children are similarly situated in that school attendance is mandatory.²²⁴ Therefore, accommodation to avoid violating the Free Exercise Clause might also include excusing children from school on their respective religious holidays.²²⁵

Justice Brennan views these activities as permissible because, unlike sponsoring the daily reading of the Bible, there is no coercion involved.²²⁶ Furthermore, the individuals involved are mature adults (except in the school children's case), so that declining to participate will not invoke the suspicion of peers.²²⁷ Additionally, these cases are distinct from the school prayer cases in that attending school does not work to deprive the students of an opportunity to practice their faith in private, or at community places of worship.²²⁸ These distinctions, according to Justice Brennan, preserve the neutrality required by the government with regard to religion, while avoiding hostility.²²⁹

219. *Id.* at 295-96 (Brennan, J., concurring); *see id.* at 296-303 (demarcating cases which (1) include conflicts between the Establishment Clause and the Free Exercise Clause, (2) accommodate religious exercises in legislative bodies, (3) involve use of the Bible in an academic setting, (4) concern tax exemptions to religious bodies, (5) pertain to incidental benefits in public welfare programs, and (6) describe traditional activities which have lost their religious meaning).

220. *Abington*, 374 U.S. at 296-99 (Brennan, J., concurring); *see id.* (discussing practices which should be invalidated under the Establishment Clause, acknowledging that to do so would run afoul of the Free Exercise Clause).

221. *Id.* at 290-97 (Brennan, J., concurring).

222. *See id.* at 297 (Brennan, J., concurring) (stating that "[i]t is argued that such provisions may be assumed to contravene the Establishment Clause. . .").

223. *Id.* at 297-98 (Brennan, J., concurring).

224. *See* CAL. EDUC. CODE § 48200 (West 1993) (mandating compulsory full-time education from ages 6 to 18, unless exempted).

225. *See Abington*, 374 U.S. at 298 (Brennan, J., concurring).

226. *Id.* at 298 (Brennan, J., concurring).

227. *Id.* at 298-99 (Brennan J., concurring).

228. *Id.* at 299 (Brennan, J., concurring).

229. *Id.*

Another category of accommodation is that of religious exercises in legislative bodies.²³⁰ Cases in this category would include prayers in legislative chambers and the appointment of legislative chaplains.²³¹ Accommodations of this sort might well avoid the prohibitions of the Establishment Clause because the participants are, again, mature adults. There is no fear that a legislator will incur any penalty from excusing himself or herself from such ritualistic exercises.²³² Furthermore, in the case of the federal legislative prayer, under the Constitution, Article I, Section 5, each House must monitor the "Rules of its Proceedings."²³³ It can be argued that the legislative prayer presents a political question, which can only be resolved by Congress.²³⁴

Justice Brennan places non-devotional use of the Bible in public schools into another category.²³⁵ Teachings about the Holy Scriptures and about religion in general are crucial to a meaningful lesson in classes such as history and literature.²³⁶ Thus, the holding of *Abington* does not foreclose the mention of God, nor references to the Bible.²³⁷

Incidental tax exemptions to religious bodies are set out as another category of accommodation.²³⁸ Where a tax exemption has been allowed to secular charities and non-profit organizations, the benefit to religion through an analogous tax exemption is incidental *in spite* of the religious character, rather than because of it.²³⁹ Religious institutions should be able to share in the benefits that are available to other charitable and eleemosynary groups.²⁴⁰

Incidental benefits in public welfare programs to people eligible wholly or partially for religious reasons is another category of accommodation.²⁴¹ These include programs for unemployment compensation for people unable to find

230. *Id.*

231. *See, e.g.,* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (stating that legislative prayer might not violate the Establishment Clause).

232. *Id.* at 299-300 (Brennan, J., concurring).

233. U.S. CONST. art. I, § 5, cl. 2; *see Abington*, 374 U.S. at 300 (Brennan, J., concurring).

234. *Abington*, 374 U.S. at 300 (Brennan, J., concurring); *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (stating that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress. . . .").

235. *Abington*, 374 U.S. at 300 (Brennan, J., concurring).

236. *Id.* Justice Brennan refers to THE STUDY OF RELIGION IN THE PUBLIC SCHOOLS: AN APPRAISAL (Brown, ed. 1958), for an inclusive examination of the challenges involving the role of religion in a secular curriculum. *Id.*

237. *Id.*

238. *Id.* at 301 (Brennan, J., concurring); *see CAL. REV. & TAX CODE* § 214 (West Supp. 1995) (exempting from taxation, property used for non-profit, religious purposes).

239. *Abington*, 374 U.S. at 301 (Brennan, J., concurring).

240. *Id.*

241. *Id.* at 302 (Brennan, J., concurring); *see Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-46 (1987) (holding that Florida's refusal to provide unemployment compensation to an employee who had been discharged because of her refusal to work on her Sabbath was a violation of the Free Exercise Clause, and that providing the benefit would not violate the Establishment Clause).

work.²⁴² The Establishment Clause could be read to preclude persons who are fired because of their inability to work on their Sabbath from collecting unemployment compensation.²⁴³ However, incidental benefits to worshipping individuals by way of a general and nondiscriminatory welfare program were not the concern of the Framers with regard to the Establishment Clause.²⁴⁴ Therefore, the benefits, although facilitating the practice of religion, do not violate the Establishment Clause when the general purpose of the benefit is neutral.²⁴⁵

Finally, Justice Brennan separates, for purposes of accommodation, those activities which, although religious in origin, have ceased to have any religious meaning.²⁴⁶ Examples of these are Sunday closing laws,²⁴⁷ the printing of "In God We Trust" on our currency, and perhaps the recitation of the verse "Under God" in the Pledge of Allegiance.²⁴⁸ According to Justice Brennan, these considerations are "interwoven . . . so deeply into the fabric of our civil polity" that their continued use is not prohibited by the Establishment Clause.²⁴⁹

From these categories it is possible to extrapolate criteria which the Court may find useful when deciding Establishment Clause cases. Strictly adhering to the categories set forth by Justice Brennan is not advisable in this author's view, for the categories would undoubtedly multiply, and result in an almost case by case determination of prohibitions by the Establishment Clause. This would shatter any semblance of predictability. However, by defining a range of goals to be sought in Establishment Clause jurisprudence, the criteria can then be given different weight in different fact patterns.

To illustrate, consider the first category, where the government seeks to accommodate free exercise when individuals have been taken out of society, and thus are unable to practice their religion on their own.²⁵⁰ This can be condensed into a goal that permits greater accommodation where there have been prior restrictions on one's ability to practice religion by the government.

In addition, exercises of religion in governmental departments (legislatures and schools)²⁵¹ can be viewed as striving for a goal of accommodation where the participants are mature adults *and* no coercion is present. This second criterion

242. See *supra* notes 88-101 and accompanying text (discussing *Hobbie* and how the state may accommodate religion consistent with both the Free Exercise and Establishment Clauses).

243. *Abington*, 374 U.S. at 302 (Brennan, J., concurring).

244. *Id.*

245. *Id.* at 302-03 (Brennan, J., concurring).

246. *Id.* at 303 (Brennan, J., concurring).

247. See *McGowen v. Maryland*, 366 U.S. 420, 447-53 (1961) (upholding Maryland's Sunday Closing statute, which required businesses to close on Sunday, because, while having lost its religious character over time, the law still served to provide a day in which employees could rejuvenate themselves for the coming week).

248. *Abington*, 374 U.S. at 303-04 (Brennan, J., concurring).

249. *Id.* at 303 (Brennan, J., concurring).

250. See *supra* note 220.

251. See *supra* notes 221-229 and accompanying text.

should be treated more stringently to protect those of differing religious, or non-religious views. Furthermore, practices which are rooted in history can be given more deference, depending on how much consideration the Court wishes to give the Framers' intent.²⁵²

Third, where there are incidental benefits to religious organizations or persons, either by tax exemptions or public welfare programs, the focus should be on the purpose of the benefit; i.e., one should ask whether the purpose is to benefit society as a whole, or to benefit particular religious institutions. If the benefit is procured by society as a whole, with the religiously-affiliated only taking as a part of that society, then the purpose can be defined as *accommodating* religion where the benefit has a secular purpose (a criterion already in use), rather than advancing a particular religious view.

Finally, upholding religious practices which, in twentieth century America, have lost their religious effect, can be seen as striving to uphold our national heritage, rather than accommodating religion.

Using these goals, rather than strict criteria, would produce more predictable and rational results. History shows that when constrained to strict criteria, the Justices, with their varying personalities and values, seldom reach a consensus, either on the judgment or reasoning of a case.²⁵³ The proposed method would avoid this hapless determination by furnishing the Justices with a format in which to express all of their concerns.

While not amorphous, the goals would necessitate a decision based on the unique facts of the case, rather than attempt to contort every case into the shape of *Lemon*. Contrary to *Lemon*, this composition of goals would provide the Justices with some common ground from which to launch their contentions. Since, presumably, most concerns would be addressed in the adjudication of the case, the Justices would not be impelled to voice their individual concerns with

252. See *Lee v. Weisman*, 112 S. Ct. 2649, 2678 (1992) (Scalia, J., dissenting) (rejecting any Establishment Clause test which, if applied consistently, would invalidate enduring traditions); *but cf.* *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and dissenting in part) (repudiating the notion that *any* historical tradition can be upheld simply because it is rooted in history). See generally Shahin Rezai, Note, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U.L. REV. 503, 507-08 (1990) (stating that strict separationists—those that regard *any* benefit to any or all religions as a breach of neutrality, view their approach to the Establishment Clause as that most in line with the Framers' intent as evidenced by Jefferson's words that the Establishment Clause was to erect a wall of separation between church and state).

253. See *supra* notes 49-73 and accompanying text (discussing the clashing logic used by the Justices).

the test being used.²⁵⁴ Thus, the apprehension that a particular test short-changes any one Justice's concern will be avoided.

With the goals clearly defined, there is less fear of the Establishment Clause adjudication developing in a haphazard manner. Finally, having these multiple factors with which to work, the Court may have an easier time in agreeing on the bounds of the Establishment Clause.

An application of this format may shed light on its merits. *Lee*, where the Court invalidated the practice of having a benediction at a junior high school graduation, was a fractured opinion in which the Justices were seemingly loath to apply the *Lemon* test, yet apprehensive about abandoning it.²⁵⁵ Consequently, the opinion was highly divided.²⁵⁶ A more concrete opinion may emerge by using the criteria gathered from Justice Brennan's opinion in *Abington*.

Justice Brennan's approach outlines areas in which accommodation of religion is permissible. The strategy is to examine the case at hand, in this instance *Lee*, and to then endeavor to match the facts of the case to one of the categories which is prone to accommodation. Of course, the Justices may disagree on the weight each category is to be given. However, they will presumably be able to agree on which categories are implicated, and therefore start down the path of a comprehensible decision.

The first category, where accommodations are permissible when there has been a prior restraint by government, is clearly not implicated. The students, while at school during the day, are free to worship alone, with their families or in church during their free time. Thus, this would not be a justification to accommodate religion.

The second category, exercising religion in governmental departments, is undoubtedly implicated. Justice Brennan, however, would only allow accommodation in this instance where the participants were mature adults *and* no coercion was present. Both of these criteria could, and probably would, be disputed by the Justices, in order to secure or reserve accommodation. Justices Scalia, Thomas, and Chief Justice Rehnquist would maintain, as they did in *Lee*, that coercion is not present unless there is the threat of sanctions for non-participation.²⁵⁷ To obtain the accommodation, they would presumably argue that

254. Many concurrences and dissents have highlighted objections, and sometimes allegiance, to the *Lemon* test. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2494-95 (1994) (Blackmun, J., concurring) (objecting to the notion that the plurality opinion departs from *Lemon*); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2149 (1993) (Kennedy, J., concurring) (criticizing the majority's invocation of *Lemon*); *Lee v. Weisman*, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting) (castigating the *Lemon* test); *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting) (criticizing the majority's obsession with the *Lemon* criteria).

255. *Lee*, 505 U.S. 577 (1992); *supra* note 79 and accompanying text (discussing cases in which the Court strayed away from *Lemon*, but refused to overrule it).

256. *Lee* was a five to four opinion. *Id.* at 2658.

257. See *Lee*, 112 S. Ct. at 2683 (Scalia, J., dissenting) (defining coercion narrowly).

junior high school students were mature *enough* to determine their participation in the benediction.²⁵⁸ Justices Kennedy, O'Connor, Souter, and Stevens would contend that, because of public and peer pressure, coercion was present—even though the prayer was voluntary.²⁵⁹ Presumably, they would also assert that the students were *not* mature enough to abstain from the prayer without feeling ostracized.

Within this category, Justice Brennan would also accommodate those practices which are rooted in history. Justice Scalia's camp would maintain that benedictions at graduation ceremonies were rooted in history, and thus argue more strenuously for accommodation.²⁶⁰ Justice O'Connor, not completely inconsistently, would give deference to such practices, but would still subject them to scrutiny.²⁶¹

The third category that Justice Brennan describes, consisting of incidental benefits to religious organizations, is not applicable to this case. However, in another situation, the approval of accommodation which some Justices may impart may offset another category where they were hesitant to give approval. This is an illustration of where certain Justices may disagree within the category, but ultimately arrive at the same decision.

The fourth category, where accommodation may be given by upholding religious practices which have lost their religious effect, may be implicated. This would depend on how the Justices view graduation benedictions. If they were to view them as a symbol of our national heritage, as it is presumed, Justice Scalia would,²⁶² then accommodation would be appropriate. However, the Court would most likely be divided, as Justice O'Connor would probably spurn the notion of accommodating such practices.²⁶³

While in this instance the Justices are split within several categories, analogous to the division in *Lee*, the outcome here is preferable because it is obvious where the dispute lies. Litigators will be able to shape their arguments to account for these similarities and differences, and lower courts can base their opinions on criteria more acceptable to the Supreme Court than *Lemon*.²⁶⁴

258. *See id.* at 2682 (Scalia, J., dissenting) (admonishing the majority for treating high school seniors "as though they were first-graders").

259. *See id.* at 2658 (holding that coercion is present even when the prayer is voluntary).

260. *See id.* at 2679 (Scalia, J., dissenting) (maintaining that to forbid traditional religious practices would frustrate the intent of the Framers).

261. *See County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring) (rejecting the notion that all religious involvement by the government can be upheld because it is rooted in tradition).

262. *See supra* note 111 and accompanying text (noting Justice Scalia's opinion on graduation benedictions).

263. *See supra* note 106 and accompanying text (reviewing Justice O'Connor's opinion of graduation benedictions at public schools).

264. *See Lee v. Weisman*, 112 S. Ct. 2649, 2654 (1992) (stating that the lower court based its opinion on the *Lemon* criteria).

The definition of coercion, the maturity of the students, and the role of graduation benedictions in history are clearly the debatable issues. Conversely, both Justice O'Connor and Justice Scalia would agree that if the graduation benediction was determined to be a tradition rooted in history, it is entitled to some degree of deference. Depending upon weight given to different categories, the Justices may even come out on the same side in the ultimate determination of Establishment.

3. Justice O'Connor's Approach

Justice O'Connor has also proposed using various criteria in response to different categories of Establishment Clause cases.²⁶⁵ However, Justice O'Connor fails to state the special characteristics of each class, the test to be used, or even the goals to be sought in each case.²⁶⁶ What she does furnish is the cases she believes to fall within each class.²⁶⁷ The classes consist of (1) government actions which impose duties or benefits on a religious group, (2) occasions when the government speaks on religious topics, (3) government decisions on matters of religious law, and (4) delegation of religious authority. Analysis of these different cases and the criteria used to decide them may provide support for a consensus on the Court, according to the particular categories.

One division that Justice O'Connor makes is that of government actions which are intended to impose unique duties or grant special benefits to a religious group.²⁶⁸ *Grumet* falls within this category because the New York Legislature was attempting to benefit the Satmar community by conferring upon it the power to create a separate school district.²⁶⁹ According to Justice O'Connor, this level of accommodation is permissible, but only if it is conferred neutrally with respect to religion.²⁷⁰ Because the power was conferred through a special statute where redress was unavailable, it was objectionable.²⁷¹

Justice O'Connor puts into a separate category those cases which involve government enunciation of religious themes.²⁷² Cases in this category include *Lee*

265. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2499-500 (1994) (O'Connor, J., concurring).

266. See, e.g., *Grumet*, 114 S. Ct. at 2499 (O'Connor, J., concurring) (stating that there cannot be a single Establishment Clause test, and that different categories may be used).

267. *Id.* at 2500 (O'Connor, J., concurring).

268. *Id.*

269. *Id.* at 2499-2500 (O'Connor, J., concurring).

270. *Id.* at 2498 (O'Connor, J., concurring); see John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 85 n.7 (1986) (defining neutrality as conflicting elements of noninvolvement and impartiality, and aligning impartiality with accommodation).

271. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2498 (O'Connor, J., concurring).

272. *Id.* at 2500 (O'Connor, J., concurring).

and *Allegheny*.²⁷³ These cases call for an analysis of whether the speech endorses or disapproves of the religion, not whether the requisite neutrality with regard to religion is met.²⁷⁴

Cases in which the government must decide about matters of religious law and doctrine fall within another category.²⁷⁵ A case in this category is *Serbian Eastern Orthodox Diocese v. Milivojevic*,²⁷⁶ where the Court refused to delve into the hierarchical structure of the church to ascertain the legitimate authority.²⁷⁷ These cases usually originate in the use of property or contract principles.²⁷⁸ In adjudicating such cases, courts may determine the structure of the religion, but may not go so far as to make the ultimate determination of right.²⁷⁹

Finally, there is the situation in which the government delegates power to a religious body.²⁸⁰ *Larkin* is an example of such a case.²⁸¹ Here, neutrality with respect to which religions are given power may not suffice, because the enmeshment of church and state may create political divisions based on religious affiliations, which is offensive to the Constitution.²⁸² Given Justice O'Connor's insinuation of restraint,²⁸³ a case could be made for the prohibition of any delegation of power to a religious body.²⁸⁴

Justice O'Connor suggests that further categories could be added, and that lines might be drawn along different boundaries.²⁸⁵ This opens her formula to attack, for predictability will not be achieved by adjudicating on a case by case

273. See *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992) (invalidating public school graduation benediction); *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (finding a display of a menorah permissible, and a display of a creche impermissible, under the Establishment Clause).

274. *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring); see *Allegheny*, 492 U.S. at 625-37 (O'Connor, J., concurring) (setting forth the principles of the endorsement test).

275. *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring).

276. 426 U.S. 696 (1976).

277. *Id.* at 724-25; see *id.* (holding that probes into matters of "ecclesiastical cognizance" contravene the First and Fourteenth Amendments).

278. *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring).

279. *Id.* Determining the structure of the church enables the free exercise of the church by empowering it to be heard in a court. Deciding the ultimate authority, however, would violate the Establishment Clause. See Lawrence M. Warmflash, *The New York Approach to Enforcing Religious Marriage Contracts: From Avitzur to the Get Statute*, 50 BROOK. L. REV. 229, 237-38 (1984).

280. *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring).

281. According to Justice Souter, *Grumet* fell into this category of cases. *Id.* at 2488.

282. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982) (holding that the rationale behind the Establishment Clause is the prevention of "a fusion of governmental and religious functions") (internal quotations omitted); see also Catherine B. Sullivan, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L. REV. 201, 213 (explaining that the Establishment Clause means that the government may not delegate its power).

283. See *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring).

284. See Marion K. McDonald, Note, *Establishment Clause Challenge to Mandatory Religious Accommodation in the Workplace*, 36 HASTINGS L.J. 121, 143 (1984) (describing how the state may not delegate its authority to religious bodies, as such actions "link religious observance to the power and prestige of the state") (internal quotations omitted).

285. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2500 (O'Connor, J., concurring).

basis.²⁸⁶ As with Justice Brennan's categories, it is useful to extract the goals that the criteria seek to reach.

Although Justice O'Connor defines distinctive categories of Establishment Clause cases, some unifying principles can be gleaned. Justice O'Connor seems to want neutrality with respect to statutes that confer a benefit or burden on religious persons and institutions.²⁸⁷ With respect to government speech on religious topics, she requires that the expression not convey a message of endorsement or disapproval, rather than demand absolute neutrality.²⁸⁸ When the government seeks to make decisions on religious matters, Justice O'Connor would allow the courts to define the structure of a church hierarchy, yet warns against making a final decision of authority.²⁸⁹ This is reminiscent of the entanglement clause of the *Lemon* test.²⁹⁰ Finally, when power is delegated to church bodies, *impartiality* is imperative, yet it may still not be enough to guarantee constitutionality under the Establishment Clause.²⁹¹

As with adjudication using Justice Brennan's formula,²⁹² not every category of Justice O'Connor's formula would be instrumental in the determination of each case. However, the ability to classify cases leads to the conclusion that similar cases will be decided in like fashion. For example, in purporting to use the *Lemon* criteria, the results in *Aguilar* and *Zobrest* contradicted each other, even though the facts of the cases were remarkably similar.²⁹³ Using Justice O'Connor's approach, however, the cases would probably be decided consistently.

The first of O'Connor's principles, that of exacting neutrality when conferring a benefit or burden on a religious institution, is applicable to both *Aguilar* and *Zobrest*. In both cases, the government was conferring a benefit on parochial schools, either directly to the school, as in *Aguilar*, or to the parents of the parochial school children, as in *Zobrest*.²⁹⁴ In this type of case, Justice O'Connor would demand that neutrality be exercised when conferring such a benefit, but

286. See *id.* at 2515 (Scalia, J., dissenting) (attacking the approach suggested by Justice O'Connor).

287. See *id.* at 2499-500 (O'Connor, J., concurring) (stating that *Grumet* falls into the category of cases which involve government actions targeted at particular individuals or groups); *id.* at 2498 (maintaining that legislative intentions to accommodate religion should be conferred neutrally).

288. *Id.* at 2500 (O'Connor, J., concurring); see *id.* (directing cases which involve government speech on religious topics to be probed for a message of endorsement).

289. *Id.*; see *id.* (citing to *Milivojevich*, in which the Court refused to decide the ultimate dispute between the religious leaders, as support for a separate category for such cases).

290. See *supra* note 24 and accompanying text (describing the entanglement clause of the *Lemon* test).

291. See *Grumet*, 114 S. Ct. at 2500 (O'Connor, J., concurring) (suggesting, as did the Court in *Larkin*, that delegations of authority to religious bodies may be unconstitutional despite impartiality).

292. See *supra* notes 214-264 and accompanying text (discussing Justice Brennan's approach).

293. Compare *Aguilar v. Felton*, 473 U.S. 402, 414 (1984) (invalidating a New York statute which paid public school teachers to teach in parochial schools) with *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2469 (1993) (holding that the Establishment Clause does not prohibit a school district from providing a deaf student in a parochial school with a sign language interpreter).

294. *Aguilar*, 473 U.S. at 414; *Zobrest*, 113 S. Ct. at 2469.

would in fact allow such an accommodation.²⁹⁵ Neutrality does not appear to be a hurdle, as the statutes applied equally to parochial schools of all sects.²⁹⁶ Justice Scalia, usually Justice O'Connor's main opponent in Establishment Clause cases,²⁹⁷ would likely agree that such an accommodation was permissible.²⁹⁸

Justice O'Connor's second principle, that of avoiding a message of endorsement when government endeavors to address religious topics, may be related to cases such as *Aguilar* and *Zobrest*. This would depend on whether the Justices viewed funding to parochial schools (either directly or indirectly) as conveying a message on the religious nature of the schools. Justice O'Connor would reject the practice if the message conveyed was one of endorsement.²⁹⁹ However, if the statute was applied neutrally, as addressed by the first principle, she might hesitate in pronouncing that it endorsed religion.³⁰⁰ Justice Scalia would firmly uphold such a practice.³⁰¹

Because the government is not seeking to resolve a religious dispute, Justice O'Connor's third principle, analogous to the entanglement prong of *Lemon*, is not implicated. Similarly, as the government is not delegating authority to religious bodies, the fourth principle concerning impartiality is not a guiding force.

By applying these principles to the cases at hand, consistent determinations will result. One could speculate that Justice O'Connor would view statutes that accommodate all religions as endorsing religion in general, thus leaving the adjudication of cases such as *Aguilar* and *Zobrest* in question. It is more probable, though, that the neutrality principle would outweigh any fear of endorsement.³⁰² As previously discussed, Justice Scalia would uphold such statutes against an Establishment Clause attack. Being that in the past, these two Justices expressed the bulk of the conflicting views,³⁰³ it is likely that the remaining Justices would

295. See *Aguilar*, 473 U.S. at 421 (O'Connor, J., dissenting) (arguing that the statute would not violate the Establishment Clause because it aided in Congress' efforts to provide remedial instruction).

296. Presumably, the parochial school would have to meet the requirements for exemption from public compulsory education. CAL. EDUC. CODE, § 56366 (West 1989 & Supp. 1995).

297. See *supra* notes 117-168 and accompanying text (demonstrating how in Establishment Clause cases, Justices Scalia and O'Connor frequently disagree).

298. See *Zobrest*, 113 S. Ct. at 2469 (upholding grants to parents of parochial school children to provide for sign language interpreters). Justice Scalia joined in the majority opinion. *Id.* at 2463.

299. See *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring) (stating that if a governmental practice conveyed a message of endorsement of religion, it would violate the Establishment Clause).

300. See *Aguilar*, 473 U.S. at 426-30 (O'Connor, J., dissenting) (disputing the majority's contention that since the statute violated the entanglement prong of *Lemon*, it was unconstitutional, despite the fact that it did not have the effect of endorsing religion).

301. See *Lee v. Weisman*, 112 S. Ct. 2649, 2683-84 (1992) (Scalia, J., dissenting) (finding that unless a government practice coerces the populace to participate, it does not violate the Establishment Clause).

302. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring) (stating that "[t]here is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation").

303. See *supra* notes 169-181 and accompanying text (arranging the Justices into two fairly distinct camps).

fall in line behind one of the two. Therefore, the statutes would likely be consistently decided.

Even if the Court splits over the final determination of an Establishment Clause case, employing the standards outlined by Justice Brennan's and Justice O'Connor's categories is preferable to the use of *Lemon*. *Lemon* forced the Justices to address certain issues, namely the three prongs of the analysis, in spite of the fact that the Justices were concerned with completely different issues.³⁰⁴ Generally, this has been a criticism of using rules as opposed to standards.³⁰⁵

4. Consolidation of the Approaches

When merged, Justice Brennan's and Justice O'Connor's "tests"³⁰⁶ cover a multitude of situations which would arise under the Establishment Clause.³⁰⁷ The integration of the tests, due to the variety of areas covered, and the esteemed sources from which they come, may prove effective to establish a fresh approach to Establishment Clause adjudication.³⁰⁸ Using this combined method, the Justices would analyze an Establishment Clause case in terms of: (1) whether prior restraint from religious practices justifies accommodation, (2) whether the participants are mature and not under any coercion, (3) whether the religious practice is rooted in history, (4) whether the purpose of the practice has an incidental benefit on religion, (5) whether upholding the religious practice would be more like upholding our national heritage, (6) whether the legislature had practiced neutrality when imparting a benefit or a burden on religion, (7) whether the government endorsed the religious practice, (8) conservatism when making decisions on church hierarchy, and (9) impartiality when power is delegated to religious bodies.³⁰⁹ Although it is doubtful that any one case would implicate all nine areas, the variety of possible combinations furthers the idea that each of the Justices' concerns will be addressed.

304. See *Lee*, 112 S. Ct. at 2661 (holding that the graduation benediction violated the Establishment Clause because it effectively compelled students to participate). The dissent by Justice Scalia, however, focused on the disregard for tradition engaged in by the majority and its coercion test. *Id.* at 2679-81.

305. See *supra* notes 208-211 and accompanying text (explaining the dynamic nature of standards).

306. See *supra* notes 199-213 and accompanying text (describing how standards differ from bright line rules, which are more associated with tests). Although the concepts put forth by Justices Brennan and O'Connor differ from static tests, it is practical to refer to them as such, due to lack of a better word to describe a system which would be commonly used by the Court.

307. See *supra* notes 214-305 and accompanying text (discussing the various situations covered by the "tests" laid out by Justices Brennan and O'Connor).

308. While this approach does not preclude the addition of further criteria, it is unadvisable to do so in this author's opinion, for it would lead to the same unpredictability which we currently face.

309. See *supra* notes 214-305 and accompanying text (discussing the issues considered in Justice Brennan's and Justice O'Connor's determination of Establishment Clause cases).

The Voluntary School Prayer Protection Act³¹⁰ (Act) provides a good test case with which to demonstrate the application of this united approach. Additionally, it is a matter which may confront the Court in the near future.³¹¹

The Act provides that the Department of Education shall withhold funding from any state or local educational agency that has a policy of denying or effectively preventing individuals from praying in school.³¹² This bill could be challenged as a violation of the Establishment Clause because it implicates both religion and government.

To employ the approaches formulated by Justices Brennan and O'Connor, one must look at the different criteria which are implicated.³¹³ The issue in question, whether the government can deny funding to educational bodies which forbid prayer in school, seems to call into question three of the nine categories.

First, Justice Brennan's concern about the purpose of the incidental benefit should be addressed. If the Justices can agree that there is an incidental benefit to religion by denying funding to any school which forbids school prayer, then they would have to decide whether the purpose of the incidental benefit was permissible.³¹⁴ The purpose could be framed as an effort to "restor[e] . . . the heritage of traditional values envisioned by our Founding Fathers."³¹⁵ On the other hand, the purpose could be seen as an attempt to "payoff a Republican special interest—the Christian right."³¹⁶

Second, Justice O'Connor's concept, that of neutrality where there is a benefit or burden on religion, is implicated. If the Court decides that the Act benefits religion, then it would have to determine whether this benefit was neutral with

310. S. 319, 104th Cong., 1st Sess. § (a) (1995).

311. See *supra* note 5 and accompanying text (discussing the likelihood of the Act coming before the Court).

312. S. 319, 104th Cong., 1st Sess. § (a) (1995).

313. See *supra* notes 214-305 and accompanying text (describing Justices Brennan and O'Connor's breakdown of Establishment Clause cases into categories). Justice Brennan focused on when religion should be accommodated and analyzed cases in terms of (1) whether there was a prior restraint on the practice of religion, (2) whether the participants were mature adults and there was no coercion, (3) whether the practice was rooted in history, (4) the purpose of any incidental benefit to religion, and (5) whether upholding the practice was simply upholding our national heritage. *Id.* Justice O'Connor broke the cases down by deciding (1) whether there was neutrality when a government practice benefitted or burdened religion, (2) whether the government endorsed religion, (3) whether the government was being asked to decide questions of church hierarchy, and (4) whether the government was impartial in delegating power to religious bodies. *Id.*

314. See *supra* notes 238-240 and accompanying text (discussing Justice Brennan's treatment of practices which incidentally benefit religion).

315. See 141 CONG. REC. S222 (daily ed. Jan. 4, 1995) (statement of Sen. Helms).

316. See Chuck Raasch, *Gingrich Backs Off On Book, School Prayer*, GANNETT NEWS SERV., Dec. 30, 1994 (describing how the promise for an early vote on the school prayer amendment made the Republican party look like it was paying off a special interest). Although the quote referred to the constitutional amendment to allow for school prayer, it may be speculated that the Voluntary School Prayer Protection Act served the same purpose.

respect to which religion or sect upon which it was conferred.³¹⁷ The Act could be seen as neutral because it refers to prayer in general and is not limited to any religion or sect.³¹⁸ On the other hand, the Act could be enforced in such a way as to confer a benefit primarily to one sect or religion, to the exclusion of others.³¹⁹ This may be seen as a violation of the Establishment Clause.

Finally, Justice O'Connor's criterion that the government not endorse religion when it addresses the topic, is implicated. It seems clear that the government is speaking to the topic of religion in the Act, for it mandates that schools not deny individuals the opportunity to pray, lest the school lose all federal funding.³²⁰ The government could be seen as endorsing religion because it cuts off all federal funding to school which prohibit individuals from participating in school prayer.³²¹ On the other hand, the government does not mandate school prayer, and thus may not be seen as endorsing religion.³²²

While the individual Justices will undoubtedly disagree to some extent on the resolution of the individual issues, they may arrive at a single determination of constitutionality.³²³ Just as important, practitioners will be able to predict the concerns of the individual Justices and focus their arguments to those ends.

The approaches advanced by Justices O'Connor and Brennan contribute to the propriety of standards in Establishment Clause adjudication. They would both lead to adjudication based on the individual facts of the case, confined only by the policies set forth, rather than the need to adhere to hard and fast rules. It may well be that the difficulty with *Lemon* is its existence as a rule, for indeed, at least one of the prongs has been specified as appropriate for consideration in Establishment Clause adjudication.³²⁴ This leads to the conclusion that, if used as a standard, *Lemon* might be more predictable. Standards are also analogized with "balancing,"³²⁵ which would occur under each of the analyses.³²⁶ Balancing is particularly appropriate where, because of competing policies, a rule which

317. See *supra* notes 268-271 and accompanying text (discussing the analysis of Justice O'Connor's criteria requiring neutrality where a benefit or burden was conferred on religion).

318. S. 319, 104th Cong., 1st Sess. § (a) (1995).

319. While this would implicate the Establishment Clause because the government could be seen as establishing a national religion through discriminatory enforcement of the Act, it might also implicate the Equal Protection Clause of the 14th Amendment. U.S. CONST. amend XIV, § 1. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that unequal enforcement of the laws violated the Equal Protection Clause).

320. S. 319, 104th Cong., 1st Sess. § (a) (1995).

321. See S. 319, 104th Cong., 1st Sess. § (a) (1995).

322. See S. 319, 104th Cong., 1st Sess. § (b) (1995).

323. See *supra* note 264 and accompanying text (describing how, although the Justices may disagree on a single issue, they may be able to reach a consensus as to the ultimate constitutionality).

324. See *supra* note 290 and accompanying text (discussing how one of Justice O'Connor's criterion is similar to the entanglement prong of the *Lemon* test).

325. See Sullivan, *supra* note 199, at 59.

326. See *supra* note 264 and accompanying text (describing how, while Justices may be diametrically opposed on a particular category, factoring in determinations on the case as a whole may lead to a congruent decision).

encompasses both is difficult to formulate. This is precisely the case with the Establishment Clause and the Free Exercise Clause. Although *Lemon* was a valiant attempt, the need for a more accommodating legal directive is apparent.

IV. CONCLUSION

In many critical areas of law, the Supreme Court has formulated distinct, identifiable criteria to use in its adjudication.³²⁷ This practice creates predictability in the law, which allows litigants to formulate their best arguments, and courts to draft unassailable opinions. The Establishment Clause is no exception. The *Lemon* test has allegedly served this purpose for the last two decades.³²⁸ However, in recent years, the test used has been neither distinct, nor identifiable. While various replacement tests have been proposed, none has garnered the support of a majority.³²⁹ Each is criticized as neglecting one of the core themes of Establishment Clause jurisprudence.³³⁰

There are numerous possibilities for *Lemon*. The Court may miraculously decide to adhere to the *Lemon* criteria. More realistically, the test could be modified to reach more consistent results. Finally, a completely new formula could be devised, such as the ones proposed by Justices Brennan and O'Connor. While these formulas do not present themselves to be tests in themselves, they do suggest themes to which the Court can be faithful. Thus, these themes can be shaped into tests that reflect the Justices various concerns regarding the Establishment Clause. The tests proposed in this Comment may persuade a majority of the Court, for they draw on themes that have been introduced by diverse Justices over the years.³³¹

327. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900-01 (1992) (describing two categories of regulatory action that constitute a taking); *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) (holding that under the Equal Protection Clause, strict scrutiny will only be applied to a facially neutral statute where there has been an intent to discriminate); *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth a three part test for obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (creating the clear and present danger test for speech that incites).

328. See *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2494 (1994) (Blackmun, J., concurring) (refuting the notion that the *Lemon* test has been abandoned).

329. See *supra* notes 185-193 and accompanying text (discussing tests that have been suggested to replace *Lemon*).

330. *Id.*

331. See *supra* notes 214-305 and accompanying text (discussing the suggestions of Justice Brennan and Justice O'Connor with respect to Establishment Clause adjudication).