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The Un-Established Establishment Clause: A Circumstantial Approach To Establishment Clause Jurisprudence

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NOTES AND COMMENTS

THE UN-ESTABLISHED ESTABLISHMENT CLAUSE: A CIRCUMSTANTIAL APPROACH TO ESTABLISHMENT CLAUSE JURISPRUDENCE†

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I. INTRODUCTION

What religion first comes to mind when thinking of Moses hiking to a mountaintop to receive affirmation of the covenant the Hebrews made with God by receiving God's rules? What about a religion that traces its heritage back to Abraham? At this point, most people in this country would likely think of Christianity first; many of those people would probably recognize that these facts also describe Judaism. What if believing that Jesus was a prophet were added to the given facts? The answer now is obviously Christianity, right? Wrong. These three facts most closely identify with Islam.[1]

The Author of this Comment has two compelling beliefs; first, Jesus Christ is the Son of God, and the only way to God is through Jesus.[2] Second, the Author also believes that had he been born in Saudi Arabia, he would believe that Allah is the one and only God, and that Mohammad is one of his prophets.[3]

What does this have to do with a paper about the Supreme Court's Establishment Clause jurisprudence? First, it hopefully serves as a rather snazzy, but relevant, attention-getter. More importantly, it should demonstrate that there is an inherent bias toward Christianity in this country,[4] and that fact should be taken into consideration any time one attempts to derive the meaning of the Establishment Clause, as it may cloud a person's vision of the protection the Clause affords, through forsaking those protections at the expense of one's own biases. However, at the same time, one must engage in somewhat of a balancing act by recognizing the previous statement's relationship

1. Both Christian and Islam scriptures say that Moses received God's covenant with the Hebrews. *See Exodus* 24:1–8 (King James); 'Abdullah Yūsaf 'Alī, The Meaning of the Holy Qur'Ān 27–28, 30, 34 (new ed., 1997). Both religions trace their heritage back to Abraham. *See Genesis* 12:1–7 (King James); 'Abdullah Yūsaf 'Alī, The Meaning of the Holy Qur'Ān 54, 842 (new ed., 1997). The scripture of both religions refer to Jesus as a prophet. *See John* 6:14 (King James); 'Abdullah Yūsaf 'Alī, The Meaning of the Holy Qur'Ān 40, 55 (new ed., 1997). However, the Christian scriptures dispel the notion that Jesus was only a prophet. *See, e.g., John* 1 (King James).

2. This is what many consider the foundation of the Christian religion. *See, e.g., John* 3:16, 14:6 (King James).

3. *See, e.g.*, GEORGE ANASTAPLO, BUT NOT PHILOSOPHY: SEVEN INTRODUCTIONS TO NON-WESTERN THOUGHT 175 (2002).

4. If this were insufficient to show that there is an inherent bias toward Christianity in the United States, see generally Matthew L. Fore, Note, *Shall Weigh Your God and You: Assessing the Imperialistic Implications of the International Religious Freedom Act in Muslim Countries*, 52 DUKE L.J. 423 (2002). A good example of the historical bias toward Christianity in the United States is that nine of the thirteen colonies had state-established religions (of course, at the time, that was permissible, as the Establishment Clause had yet to be incorporated to the states). James E. Wood, Jr., *New Religions and the First Amendment*, *in* RELIGION AND THE STATE 185, 188 (James E. Wood, Jr. ed., 1985). The Court has recognized the bias, and claimed that it should be done away with. *See* Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985).

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with the indisputable fact that this country was founded on Christian religious principles.[5]

Contrary to what most people seem to believe,[6] the language "Separation of Church and State" appears nowhere in the Constitution.[7] In the words of then Justice Rehnquist:

> There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.
>
> . . . .
>
> . . . The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.[8]

Most likely, what many people are referring to when thinking of "Separation of Church and State" is the Establishment Clause and the Free Exercise Clause.[9] The first provision of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[10] The first part of the provision[11] is commonly referred to as the Establishment Clause.[12] The second part of the provision[13] is known as the Free Exercise Clause.[14] Because both Clauses interact with one another, it is difficult to discuss one without implicating the other.[15] For this reason,

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5. *See* Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 212 (1963).

6. *See generally,* DAVID BARTON, THE MYTH OF SEPARATION 41 (3d ed. 1992) (David Barton's fascinating book traces the true relationship between church and state in detail, and demonstrates that the "wall of separation" is nothing more than a mere "myth.").

7. *See* U.S. CONST.

8. Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

9. Most people agree that the purpose of these two clauses is to, "[A]ssure the separation of church and state in a nation characterized by religious pluralism." JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1033 (9th ed. 2001). The Supreme Court has often used the language since it first chose to do so in 1878. Reynolds v. United States, 98 U.S. 145, 164 (1878). But as a matter of accuracy, one should be aware that such language is not part of the Constitution. The language actually comes from a letter dated January 1, 1802, written by Thomas Jefferson to a Committee of the Danbury Baptist Association in which he was attempting to explain the First Amendment. Philip Hamburger, *Separation and Interpretation*, 18 J.L. & POL. 7, 7 (2002). Furthermore, the current Chief Justice has said, the wall of separation "has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that '[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.'" Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (quoting Berkey v. Third Ave. R. Co., 155 N.E. 58, 61 (N.Y. 1926)).

10. U.S. CONST. amend. I, cl. 1–2.

11. "Congress shall make no law respecting an establishment of religion . . . " U.S. CONST. amend. I, cl. 1.

12. CHOPER ET AL., *supra* note 9, at 1033.

13. "[O]r prohibiting the free exercise thereof." U.S. CONST. amend. I, cl. 2.

14. CHOPER ET AL., *supra* note 9, at 1033.

15. *Id.*

while this Comment is geared toward the Establishment Clause, one should be aware of the overlap.[16]

The Supreme Court's jurisprudence has yielded a rather schizophrenic view of how the Establishment Clause should be applied.[17] While the Court has developed multiple tests to determine whether an act or symbol violates the Establishment Clause,[18] it has never adopted a clear test.[19]

> In the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."[20]

For example, while the Court has credited the so-called *Lemon* test as being the primary operative test,[21] it has often implied that the oft-criticized *Lemon* test is insufficient and instead replaced it with a different test to reach a result contrary to what the *Lemon* test would have yielded.[22] All of this mayhem only to later revive the *Lemon* test from its dormant state—whenever convenient—as stated by Justice Scalia in his dissenting opinion in *Lamb's Chapel v. Center Moriches Union Free School District*,[23] "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."[24]

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16. This interaction has led to interesting viewpoints on how each of the clauses should be interpreted in order to function together. For example, the legendary Professor Tribe has argued that the Free Exercise Clause should be viewed broadly, while the Establishment Clause should be viewed narrowly. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 826–33 (1978).

17. *See infra* Part III.

18. *See infra* Part II.

19. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 869 (2000) (Souter, J., dissenting) (commenting that "[i]n all the years of its effort, the Court has isolated no single test of constitutional sufficiency").

20. Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (footnote omitted) (citing Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Wolman v. Walter, 433 U.S. 229, 236 (1977); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Tilton v. Richardson, 403 U.S. 672, 677–78 (1971)).

21. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 394 (1983); *see also Lynch*, 465 U.S. at 688–89 (O'Connor, J., concurring) (applying the 3-prong *Lemon* test in examining the right of a city to place a nativity scene in its Christmas display).

22. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592–93 (1989) (applying the endorsement test instead of the *Lemon* test); *Lynch*, 465 U.S. at 679 (admitting that the Court has decided Establishment Clause cases without ever applying the *Lemon* test, claiming that a single test would be insufficient).

23. 508 U.S. 384 (1993).

24. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

But the conflict does not stop with scaring only children and attorneys. Attorneys should at least know that the *Lemon* test, or at least some variation of it, is the operative test and will be applied—unless of course it will not. What about the lower courts? Lacking clear direction, the lower courts commonly apply all the tests the Court has used.[25] That would not be so bad, except for the small problem that the tests do not always yield the same result, leaving the lower courts to try to manipulate one or more of the tests in order to reach the same result under all of them.[26] The Fifth Circuit called the Court's Establishment Clause jurisprudence "rife with confusion."[27] Such a statement seems to be true, as the lower courts have split on cases involving similar facts, but for some rather odd reasons.[28]

And what about the state legislators? After all, the Establishment Clause does apply to states.[29] The Court has proclaimed the purpose of the Establishment Clause "was to state an objective, not to write a statute."[30] Surely that is true, as the Establishment Clause is obviously not a statute, but a part of the Constitution.[31] But state legislators are faced with the task of writing statutes, which obviously should comport with all parts of the Constitution. This task must be difficult considering the fact that they lack the luxury of guidance, at least inso-

25. This is a concept the Court has itself noted. *See* Mitchell v. Helms, 530 U.S. 793, 804, 808 (2000).

26. *See, e.g.*, Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002), *rev'd* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (mem.) (manipulating, as some might argue, all of the tests, but at least the coercion test, in holding that the words "under God" in the Pledge of Allegiance are unconstitutional). This case was reversed by the Supreme Court on standing grounds. *Id.* at 2304. *See generally* Laura A. Bowers, Note, M.C.L. v. Florida*: A Vignette of the Inconsistencies Plaguing Establishment Clause Jurisprudence*, 27 STETSON L. REV. 1437 (1998) (discussing the inconsistent rulings resulting from the Supreme Court's failure to overrule previous decisions regarding the Establishment Clause). See *infra* Part III for a hypothetical that demonstrates this concept.

27. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999).

28. For an example of this conflict, compare Freethought Soc'y v. Chester County, 334 F.3d 247, 249–51 (3d Cir. 2003) (holding that a Pennsylvania courthouse may continue to display an 83-year-old plaque of the Ten Commandments), with Glassroth v. Moore, 335 F.3d 1282, 1284 (11th Cir. 2003) (holding that the Chief Justice of the State of Alabama must remove a 5,280-pound display of the Ten Commandments he had installed in the rotunda in the Alabama State Judicial Building). It has been suggested that one of the primary reasons the Third Circuit allowed the display to remain, was because of the age of the object on which the Ten Commandments was written! *See* Stephanie Francis Ward, *In with the Old, Out with the New*, 2 No. 26 A.B.A. J. E-Report 1 (July 3, 2003).

29. The actual Establishment Clause, that is, the first clause in the First Amendment, was incorporated to the states in 1947. Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947). The Free Exercise Clause was incorporated to the states in 1940. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

30. Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970).

31. U.S. CONST. amend. I, cl. 1.

far as consistency is concerned, from the Court on what is or is not permissible under the Establishment Clause.[32]

If the Court is unwilling to pick a clear test and stick with it because the Establishment Clause does not lend itself to being interpreted through only one test, as it claims,[33] then it should at least set forth clear circumstances under which each test would be applied. This would provide what one could describe as much needed and appreciated consistency for lower courts to base their decisions on, for legislatures, who undoubtedly have an interest in authoring statutes that are constitutional, and for attorneys who are representing clients in cases arising under the Establishment Clause.

The purpose of this Comment is not to suggest a new test for Establishment Clause jurisprudence—there are plenty of well-known scholars who have been engaged in such a task, some for over thirty years.[34] Instead, this Comment will draw an analogy between the Court's Establishment Clause jurisprudence and other regions of the Court's jurisprudence, and recommend a similar approach be taken by the Court in this area in a manner that would bring order to chaos, yet maintain the flexibility the Court desires. Part II discusses the modern approach to issues arising under the Establishment Clause, which includes the modern tests and their origin. Part III explores the problems these multiple approaches have created. Part IV addresses the need for consistency. The circumstantial approach is introduced and discussed in Part V, which is followed by the conclusion in Part VI.

II. The Modern Establishment Clause Tests and Their Origin

A. *History and Theory*

The Court had little opportunity to interpret the Establishment Clause until the mid-twentieth century.[35] Before this time, few people

32. *See infra* Part IV.

33. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (admitting that the Court has decided Establishment Clause cases without ever applying *Lemon*, claiming that a single test would be insufficient).

34. *See, e.g.*, Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260, 261 (1968). *See also* Kristin M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 Pac. L.J. 121 (1995) (encouraging the resolution of Establishment Clause cases through the application of set standards).

35. *See* Elizabeth A. Harvey, Casenote, Freiler v. Tangipahoa Parish Board of Education: *Squeeze the* Lemon *Test Out of Establishment Clause Jurisprudence*, 10 Geo. Mason L. Rev., 299, 302 (citing 2 Major Problems in American Constitutional History 462 (Kermit L. Hall ed., 1992)). Prior to 1947, the Court decided only two cases in which it conducted an examination of the Establishment Clause. *See* Quick Bear v. Leupp, 210 U.S. 50 (1908); Bradfield v. Roberts, 175 U.S. 291 (1899).

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were bothered by prayers and the teachings of Christian beliefs.[36] In the 1940s, religious diversity began to emerge, likely due to the prior influx of immigrants to the U.S.[37] In 1947, the Court first applied the Establishment Clause to the states using the process of selective incorporation through the Fourteenth Amendment.[38] It was about this time that the Court began to frequently be called upon to interpret the Establishment Clause.[39]

Many of the Establishment Clause cases addressed by the Court have dealt with religion's relationship to the quasi-governmental institution of public schools.[40] Other cases have dealt with religious symbols in government buildings or on government property, or religious symbols set up by the government.[41] A variety of similar cases have been dealt with only in the lower courts.[42]

The Court has developed four unique tests, or at least principles, for interpreting the Establishment Clause: the *Lemon* test,[43] the endorsement test,[44] the coercion test,[45] and the neutrality principle.[46] Each test is discussed in detail below, in Part II.B–E.

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36. Harvey, *supra* note 35, at 302 (citing 2 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY 462 (Kermit L. Hall ed., 1992)).

37. Harvey, *supra* note 35, at 302 (citing 2 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY 462 (Kermit L. Hall ed., 1992)). Modernly, it has been noted that this country "boasts more than 55 different religious groups and subgroups with a significant number of members." Zelman v. Simmons-Harris, 536 U.S. 639, 723 (2002) (Breyer, J., dissenting).

38. Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947). Justice Thomas, however, has recently questioned whether this should have occurred. *Zelman*, 536 U.S. at 676–84 (Thomas, J., concurring).

39. Harvey, *supra* note 35, at 302 (citing 2 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY 463 (Kermit L. Hall ed., 1992)).

40. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (dealing with student-led and student-initiated prayers before football games); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386–87 (1993) (dealing with after-hours access to public school facilities for religious purposes); Edwards v. Aguillard, 482 U.S. 578, 580–81 (1987) (dealing with a requirement to teach the concept of creation in addition to evolution in public schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (dealing with financial assistance for secular activities in private schools); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (dealing with Bible reading and recitation of the Lord's prayer in public schools); Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002), *cert. granted* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (dealing with requirement of daily recitation of the Pledge of Allegiance, which uses the words "under God").

41. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 578–82 (1989) (dealing with a crèche depicting a nativity scene placed in the county courthouse and a Chanukah menorah placed outside City-County Building); Lynch v. Donnelly, 465 U.S. 668 (1984) (dealing with the city setting up a nativity scene in a park owned by a non-profit organization).

42. *See, e.g.*, Glassroth v. Moore, 355 F.3d 1282 (11th Cir. 2003) (dealing with a display of the Ten Commandments in the rotunda in the Alabama State Judicial Building); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999) (dealing with a disclaimer adopted by the school board which required a reading of a disclaimer before teaching evolution in public schools).

43. *Lemon*, 403 U.S. at 602, 612–13.

44. *County of Allegheny*, 492 U.S. at 592–93.

Before the tests are discussed in detail, a surface-scratching introduction to the basic theories of thought should prove helpful. The theoretical view points on the Establishment Clause can be broken down into two large and somewhat murky classes,[47] which will be referred to collectively as the theoretical views. The first is the broad view, sometimes called the strict-separationalist or neutrality approach (the kind sanctioned by persons such as Justice Souter), which seeks to prevent *any* aid to religion.[48] The adherents of this approach tend to look to Jefferson's view of "Separation of Church and State" for support.[49] The key to this broad view is that it demands not only a strict-separation of religion and government, but it also deems neutrality toward religion as an essential feature intended by the founders of this Country.[50]

The second theoretical view, the narrow view, often called the accomodationalist approach, (a view sanctioned by persons such as Chief Justice Rehnquist) also looks to history, but reasons that none of the framers ever claimed that the government must be neutral, and that such a reading would be at odds with the Free Exercise Clause.[51] Instead, adherents of this view give the term "establish" a literal meaning, and reason that the government cannot discriminate among religions.[52] Thus, under the broad view, the government need not be neutral toward religion; it need only refrain from differentiating amongst various religions.[53]

The broad view has dominated the Court's Establishment Clause jurisprudence.[54] Although recently, the Court has modified some of the rules which came from the broad view by interposing some of the ideas captured in the narrow view.[55] There are fractional subparts of both of these theoretical views, which are seen in the various approaches the Court has employed in an attempt to interpret the Establishment Clause.[56] Different justices have become associated with the various theoretical views. For example, Justices Souter, Stevens, and

45. Lee v. Weisman, 505 U.S. 577, 592 (1992).

46. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 839 (1995).

47. DEREK DAVIS, ORIGINAL INTENT 46 (1991).

48. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 867–68 (2000) (Souter, J., dissenting); *see also* DAVIS, *supra* note 47, at 48.

49. Shahin Rezai, Note, County of Allegheny v. ACLU*: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. Rev. 503, 507–08 (1990).

50. *See* Engstrom, *supra* note 34, at 124 (citing Robin W. Lovin, *Rethinking the History of Church and State*, 76 CAL. L. REV. 1185, 1193 (1988) (book review)).

51. DAVIS, *supra* note 47, at 48–49. For example, preventing *any* aid to religion may inhibit people from their right to freely exercise their religion.

52. *Id.* at 48.

53. *See id.*

54. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1118 (1988).

55. *See infra* Part IV.

56. *See infra* Parts II.B–D, III.

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Ginsburg follow the strict-separationalist line.[57] Justice Kennedy adheres to the narrow viewpoint.[58]

These theoretical views have influenced the Court over the years. Generally the Court has developed four tests in the Establishment Clause area including the *Lemon* test, the endorsement test, the coercion test, and the neutrality principal. A further explanation of these tests and their origin is required.

B. *The* Lemon *Test*

The *Lemon* test, which originated in 1971, in the case of *Lemon v. Kurtzman*,[59] is a form of the broad view.[60] The *Lemon* test is arguably considered the operative test,[61] but it is definitely the one met with the most criticism, even from the members of the Court.[62] The purpose of the *Lemon* test was to confront three primary evils—sponsorship, financial support, and the government's active involvement in religious activities.[63] The *Lemon* test is a three prong test: "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion" and "finally, the statute must not foster 'an excessive government entanglement with religion.'"[64]

In *Lemon*, the Court, per then Chief Justice Burger, held that a Rhode Island program that allowed the state to provide a fifteen percent salary supplement directly to teachers at religious schools who were teaching secular subjects, and a Pennsylvania program that reimbursed religious schools in a similar manner, as well as provided partial reimbursement for secular class materials in those religious schools, were unconstitutional.[65] The Court looked to its previous Establishment Clause jurisprudence for guidance, and even it acknowledged that "[t]he language of the Religion Clauses of the First Amendment is at best opaque . . . ."[66] It then derived the first two prongs of what is now known as the *Lemon* test, from a 1968 case,

57. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 867–68 (2000) (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting).

58. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 586–90 (1992) (Kennedy, J., writing for the majority applying the coercion test).

59. 403 U.S. 602 (1971).

60. *See* George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 878 n.81 (1988).

61. The *Lemon* test is considered the operative test because the lower courts are still bound by it, because it has yet to be overruled. *See Lee*, 505 U.S. at 587 (applying the coercion test, but refusing to "accept the invitation of petitioners and amicus of the United States to reconsider our decision in *Lemon v. Kurtzman*.").

62. *See infra* Part III.A.

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

64. *Id.* at 612–13 (quoting Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970)).

65. *Id.* at 607.

66. *Id.* at 612.

Board of Education v. Allen, and the third prong from a 1970 case, *Walz v. Tax Commission*.[67] The *Lemon* Court found that both state statutes met the first prong without a problem.[68] The Court spent little time evaluating the second prong because it found that both statutes violated the third prong. The Court concluded that "the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[69] The Court did, however, acknowledge that some relationship between the government and the church was to be expected,[70] and that the "Wall of Separation" was really no more than a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[71] The Court still had to decide whether there was an "excessive entanglement" of the government with religion.[72] To do so requires an evaluation of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[73]

The Court went on to describe the environment at the schools that received state funding and concluded that the government's financial support of such schools demonstrated an adequate entanglement of the government with the state.[74]

The *Lemon* test is very complicated; therefore, a further explanation of its three prongs—secular purpose, primary effect and excessive entanglement—may prove helpful.

1. Secular Purpose

The secular purpose prong of the *Lemon* test asks whether the actual purpose of the government in enacting the statute is to endorse or condemn religion.[75] The government's purpose to endorse religion may be shown in two ways: promotion of religion in general,[76] or "by advance[ing] a particular religious belief."[77] An example of a case where the Court used this prong to strike down a state statute is *Ed-*

67. *Id.* at 612–13 (citing Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970) and Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

68. *Id.* at 613.

69. *Id.* at 613–14.

70. *Id.* at 614 (citing Zorach v. Clauson, 343 U.S. 306, 312 (1952) and Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)).

71. *Id.* at 614.

72. *Id.*

73. *Id.* at 615.

74. *Id.* at 615–25.

75. Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Justice O'Connor's interpretation of this prong is also the foundation of the endorsement test. *See infra* Part II.C.

76. *Edwards*, 482 U.S. at 585 (citing Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985)).

77. *Id.* (citing Stone v. Graham, 449 U.S. 39, 41 (1980)).

wards v. Aguillard.[78] In *Edwards*, the Court held that a Louisiana statute, which required teachers to read a disclaimer about "Creationism" before evolution was taught in public elementary and secondary schools, was unconstitutional.[79] The Court concluded that the purpose of the statute "was to restructure the science curriculum to conform with a particular religious viewpoint."[80] The secular purpose prong focuses on the actual intent behind the governmental action by asking whether the action was designed to sanction or censure religion.[81]

2. Primary Effect

There is no case where the Court has struck down a statute based solely on this second prong;[82] thus, the Court has not provided a clear interpretation of this prong, nor a case to serve as an illustration. For example, the majority in *Lynch v. Donnelly*,[83] found that a crèche displayed in the city's annual Christmas display did not have an "impermissible effect" that advanced religion; however, the Court described the effect as "indirect, remote, and incidental" without setting forth any reasoning as to why.[84] Modernly, one is unlikely to stumble over any case where the Court provides insight into the meaning of this prong. The reason is because the *Lemon* test has undergone change since its inception.[85] The Court has collapsed the third prong into the second prong, and at times, has even given them more of an endorsement test context.[86] Thus, an in-depth discussion of the primary effect prong of the *Lemon* test is unnecessary.

3. Excessive Entanglement

The best case to use as an example of the excessive entanglement prong is likely *Lemon* itself. Recall that the Court in *Lemon* held that the statutes of two states that provided programs for the states to partially reimburse religious schools for their costs in teaching secular

78. 482 U.S. 578 (1987).
79. *Id.* at 581–82.
80. *Id.* at 593.
81. *See id.* at 585 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).
82. While the Fifth Circuit has interpreted this second prong, the Supreme Court has not. *See* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 346–48 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251, 1251–55 (2000). Justice Scalia joined by the Chief Justice and Justice Thomas filed an interesting dissent from denial of certiorari. Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari).
83. 465 U.S. 668 (1984). This case is discussed in more detail later at *infra* Part II.C.
84. *See Lynch*, 465 U.S. at 683.
85. *See infra* Part III.A.
86. *See* County of Allegheny v. ACLU, 492 U.S. 573, 592–93 (1989); *infra* Part IV.

subjects were unconstitutional.[87] The Court reasoned that searching for an excessive entanglement requires an evaluation of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[88] In *Lemon*, the Court reasoned, *inter alia*, that facts such as many of the teachers receiving state funded supplements were nuns who were under the supervision of a Bishop, and that the students were at an impressionable stage in their lives, demonstrated a "substantial degree" of entanglement.[89] Thus, the excessive entanglement prong is analogous to a three-step inquiry into (1) the nature and purpose of the organizations receiving the benefit; (2) the type of assistance provided; and (3) and the connection between the religious activity and the State that is derived.[90]

C. *The Endorsement Test*

The endorsement test was first proposed as an alternative to the *Lemon* test by Justice O'Connor in 1984 in her concurring opinion in *Lynch v. Donnelly*.[91] In *Lynch*, the Court was faced with the decision of whether a nativity scene set up by the city, in a park owned by a nonprofit organization, within a prominent shopping location, was constitutional.[92] The majority opinion, which was written by Chief Justice Burger, found no violation of the Establishment Clause.[93]

In her concurring opinion, Justice O'Connor "[wrote] separately to suggest a clarification of . . . [the] Establishment Clause doctrine."[94] She reasoned that there were two ways in which the government could violate the Establishment Clause: one is the government being excessively entangled with religion and the other, and in her mind more direct, is the government's endorsement or disapproval of a religion.[95] She claimed that these two methods of violating the Establishment Clause clarify the *Lemon* test.[96]

Five years later, in *County of Allegheny v. ACLU*,[97] the Court, per Justice Blackmun, adopted the endorsement test in holding that a crèche depicting a nativity scene hung from the prominent grand stair case in the county courthouse violated the Establishment Clause, but

87. Lemon v. Kurtzman, 403 U.S. 602, 607 (1971); *see supra* Part II.B.
88. *Lemon*, 403 U.S. at 615.
89. *Id.* at 615–17.
90. *See County of Allegheny*, 492 U.S. at 592–93.
91. *See id.* at 687–94 (O'Connor, J., concurring).
92. *Id.* at 671.
93. *Id.* at 687.
94. *Id.* (O'Connor, J., concurring).
95. *Id.* at 687–88 (O'Connor, J., concurring). Note that the second way suggested by Justice O'Connor is the same "test" as the Court's interpretation of *Lemon*'s secular purpose prong in *Edwards*. *See supra* Part II.B.1.
96. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).
97. 492 U.S. 573 (1989).

that an eighteen-foot Chanukah menorah placed outside the City-County Building next to a forty-five foot Christmas tree did not violate the Establishment Clause.[98] The majority acknowledged that it customarily used the *Lemon* test, but then went on to name cases in which its decisions were based largely on whether the government endorsed a particular religion.[99] A strongly divided Court went on to adopt and apply the endorsement test.[100]

It is not totally clear which viewpoint the endorsement test follows; however, some statements of Justice O'Connor make it relatively clear that it was not intended to follow the broad view.[101]

The endorsement test has rapidly gained acceptance by many commentators who credit it as being the preferred test; however, it still faces strong, and worthy, opposition that will likely prevent it from becoming the sole operative test in the near future.[102]

D. *The Coercion Test*

The coercion test was formally added to the slate in 1992.[103] It is a form of the narrow view.[104] It originated, officially, in *Lee v. Weisman*.[105] In that case, the Court was faced with the decision of whether school officials inviting clergymen to offer an invocation and benediction at public school graduation ceremonies was a violation of the Establishment Clause.[106] The Court reasoned that, "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."[107] The Court held that the government's involvement in these school prayers violated this minimum guarantee.[108] In so holding, the Court reasoned

98. *Id.* at 578–79. To be fair, it should be made clear that the crèche probably depicted aspects more analogous to what one would expect to find in a church than from one hung from the staircase (arguably the most beautiful part of the courthouse), in that it portrayed the birth of Jesus along with the phrase "Gloria in Excelsis Deo!" (Glory to God in the Highest); while the menorah was merely placed next to the Christmas tree, a symbol which has been held time and time again to serve a valid secular purpose. *See id.* at 580–85. None of these statements are meant to downplay the significance of the Chanukah menorah, which represents a fascinating connotation. *See id.*

99. *Id.* at 592–93.

100. *Id.*

101. *See* Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (stating that "[t]he endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy").

102. *See infra* Part III.B.

103. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

104. The coercion test, by its very nature, is designed to not discriminate among various religions, but it does not require that the government be neutral either—only that the government not be coercive. *See supra* Part II.A.

105. 505 U.S. at 587.

106. *Id.* at 580.

107. *Id.* at 587.

108. *Id.*

that it was the principal, whose decisions are attributable to the State, who decided that the prayers should be offered at the ceremony, as well as who should offer them.[109]

Apparently, by the principal deciding that an invocation and benediction would be offered, the State was "coercing" persons in attendance at the ceremony to "participate in religion or its exercise."[110] Further, by the principal choosing who was to offer the prayers, the state was "coercing" persons in attendance to "support" a particular religion.[111]

Like the endorsement test, the coercion test gained some acceptance by commentators when compared with its counterparts, especially the *Lemon* test; however, the coercion test has likewise been the subject of harsh criticism, slowing its expansion.[112]

E. *The Neutrality Principle*

As will be seen, the neutrality principle is somewhat of a perplexing concept. Notice this section is entitled the neutrality principle, as opposed to the neutrality test. This is because it is a little confusing to determine what exactly "the neutrality test" really is. For example, in a concurring opinion, Justice O'Connor stated, "[W]e have emphasized a program's neutrality repeatedly in our decisions . . . . Nevertheless, we have never held that a government aid program passes constitutional muster *solely* because of the neutral criteria it employs . . . ."[113] Further, some writers credit neutrality as being the primary test used early in the Court's Establishment Clause jurisprudence,[114] while others speak of it as the possible up and coming test.[115] Either way, the basic idea is the same. In the words of the Court, "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion . . . favoring neither one religion over others nor religious adherents collectively over non-adherents."[116]

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109. *Id.*

110. *See id.*

111. *See id.* This is an important point. An interesting question is whether the principal's choice that a prayer would be offered is sufficiently coercive, or whether the fact that the principal also chose who was to offer the prayer as well, was required for the coercion test. The latter has a stronger correlation with the endorsement test. *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

112. *See infra* Part III.C.

113. Mitchell v. Helms, 530 U.S.793, 838–39 (2000) (O'Connor, J., concurring).

114. Harvey, *supra* note 35, at 307.

115. *See, e.g.*, Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603 (2003).

116. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) (citing Comm. for Pub. Educ. & Religious Liberty v. Nyguist, 413 U.S. 756, 792–93 (1973) and Epperson v. Arkansas, 393 U.S. 97 (1968)).

Two cases can demonstrate this concept at work. The first is *Rosenberger v. Rector & Visitors of the University of Virginia*,[117] and the other is the more recent case of *Mitchell v. Helms*.[118] In *Rosenberger*, the University of Virginia's Student Activities Fund paid for various expenses, such as the printing cost of student publications for student organizations, but refused to pay similar expenses for a religious student organization's publication, and attempted to defend such actions on the ground that doing so would be a violation of the Establishment Clause.[119] Miraculously, the majority side-stepped the *Lemon* test in its entirety in holding that the university's argument—providing the religious student organization with funding in the same way it does all other organizations was a violation of the Establishment Clause—was without merit.[120] The Court stated, "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[121] The Court found that the government program was neutral because by funding the religious student organization in the same manner it does all other student organizations, the university would not be attempting to advance religion, or aid a religious cause.[122]

At stake in *Mitchell*, was a governmental program that provided funding to state and local governments, which would then lend educational materials and equipment to public and private schools.[123] The Court's plurality opinion found that the program did not violate the Establishment Clause, reasoning that, "[If] the religious, irreligious, and areligious [sic] are all alike eligible for governmental aid . . . . [t]hen it is fair to say that any aid going to a religious recipient only has the effect of furthering [a] secular purpose."[124]

One interesting facet of the neutrality principle is that it is commonly applied to situations involving governmental assistance to both public and private institutions, particularly where those institutions are schools.[125]

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117. 515 U.S. 819 (1995).

118. 530 U.S. 793 (2000). The idea that this case is "more recent" is somewhat misleading. The Court, in a plurality opinion, decided the case in 2000. *Id.* However, the case had what Justice Thomas referred to as a "tortuous history," as it had been in litigation for almost fifteen years. *Id.* at 804.

119. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823–28 (1995).

120. *Id.* at 840. *Lemon v. Kurtzman* was mentioned only two times, both of which were in the dissent, one of which was in a footnote. *See id.* at 882 n.8, 899. (Souter, J., dissenting).

121. *Id.* at 839. Note that the Court used the term "significant factor." *Id.* This is an example of neutrality used as a principle, as opposed to a full test.

122. *Id.* at 840.

123. Mitchell v. Helms, 530 U.S. 793, 801 (2000) (plurality opinion).

124. *Id.* at 809–10.

125. *See, e.g.*, *id.* at 801. The Court notes numerous cases which demonstrate this trend. *See also infra* Part V.B.

Now that the four major tests and their usages in cases have been examined, Part III will discuss the tribulations to which they have led.

III. Problems with the Modern Status

As mentioned earlier, perhaps the most significant problem with the modern state of the Court's Establishment Clause jurisprudence is that there is no clear test, leaving the lower courts to face the dilemma of what test to apply or how to manipulate one or more of the tests to ensure that the same result is reached under each.[126]

The basic flaw is not a novel one. The tests each apply different criteria, and therefore easily lead to different results. For example,[127] if a city put up a sign outside its city hall, reading, "Worship this Week at the Church of Your Choice!," the tests would likely yield different answers as to whether such a sign violated the Establishment Clause.[128] Under the *Lemon* test, the sign probably would be a violation of the Establishment Clause because its "primary effect" is to aid religion, even though not any one specific religion.[129] The endorsement test would likely lead to the same result, as the sign clearly endorses religion in general.[130] However, such an act would likely survive the less rigid coercion test, as it likely would not coerce anyone to participate in any religious act.[131] Lastly, a good argument could be made that such an act would not pass the neutrality principle or test because the sign likely does not demonstrate neutrality toward non-adherents.[132]

A short discussion of the benefits and criticisms of each of the tests follows.

126. *See supra* Part I. In the words of Justice O'Connor in her concurring opinion in *Mitchell*, "[T]here remains the question of which of the two irreconcilable strands of our Establishment Clause jurisprudence we should now follow." *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring).

127. This example and sample analysis is not the Author's own, but that of a prominent law professor in his outstanding student's study aid, which has kept many students afloat in Constitutional Law. *See* Calvin R. Massey, Roadmap: Constitutional Law 532–33 (2d ed. 2001).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) (citing Comm. for Pub. Educ. & Religious Liberty v. Nyguist, 413 U.S. 756, 792–93 (1973) and Epperson v. Arkansas, 393 U.S. 97 (1968)). Professor Massey's source, referred to in the previous footnote, does not express his opinion as to the result under the neutrality principle; thus, the analysis in this part of the example, unlike the previous ones, is this Author's own.

A. *The* Lemon *Test*

While the *Lemon* test is technically still the operative standard, as it has never been overruled,[133] and is definitely the test most relied upon by the lower courts,[134] it has undergone many changes during its short life.[135] For example, in *Agostini v. Felton*,[136] the third prong was collapsed into the second prong.[137] The reason for this collapse is quite simple—it is difficult to perceive a situation where a law would have an excessive entanglement with religion but would not have either an impermissible purpose or effect. The *Lemon* test, even as modified, has been met with a plethora of criticism from the members of the Court,[138] law students,[139] and legal scholars.[140] The criticism ranges from slight criticisms, such as pleas to reconstruct the current *Lemon* test into a more workable standard,[141] to severe blows, such as now Chief Justice Rehnquist's statement that the purpose and effect prongs of the *Lemon* test (which are the only two left after the *Lemon* test was modified)[142] "are in no way based on either the language [of the Constitution] or intent of the drafters."[143]

It is likely that one could easily fill volumes with nothing but stark criticism of the *Lemon* test.[144] In the interest of saving trees, it should suffice to merely consider the following: the majority of the current

133. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (refusing the invitation to overrule the *Lemon* test).

134. CHOPER ET AL., *supra* note 9, at 1040; *see also* Danyll Foix, *From Exemptions of Christian Science Sanatoria To Persons Who Engage in Healing by Spiritual Means: Why* Children's Healthcare v. Vladeck *Necessitates Amending the Social Security Act*, 15 LAW & INEQ. 373, 402 n.191 (1997) (noting that most lower courts realize that they must apply the *Lemon* test).

135. *See infra* Part III.A.

136. 521 U.S. 203 (1997).

137. *See id.* at 222–23; *see also* Tobias G. Fenton, *The Need to Revive the Role of Legislative Purpose in Establishment Clause Cases*, 83 B.U. L. REV. 647, 663 (2003) (stating that "the most significant post-*Lemon* Establishment Clause case may be *Agostini*, in which the Court formally restructured the *Lemon* test's second prong"). *See generally* Jeremy T. Bunnow, *Reinventing the Lemon:* Agostini v. Felton *and the Changing Nature of Establishment Clause Jurisprudence*, 1998 WIS. L. REV. 1133.

138. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 668 (1971) (White, J., dissenting) (accusing the Court of "creat[ing] an insoluble paradox").

139. *See, e.g.*, Harvey, *supra* note 35.

140. *See, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church and Labor Relations and the Right of Church Autonomy*, 81 COLUM. L. REV. 1373, 1380 (1981) (arguing that the Court's choice in using the word "inhibits" in the second prong of the *Lemon* test is contradictory to the Court's own determination of the purpose of the Establishment Clause as well as to the Constitution itself).

141. *See, e.g.*, Bunnow, *supra* note 137.

142. *See supra* Part II.B.

143. Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

144. However, the *Lemon* test does have some supporters. *See, e.g.*, Penny J. Meyers, Note, Lemon *Is Alive and Kicking: Using the* Lemon *Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies*, 34 VAL. U. L. REV. 231 (1999).

Justices of the Supreme Court disfavor the *Lemon* test. The list of justices includes Justice Scalia, Justice Thomas,[145] Justice Kennedy,[146] Justice O'Connor,[147] and Chief Justice Rehnquist.[148] At the time this observation was first made by the Court, there were actually six justices, including Justice White, who opposed the *Lemon* test.[149]

So why does the Court not wipe the slate clean and abdicate the sour test? Justice Scalia may have hit the nail on the head:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will . . . . [W]hen we wish to uphold a practice it forbids, we ignore it entirely . . . sometimes, we take a middle course, calling its three prongs "no more than helpful signposts" . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[150]

B. *The Endorsement Test*

The endorsement test, while it has some flaws, seems to be the test favored by many commentators[151] and some justices.[152] Justice O'Connor has slightly modified the endorsement test since she first suggested it, by stating that the question posed by the endorsement test should be evaluated "from the perspective of a 'reasonable non-adherent.'"[153] In other words, to Justice O'Connor, the question is whether a reasonable non-adherent of the religion of the religious symbol in question would think that the government is endorsing a particular religious practice or belief.[154]

The test sounds like a winner, but it has been observed that these reasonable observers may easily diverge in the way they respond to

145. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J. and Thomas, J., dissenting).

146. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 655–57 (1989) (Kennedy, J., concurring in part and dissenting in part).

147. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346–349 (1987) (O'Connor, J., concurring).

148. *See, e.g.*, *Wallace*, 472 U.S. at 107–13 (Rehnquist, J., dissenting).

149. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

150. *Id.*

151. *See, e.g.*, Eliott M. Berman, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 COLUM. J.L. & SOC. PROBS. 1 (1990).

152. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., joined by Brennen and Stevens, J.J., concurring) (stating that "the endorsement test captures the essential command of the Establishment Clause").

153. *Id.* at 620.

154. *See id.*; Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

the messages sent by governmental actions.[155] One commentator has pointed out, "Under the endorsement test, the government may not express endorsement *or disapproval* of religion."[156] Many of these governmental actions raise the most important, controversial, and often litigated issues, and the endorsement test does not sufficiently address them.[157]

To Justice Kennedy, the endorsement test is too broad because it gives no deference to historical practices, such as Thanksgiving Proclamations by the President (which date back to President Washington), legislative prayer,[158] and the phrase "God save this United States and this honorable Court" which is used as an opening line before the Court's sessions.[159] Justice Kennedy went so far as to describe the endorsement test as "a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence" and that it "is flawed in its fundamentals and unworkable in practice."[160]

C. *The Coercion Test*

Like the other tests the Court has used to answer questions arising under the Establishment Clause, the coercion test does have its supporters,[161] but it also has its critics.[162] One criticism of the coercion test is that it is unfair to religious minorities.[163] The big question with coercion is really just how coercive is coercive. On one end of the spectrum, there is Justice Souter's belief that, "[O]ne can call any act of endorsement a form of coercion, but only if one is willing to dilute

155. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 150 (1992).

156. Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 368 (1999) (citing, *inter alia*, Wallace v. Jaffree, 472 U.S. 38 (1985)).

157. McConnell, *supra* note 156, at 150.

158. This is a practice that has actually been challenged and upheld, but exclusively under the theory that Congress authorized legislative prayer at the time of the Bill of Rights. *See* Marsh v. Chambers, 463 U.S. 783, 787–88 n.10 (1983).

159. *County of Allegheny*, 492 U.S. at 671–72 (Kennedy, J., concurring in part and dissenting in part).

160. *Id.* at 668–69 (Kennedy, J., concurring in part and dissenting in part). Chief Justice Rehnquist, and Justices White and Scalia joined him in this opinion. *See id.* at 655.

161. *See, e.g.*, Ralph W. Johnson III, Lee v. Weisman*: Easy Cases Make Bad Law Too—The "Direct Coercion" Test Is the Appropriate Establishment Clause Standard*, 2 GEO. MASON INDEP. L. REV. 123, 178–79 (1993).

162. *See infra* Part III.C.

163. *See generally* Matthew A. Peterson, Note, *The Supreme Court's Coercion Test: Insufficient Constitutional Protection for America's Religious Minorities*, 11 CORNELL J.L. & PUB. POL'Y 245 (2001) (discussing how the coercion test fails to address a variety of establishment violations). *But see* Conkle, *supra* note 54, at 1151 (arguing that "The Supreme Court's establishment clause doctrine . . . works largely to the benefit of religious minorities and nonbelievers, because the [E]stablishment [C]lause generally operates to invalidate government attempts to prefer dominant religions").

the meaning of 'coercion' until there is no meaning left."[164] On the other side is Justice Scalia, who one might say would almost require the government to put a gun to someone's head, "The coercion that was a hallmark of historical establishments of religion, was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[165] However, Justice Kennedy, who is a coercion test enthusiast, takes a view that falls somewhere in the middle of the road:

> [S]ome of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation. . . . That may be true if by "coercion" is meant *direct* coercion in the classic sense of an establishment of religion that the framer's knew. But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case.[166]

D. *The Neutrality Principle*

A similar definitional question arises with the neutrality principle. One confusing aspect of the principle is that it shares the same name as one of the viewpoints.[167] However, the term "neutrality" has been used in two very different ways.[168] To Justice Souter, "neutrality" is representative of the broad view, evidenced by his dissenting opinion in *Mitchell*, in which he would hold that *all* religious aid violates the Establishment Clause.[169] However, to the plurality of the Court, "neutrality" means only that the government may not discriminate among different religions when providing religious aid.[170]

These diverging views as to the proper meaning to be assigned to key terms such as "endorsement," "coercion," and "neutrality" create additional confusion.

IV. The Need for Consistency

Even after reviewing all the criticisms of each of the individual tests, perhaps the largest problem with them has yet to be discussed in any

164. Lee v. Weisman, 505 U.S. 577, 623 n.5 (1992) (Souter, J., concurring).

165. *Id.* at 640 (Scalia, J., dissenting).

166. County of Allegheny v. ACLU, 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part).

167. *See supra* Part II.A (the broad view is also called the neutrality approach).

168. Compare the plurality's view of neutrality with Justice Souter's view of neutrality in *Mitchell v. Helms*, 530 U.S. 793 (2000). Also compare the majority's view of neutrality and Justice Souter's view of neutrality in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

169. *Mitchell*, 530 U.S. at 867–68 (Souter, J., dissenting).

170. *Id.* at 835–36. By the way, there is also a view that lies in between. Justice O'Connor, who applied her endorsement test in *Mitchell*, would hold that the plaintiff has the burden of proving that the provided aid was *actually* used for religious purposes (as opposed to Justice Souter, who claimed that the plaintiff need only show that the aid *could* be used for a religious purpose). *See id.* at 857 (O'Connor, J., concurring).

length. One can be sure that any test the Court invokes will have its opponents, but the key is consistency. Of course consistency, taken too literally, could be devastating. For example, Justice Souter's proposed bright-line rule (which he, of course, believes is not his rule, but a command of the Constitution) that *no* aid can be given to an institution that could use that aid for religious purposes,[171] is definitely one that would assure consistency. However, the price for that consistency may mean loss of an educational opportunity for students in private schools. An educational opportunity is a purpose that the majority of the Court has recognized as being validly secular.[172]

The Court is so inconsistent in its Establishment Clause jurisprudence that it seems that the test that will be applied is the one that can muster five justices, or at least four justices for a plurality, to sign off on it. The strong correlation between the justice who authors the opinion, that particular justice's favored test or viewpoint, and the test or viewpoint he or she chose to employ should be noted.[173] Additionally, if the Court itself cannot decide which test to use, then it has been known to utilize the lower-court-fix: apply them all![174]

Moreover, what is worse is that the Court does not even apply the same test in the same way.[175] For example, compare Justice Souter's interpretation of "neutrality" with that of Chief Justice Rehnquist.[176] Compare Justice Kennedy's analysis of coercion with Justice Scalia's analysis,[177] or Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas's view of endorsement with that of Justices O'Connor, Souter, Breyer, and Stevens.[178] Furthermore, sometimes the same justice will not apply the same test the same way.[179] For example, while Justice O'Connor claims the endorsement test gives great deference to the legislature, and that the Court's inquiries to the legislature should be limited, she actually did just the opposite in several cases.[180]

171. *Id.* at 867–68 (Souter, J., dissenting).

172. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002).

173. For example, if Justice O'Connor is writing, she is using the endorsement test. *See, e.g.*, *Mitchell*, 530 U.S. at 836 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). If Justice Kennedy is writing, he is using the coercion test. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 580 (1992) (Kennedy, J., writing for the majority). If Justice Souter is writing, he is employing the broad view. *See, e.g.*, *Zelman*, 536 U.S. at 686 (Souter, J., dissenting). If Chief Justice Rehnquist is writing, he is employing the narrow view. *See, e.g.*, *id.* at 643.

174. The Court has applied all of the tests in the same case. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

175. *See infra* Part IV.

176. *See supra* Part III.E.

177. *See supra* Part III.D.

178. *See generally* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (exhibiting the differing views of the Justices with respect to the endorsement test).

179. *See supra* note 174.

180. Justice O'Connor has stated, "[T]he inquiry into the purpose of the legislature . . . should be deferential and limited." Wallace v. Jaffree, 472 U.S. 38, 74 (1985).

Thus far this Comment has focused primarily on the viewpoints of the Justices of the Supreme Court. However, the inconsistency in the Court's Establishment Clause jurisprudence permeates far beyond the walls of the Court. Lower courts are left clueless as to which test should be employed, much less how to apply a given test.[181] For example, a district court in Indiana stated, "Plaintiff's first obligation is to establish some likelihood of success on the merits of her challenge . . . on First Amendment-Establishment Clause grounds. This is no small assignment, given the profusion and confusion reflected in the case law and in Supreme Court precedent."[182]

Thus, before even the suggestion of a circumstantial approach, which is discussed in detail in Part V, the Court must be willing, at the very least, to treat the same test with consistency in its application, or give a test that does not do so a different name. That, in and of itself, might eliminate much of the confusion.

In addition to consistency in applying the various tests, the Court must also aid the lower courts in deciding *which* test should apply to a given situation. This concept is exactly what this Comment is about. The need for consistency stems beyond the need for consistency in application of *a* specific test, but also to the consistency in application of *which* test. For example, the Fourth Circuit exclaimed:

> There is little confusion over the general concept behind the Establishment Clause . . . . There is much confusion, however, about how to apply this broad principle in specific cases. Traditionally, Establishment Clause cases have been evaluated using the *Lemon* test set out in *Lemon*. In more recent Establishment Clause cases, however, the Supreme Court has employed several different tests presented as either glosses on or replacements for the *Lemon* test; therein lies the confusion as to the applicable standard.[183]

The Fifth Circuit came across as almost defensive when it stated, "Our multi-test analysis in past cases has resulted from Establishment Clause jurisprudence rife with confusion and from our own desire to be both complete and judicious in our decision-making."[184] Thus, the need for a consistent approach seems to be as strong, or stronger, than the need for a consistent test.

Finally, the last thing to cover before moving on to the circumstantial approach proposed by this Comment is a clear understanding of the interrelationship of these tests.[185] On a view from afar, one can

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However, in that very case, she did not give much deference to the legislature. *See id.* Further, she joined the majority only two years later in a case that gave extensive weight to legislative intent. *See* Edwards v. Aguillard, 482 U.S. 578, 586 (1987).

181. *See supra* notes 175–80 and accompanying text.

182. Kimbley v. Lawrence County, Ind., 119 F. Supp. 2d 856, 864 (S.D. Ind. 2000).

183. Koenick v. Felton, 190 F.3d 259, 264 (4th Cir. 1999) (citation omitted) (footnotes omitted).

184. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999).

185. *See infra* Part IV.

almost see a hierarchical level of scrutiny that is being applied based on which test is chosen.[186] For example, the coercion test, as applied by Justice Kennedy,[187] seems to be part of the analysis of the endorsement test.[188] The endorsement test, in turn, is part of the analysis of the *Lemon* test's effect prong.[189] That is to say, where a law or act violates the *Lemon* test's effect prong, in that it advances religion, then surely such a law or act also endorses religion. If the law or act endorses religion, then it probably also violates the coercion test, as applied by the majority in *Lee v. Weisman*.[190] While it may not always be true, it seems that the three tests employed by the Supreme Court to date can usually be lined up from the highest level of scrutiny to the lowest as follows: *Lemon*, endorsement, coercion. As will be seen, this phenomenon parallels another area of the Court's jurisprudence, which may serve as a model approach to Establishment Clause cases.[191]

V. When the Court Gives You Lemons, Make Lemon Aid: A Circumstantial Approach to Establishment Clause Jurisprudence

A. *Introduction to the Circumstantial Approach*

The concept of applying different levels of scrutiny to problems arising under the Constitution is far from foreign to the Court.[192] For example, cases arising under the Equal Protection Clause are given one of three levels of scrutiny: strict scrutiny, intermediate scrutiny, or rational basis review.[193] The Court has set forth clear circumstances to determine which respective level of scrutiny should be applied in a given case: a classification based on a suspect class, such as race or alienage, will receive the highest level of scrutiny.[194] Classifications based on things such as gender, will receive intermediate scrutiny, and classifications not falling within one of the other set categories (or cir-

186. *See infra* Part IV.

187. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (stating that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").

188. In the words of Justice Blackmun in his concurring opinion in *Lee*, "Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion." *Lee*, 505 U.S. at 604 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring).

189. *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

190. 505 U.S. at 587.

191. *See infra* Part V.A.

192. *See infra* Part IV.

193. *See* Choper et al., *supra* note 9, at 1137–38.

194. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 642 (1973); Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

cumstances), such as disability or age, will receive rational basis review.[195]

While this system, like any other, has its critics,[196] at least there is consistency in its application. The lower courts know which level of scrutiny to apply as soon as they determine what classification upon which the challenged law was based.[197] While Equal Protection jurisprudence may not be perfect, it is far more fair than the Court, as Justice Scalia observed, side-stepping the *Lemon* test when it wishes to uphold a law it thinks is just, only to revive it later to strike down a law it thinks should be forbidden.[198] The varying levels of scrutiny in Equal Protection jurisprudence were born out of the fact that racial minorities (as well as other classifications such as gender) were undoubtedly subjected to disparate treatment throughout much of the history of this country.[199] The Author submits that just as there are significant differences among some classifications such as race and gender, but not in others such as disability, age, or sexual preference,[200] there are likewise significant differences among various circumstances arising under the Establishment Clause. This concept has actually been touched upon by the Fifth Circuit, "The decision to apply a particular Establishment Clause test rests upon the nature of the Establishment Clause violation asserted."[201] Because the different tests used to determine whether a law or act violates the Establishment Clause are analogous to choosing what level of scrutiny should be applied,[202] the Court should borrow this concept from its other jurisprudence by setting forth clear criteria as to when each test should be applied.

The Author is far from a constitutional scholar; thus, any attempt on his part to fully set forth all the circumstances which may arise and to suggest the proper test for each would be speculative indeed. What the Author does bring to the table is a little good ole fashioned common sense. What follows are some of the categories that have been derived from the Court's jurisprudence, and a sample of how this cir-

195. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 643 (1996) (applying only rational basis to classifications based on sexual orientation); Craig v. Boren, 429 U.S. 190, 197 (1976) (adopting intermediate scrutiny for classifications based on gender).

196. *See, e.g.*, Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 615–17 (2003).

197. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985).

198. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

199. *See Korematsu*, 323 U.S. at 216; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976).

200. *See supra* Part V.A.

201. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999). The court went on to exclude the coercion test from its analysis believing that "the nature of the . . . violation asserted" eliminated the need to apply the coercion test. *See id.*

202. *See supra* Part V.A.

cumstantial approach would work. The circumstances set forth herein are not meant to be exclusive, nor the suggested test dispositive. For example, numerous scholars have suggested alternative tests to the Court's current list of choices.[203] Perhaps one of those tests, or one that has yet to be developed, is superior to the ones chosen for the circumstances that the Court may be faced with. This Comment will use the tests as they stand at the time of the writing of this paper. The purpose of this piece is not to develop a new and better test; it is to establish a circumstantial framework that can be used to determine which Establishment Clause test to use—the idea of circumstantial line drawing. What follows is intended to serve as an example of the idea at work.

The lines should be drawn wherever there is a substantial difference between two circumstances such that those circumstances give rise to the need for different degrees of scrutiny which should be applied to the law or act at issue. The circumstances—or as the Fifth Circuit might say, "the nature of the Establishment Clause violation asserted"[204]—which will be discussed in this Comment are those which have been recognized as categories in cases which give rise to an Establishment Clause question, including government aid to religion and religious expression on governmental property.[205] These circumstances are discussed below, respectively.

B. *Government Aid to Religion*

Government aid to religion has been a rather hot topic recently.[206] Government aid to religion is often in the form of government aid provided to private institutions with a religious affiliation.[207] A common and appropriate way to divide this category is distinguishing between direct aid and indirect aid.[208]

1. Direct Government Aid to Religion

A recent case dealing with direct governmental aid to religious private schools is *Mitchell v. Helms*.[209] Recall that *Mitchell* dealt with a governmental program that provided funding to state and local government, which would then lend educational materials and equipment to public and private schools, some of which had a religious affilia-

203. *See, e.g.*, Choper, *supra* note 34.
204. *Freiler*, 185 F.3d at 344.
205. *See, e.g.*, CHOPER ET AL., *supra* note 9, at 1036, 1072.
206. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (concerning vouchers redeemable for a private school tuition of one's choosing, including religious affiliated schools); Mitchell v. Helms, 530 U.S. 793 (2000) (concerning lending of materials to private religious affiliated schools).
207. *See, e.g.*, *Zelman*, 536 U.S. 639; *Mitchell*, 530 U.S. 793.
208. Members of the Court have made this distinction. *See, e.g.*, *Zelman*, 536 U.S. at 649.
209. 530 U.S. 793 (2000).

tion.[210] The plurality used the neutrality principle to interpret the "effect" prong of the *Lemon* test as it stood after *Agostini*.[211] As Justice O'Connor pointed out, however, it seemed that the plurality was really applying a straight neutrality test[212] under Chief Justice Rehnquist's interpretation of neutrality (i.e., neutrality meaning nondiscriminatory).[213]

While it is clear that there is unlikely to be agreement among the Court about the "proper" test to apply in this situation,[214] neutrality as applied by the plurality in *Mitchell* makes much sense.[215] Of course, it only makes sense to those who subscribe to the Chief Justice's view of neutrality, meaning that the government cannot discriminate among religions when it gives direct aid.[216] Opponents may argue that allowing the government to provide this aid has the effect of reducing the private contributions made to those religious institutions that receive the aid from the government, or that individuals should have the right to choose which religious institutions they wish to contribute to, and by the government providing this aid, the choice has been taken out of their hands. On the other side, there is the argument that people in private schools should not be disadvantaged as a result of inadequate funding for educational materials. For example, should students enrolled in a private school who would otherwise not have access to a computer in their schools, absent support from the government, be denied that educational opportunity because they *might* use it for religious purposes, as Justice Souter would hold?[217] If so, does that really matter? After all, they chose to go to a private school instead of the public school already provided by the government. What if the public school system is so inferior that the graduates of the public school system cannot even read and write, or conduct basic mathematical computations?[218]

There is a legitimate debate here. As promised, the Author will not engage in a "this test is the best test" argument. However, one thing must happen—the Court must be consistent in cases that raise this issue. Whatever test is the most fair for the circumstance should be applied consistently every time that circumstance is before the Court. Because the neutrality principle was used here, it will be used as an example of the circumstantial approach. All cases involving direct aid

210. *Id.* at 801.

211. *Id.* at 811–12; *see also* MASSEY, *supra* note 128, at 533.

212. *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring).

213. *See supra* Part II.A.

214. For example, compare the opinion of the plurality in *Mitchell* with the joint opinion and Justice O'Connor's separate opinion. *See Mitchell*, 530 U.S. 793.

215. *See id.* at 835–36.

216. *See supra* Part II.A.

217. *See Mitchell*, 530 U.S. at 867–68 (Souter, J., dissenting).

218. This has happened in the Cleveland, Ohio school district. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

to religious organizations should be subjected to the neutrality test, meaning that the aid must not discriminate against a religious institution, and must be equally available to all religious institutions. Otherwise, the next time a case involving direct aid is brought, a different test may be applied, which would strike down such a program, once again leading to inconsistency.

Additional subcategories within direct aid can be established. For example, there is a difference between the higher-level education, such as college, and elementary level education, in that students in elementary school are at a more impressionable age.[219] Further, there may be a difference in the levels of religious schools—pervasively sectarian, primary or secondary religious schools, *et cetera*.[220] But such subcategories do not defeat the circumstantial approach. If there is truly a substantial difference between the institutions, such that a higher or lower level of scrutiny should be applied, then that subcategory is merely a different circumstance, and the Court should set forth the test to be applied in that circumstance. If the Court is clear in its line drawing of what gives rise to the categories it has created, and which test a law in that category will be subjected to, then the additional classification will steal no consistency away from the circumstantial approach—the lower courts will know how to deal with the cases as they arise, and the legislative body writing the laws will have the consistency needed to create laws or programs that conform to the Constitution, and so on.

2. Indirect Government Aid to Religion

There is a substantial distinction to be made between direct and indirect aid, in that the power of choice resides in the individual as opposed to the government when the aid is indirect; thereby alleviating the likelihood that the government is coercing, endorsing, or advancing religion.[221]

Not long ago, there was much debate about whether the government violated the Establishment Clause by providing private school vouchers to parents of students, and allowing those parents to use the vouchers to enroll their child in a private school of their choice, including religious private schools.[222] The Court recently addressed just

219. *See* Tilton v. Richardson, 403 U.S. 672, 685 (1971) (stating that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools" (footnote omitted)).

220. This is a distinction recognized by Justice Souter. *Mitchell*, 530 U.S. at 885–86 (Souter, J., dissenting). The plurality also made it known that it was aware of such a distinction. *See id.* at 827 (plurality opinion).

221. *See Zelman*, 536 U.S. at 649–52.

222. *See, e.g.*, Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (1999).

that issue in *Zelman v. Simmons-Harris*.[223] In that case, the Court upheld the government program.[224] The majority employed a similar neutrality-based approach as was applied in *Mitchell*—meaning the majority used neutrality to ascertain whether the vouchers had the effect of advancing or inhibiting religion.[225]

Even though a similar approach was used, unlike in *Mitchell*, the Court in *Zelman* was able to swing a majority.[226] This is likely attributable to the fact that indirect aid places the choice to attend a religious school or not, and if a religious school, which religion, in the hands of the individual, as opposed to the government.

The rule from *Zelman* could fit into the circumstantial approach in one of two ways. First, one could reason that because indirect aid provides the element of private choice that direct aid does not, indirect aid should be subjected to a test that imposes a lower level of scrutiny. Thus, an approach somewhat analogous to coercion would seem appropriate. The coercion test, as applied by Justice Kennedy,[227] in the circumstance of indirect aid generally, would ensure that the government was not hiding a coercive factor wrapped in a deceitfully labeled indirect program.

Another way the circumstantial approach could treat the rule from *Zelman* is to use it as somewhat of a bright-line rule—all formally non-discriminatory programs that provide indirect aid should be upheld.[228] Either way of looking at it, the outcome will be the same, because an indirect program would pass constitutional muster so long as it does not discriminate among religions.[229] If an indirect program had a hidden agenda to advance religion in some way, the first method would catch it because the coercion test, as applied by Justice Kennedy, should strike it down.[230] Additionally, the bright-line method would catch it because it is not truly an indirect program if it does not provide the essential element of individual choice.

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223. 536 U.S. 639 (2002).

224. *Id.* at 652.

225. *Id.* at 649.

226. *See id.* at 643.

227. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

228. *See Zelman*, 536 U.S. at 652 (stating:

> [Previous decisions] make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause).

229. *See id.*

230. Recall that to Justice Kennedy "coercion" arising to the level of "[s]ymbolic recognition or accommodation of religious faith" can be enough to violate the Establishment Clause. County of Allegheny v. ACLU, 492 U.S. 573, 660–61 (1989) (Kennedy, J., concurring in part and dissenting in part). Thus, if this symbolic recognition or accommodation is sufficient, than surely a hidden religious agenda would be as well.

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3. Government Aid to Religion: The Circumstantial Approach in Action

To put the circumstantial approach to work in this arena, consider the current hot topic of charitable choice. Charitable choice is the sizzling topic of today, much the way that school vouchers were only a few years ago.[231] Charitable choice is a term used to describe welfare and social services offered through private pervasively sectarian institutions.[232]

If the program were direct, such as the government providing supplies directly to a certain charitable organization, then under the circumstantial approach, the Court should have no quarrel over which test it should apply. Instead, it would merely recognize the program as being one of the government providing direct aid and apply the test chosen for that circumstance.

If the program were indirect, such as the government providing vouchers to persons in need of the services, then the Court could use either option discussed under indirect aid, and both would lead to the same result—which would likely be that such a program would be upheld. If the first option were employed, the chosen test for this circumstance would be one that subjected the program to the lesser scrutiny of the direct program—because the indirect program provides the element of individual free choice. When the element of free choice is provided, the government's hands are clean of coercion.[233] If the bright-line rule method for this circumstance were used, the program would survive as well, so long as it is truly provided the element of private choice.

C. *Religious Expression on Government Property*

This is a large category and would likely have to be broken down into more subparts than will be done here. To serve as an example, religious expression on government property will be divided into two parts: public schools and other government property. These sections can easily be further subdivided.

1. Public Schools

How the lines are drawn will depend on whether there is a substantial difference as to how the cases that arise out of those circumstances should be handled—meaning that the circumstances that are more

231. *See generally* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (discussing the privatization of government programs and the prohibition from discriminating against religious providers).

232. *See id.* at 1384–85.

233. Coercion is being used as an example here because that was the test offered as an example under indirect aid. *See supra* Part V.B.2. Again, the purpose of this Comment is not to offer a certain test for each circumstance, but to suggest the circumstantial approach, and show how it works.

likely to contain holes, which in turn increase the likelihood of a violation of the Establishment Clause, should be subjected to a test of greater scrutiny. Public schools can likely be split into distinct subclasses: the actual classrooms while classes are in session, and other school related events—such as graduation and football games.[234] The reason for this distinction is that class attendance, being mandatory (more or less to some people), is different from students who want to go to the Friday night football game.[235] The test applied to what occurs in the classroom should subject those actions to a higher level of scrutiny than the test employed to regulate actions taken at a football game.

Historically, the *Lemon* test has dominated religious expression in public schools.[236] Such issues range from mandatory Bible reading to prayer at football games.[237] The Court does not treat all classifications the same under the Equal Protection Clause,[238] nor should it treat all laws challenged on Establishment Clause grounds the same. Practices such as teacher-led prayer and mandatory Bible reading should get the highest level of scrutiny.[239] It makes sense that some test (not necessarily *Lemon*), which affords a higher level of scrutiny, should be used to address questions such as whether creationism must be taught in conjunction with evolution.[240] But the same level of scrutiny should not apply to high school football games; yet, the Court has done so.[241]

It may well be that lines within these lines are appropriate. For example, a moment of silence law seems like it should be subject to

234. Each of these could be broken down further as necessary.

235. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 322–23 (2000) (Rehnquist, C.J., dissenting). The Author is aware that the Court found that the prayer offered at a football game under the circumstances presented in this case, was found unconstitutional under all three tests. However, as already discussed, the Author has left open the idea that the test currently employed should be replaced by others. Further, the Author is not suggesting that prayer should be allowed at football games, and is certainly not suggesting such under the circumstances as they were in *Santa Fe Independent School District.* Whatever test the Court uses, whether it is one already in existence, or a new one, should be consistent. Such a test may consistently strike down prayer at high school football games, as was done in *Santa Fe Independent School District.* The point is that there is a difference between the classroom and a football field, even if you live in Texas.

236. *See, e.g.*, Edwards v. Alliguard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985).

237. *See Santa Fe*, 530 U.S. 290 (applying all three tests); Engel v. Vitale, 370 U.S. 421, 422–23 (1962) (dealing with Bible reading).

238. *See supra* Part V.A.

239. The Court has dealt with these before. Sch. Dist. of Abbington v. Schempp, 374 U.S. 203 (1963) (dealing with teacher led prayer and Bible reading); *Engle*, 370 U.S. at 422–23 (dealing with Bible reading).

240. *Edwards*, 482 U.S. 578.

241. *Santa Fe*, 530 U.S. 290.

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less scrutiny than teaching the science of creationism.[242] Prayer at a graduation ceremony should probably get a higher level of scrutiny than prayer at a football game because a student will only experience graduation from that school once in his or her life, but the Friday night football game is once a week every year during football season; yet the Court has done just the opposite.[243]

2. Other Government Property

Issues arising in this category often involve religious symbols placed on government property, especially during the holiday season.[244] Like the cases in the public schools category, cases involving other government property should be broken down into subcategories based on which level of scrutiny should apply. Again, the question of where the line should be drawn is answered through a determination of the level of scrutiny needed. It is not being suggested that the lines should be drawn based on the religious significance of what is portrayed—it would be absurd to say that a nativity scene's religious significance changes. Rather, the lines should be drawn based on the location of the placement of the nativity scene.

For example, there may be a substantial difference between the rotunda of the courthouse and a public park. A person may be compelled to enter the courthouse—for example, under subpoena—but no one would be compelled to enter a public park. This is not to say that there should be a lenient test for religious displays in a public park. While one is not compelled to make use of a public park, he or she should have the right to use that park without having to sit down next to a nativity scene, or explain to their children why their family's chosen religion is not represented in the park. A mid-level scrutiny test—something analogous to today's endorsement test[245]—would seem appropriate, while placements in a courthouse would seem to demand a higher level of scrutiny.

There is more to the distinction between a courthouse and a park than merely the likelihood that someone would be forced to go there. People may be more likely to associate the "position" the government is taking as to a certain religion based on the location of the display. A display in or around a courthouse may imply the impression of legal meaning, while a display in a park would likely not carry such a profound connotation. Again, these are just examples.

Some may wonder how a court can deal with all the possible circumstances in deciding what approach should be employed in all the

242. *Compare Edwards*, 482 U.S. 578, *with* Wallace v. Jaffree, 472 U.S. 38 (1985). The Court applied the *Lemon* test in both cases.

243. *Compare* Lee v. Weisman, 505 U.S. 577 (1992) (applying the coercion test), *with Santa Fe*, 530 U.S. 290 (applying all three tests).

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

245. *See supra* Part IV.

varying situations. This is a worthy criticism, but one that the circumstantial approach adequately addresses. It is important to bear in mind that when the Author refers to the circumstantial approach, the terms "circumstances" and "circumstantial approach" must be distinguished. The "circumstantial approach" is the idea, the concept, and the methodology recommended for how the Court should address issues arising under the Establishment Clause.[246] In this sense, it may be helpful to think of the circumstantial approach as being a "categorical approach," in which the circumstances—such as direct government aid to religion, indirect government aid to religion, religious expression on government property, *et cetera* are thought of as categories. The "circumstances" are all the surrounding conditions and facts of a given situation or case.[247] The surrounding conditions and facts of a given situation or case are not dealt with by the circumstantial approach directly. The circumstantial approach is only a mechanism by which a court knows *which test* to apply (analogous to which level of scrutiny shall apply).[248] The circumstances of the actual cases themselves are dealt with under *the test* that is employed because of the circumstantial approach.

How the lines should be drawn has already been discussed.[249] Of course, the next concern that many would likely have is the amount of time it would take the Court to set forth the test that should be applied in what circumstances. However, one should keep in mind that any change to the Court's Establishment Clause jurisprudence will likely take time. Even if the Court came up with another test to encompass all Establishment Clause questions, what is the likelihood that the lower courts would apply it correctly?[250] It took the Court years to develop its Equal Protection Clause jurisprudence.[251] Procrastination not only delays the process, but it actually creates more mayhem as the Court continues to twist and mangle its old Establishment Clause decisions by supplementing them with additional tests and interpretations, which in turn lead to a set of unorganized decisions that the Fifth Circuit has describe as "rife with confusion."[252] The need for change in Establishment Clause jurisprudence is evident,

246. *See supra* Part V.A.

247. *See* THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE: ENCYCLOPEDIC EDITION 179 (1988 ed.).

248. *See supra* Part V.A.

249. *See supra* Part V.A.

250. For example, the Court had noted several times in dicta that the words, "under God" in the Pledge are Constitutional; yet the Ninth Circuit completely ignored the Court's dicta—a point that was acknowledged by the dissent. *See* Newdow v. United States Congress, 292 F.3d 597, 613–14 (9th Cir. 2002) (Fernandez, J., dissenting), *rev'd* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004).

251. In fact, it is still being refined today, especially in areas such as affirmative action. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

252. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999).

and continued hindrance of this change will only lead to further perplexity.

VI. CONCLUSION

The Court's Establishment Clause jurisprudence is anything but established.[253] The approach currently taken to Establishment Clause questions—the test that will be applied is the test that the most can agree on today[254]—must change. While it is true that the test in any case, involving any part of the Constitution, will always be the one that the majority decides to use, the Court has set forth clear guidelines in other areas,[255] and should do so here.

The Court refuses to pick one test and stick with it.[256] But just picking a test, at least from the list of current candidates, does seem problematic because it would treat all circumstances as if they need the same level of scrutiny. Some critics will likely respond that there is only one Establishment Clause, and that it cannot mean different things under different circumstances. It is not being argued that the Establishment Clause means different things under different circumstances. For a response to such criticism, one need go no further than the Court itself. The Court has blatantly stated that no one standard is sufficient to interpret the Establishment Clause.[257] Further, the Equal Protection Clause, like the Establishment Clause, is only one provision, yet the cases interpreting equal protection have clearly drawn distinct lines among the circumstances presented.[258] Whether a classification made by the government violates the Equal Protection Clause depends on the type of classification being made.[259] The meaning of the Equal Protection Clause itself does not change. This is similar to the nativity scene example discussed earlier.[260] The religious significance of the nativity scene as a symbol does not change, no matter where it is located. However, whether it violates the Establishment Clause might change based on location. This is a view that the Court itself has specifically adopted.[261]

How the lines are drawn will depend upon whether there is a substantial difference as to how cases that arise out of those circumstances should be handled—meaning that the circumstances that are more likely to contain holes, which in turn increase the likelihood of a

253. *See supra* Parts I, III.
254. *See supra* Part IV.
255. *See supra* Part V.A.
256. *See supra* Part I.
257. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).
258. *See supra* Part V.A.
259. *See supra* Part V.A.
260. *See supra* Part V.B.2.
261. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 598, 613–14 (claiming one of the differences was that the crèche was hung from the grand staircase in the courthouse, while the menorah was only outside the City-County Building).

violation of the Establishment Clause, should be subjected to a test which affords greater scrutiny. The statement of how the lines should be drawn is actually less complicated than it sounds. Good old-fashioned common sense can be a mighty ally. Common sense is all one needs to recognize that there is a substantial difference between activities like teacher-led prayer or Bible reading in public schools, and school vouchers provided to individuals who can choose which school, religious or not, they want to attend.

Unfortunately, borrowing from Justice O'Connor's view and shaping the question of how the lines should be drawn as to whether a "reasonable observer" would think that a higher level of scrutiny should apply to a given law or practice[262] also comes with all of the problems associated with who the "reasonable person" is.[263] For example, is the reasonable person a religious person or not?[264] If the reasonable person is religious, then what religion is he affiliated with?[265] If the reasonable person is a "nonadherent"[266] to the religion expressing the symbol or act in question, then similar complications arise. For example, if the symbol in question is a Christian symbol, would it not make a difference if the "nonadherent" were a Jew, Muslim, Atheist, or Satanist? Thus, the "reasonable person" standard seems to be unworkable regardless of the approach taken.

However, drawing lines using common sense, such as recognizing the inherent difference between direct aid and indirect aid—*who* makes the choice, the government or the individual—would provide a very usable framework for those who rely upon consistency in the Court's Establishment Clause jurisprudence, while at the same time affording the Court the greater flexibility it desires in approaching questions raised under the Establishment Clause. The Court has said:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves . . . . What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility . . . .[267]

The circumstantial approach concept would provide this much needed clarity and predictability while preserving the current flexibility.

The people, the legislature, and not to mention other courts, are reliant on the Court's decisions. Without providing consistent guidelines, the Court has left its dependents in disarray.[268] The Court

262. *See id.* at 620 (O'Connor, J., concurring).
263. *See generally* William P. Marshall, *"We Know It When We See It," The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (providing a general direction to the establishment inquiry).
264. *Id.* at 537.
265. *Id.*
266. *County of Allegheny*, 492 U.S. at 620 (O'Connor, J., concurring).
267. Comm. for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).
268. *See supra* Part I.

should use common sense and look to the history of this country to draw a clear and distinct framework for others to follow when interpreting the Establishment Clause—much the same way it has in its Equal Protection jurisprudence[269]—by drawing the lines at the points where there is a substantial difference as to how cases arise out of those circumstances should be handled. It would undeniably be a grueling process to obtain agreement from the current Court on where the lines should be drawn. However, it is doubtful that it could possibly be any more arduous than obtaining agreement in cases arising under the Establishment Clause with the jurisprudence in its current state. In drawing these lines, the Court will be forced to answer the question posed by Chief Justice Rehnquist almost a decade ago, "History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause."[270]

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269. *See supra* Part V.A.

270. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). Perhaps the Court will decide some of these issues this term, as the Court recently granted certiorari in a case where at issue was the religious expression on government property. *See* Van Orden v. Perry, 2004 WL 63551 (5th Cir.), *cert. granted*, 125 S. Ct. 346 (2004) (mem).