LIBERTY UNIVERSITY

Liberty University Law Review

Volume 6 | Issue 3 Article 5

December 2012

Audience Maturity and the Object of the Establishment Clause

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COMMENT

AUDIENCE MATURITY AND THE OBJECT OF THE ESTABLISHMENT CLAUSE

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I. INTRODUCTION

There are few issues, throughout history and still today, that evoke a stronger reaction than the subject of religion. A person's religious beliefs are an inextricably intimate and personal subject, and yet also, paradoxically, something that individuals use to interact and communicate with others. In this way, religious beliefs cannot be classified as wholly personal, wholly communal, or wholly social. Our understanding and beliefs of who God is—or our rejection that any god even exists—establishes the framework through which nearly every action and perception is governed. As such, it is no surprise that differing beliefs on the subject of religion tend to illicit very strong emotions, and if unchecked, can lead to great destruction as often as great compassion. Because of the vehemency of opinions pertaining to this subject, it is no surprise that the constitutional clause addressing it is so hotly debated and questioned. The Establishment Clause[1] touches upon this most sensitive of subjects and does so in a way that few would claim to be the model of clarity.

This Comment contends that the current Establishment Clause jurisprudence has attempted to resolve the issue of interpreting and applying the Establishment Clause while neglecting to keep the actual object[2] of that Clause—the protection of individuals from a forced violation of their freedom of conscience—in mind. This abandonment of the object of the Establishment Clause has led to a scattered—often disjointed—

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2. *See infra* Part IV (arguing that the object of the Establishment Clause is freedom of conscience). The Supreme Court has supported the notion that the Establishment Clause must be viewed through an object-type analysis. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 678 (1984) ("The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'").

spectrum of tests,[3] an unpredictable and uncertain ability to define the law,[4] and an ever-increasing hostility toward the allowance of religion to even exist in the public forum.[5]

The results of these many tests often seem to be incongruous: in Rhode Island, the inclusion of a nativity scene within the city's Christmas display was upheld,[6] while in Pennsylvania, the inclusion of a nativity scene in front of the county courthouse was struck down.[7] Again in Rhode Island, the inclusion of prayer as part of a high school's graduation ceremony was struck down,[8] while in Tennessee and Indiana, the inclusion of prayer in several school-sponsored activities—including the graduation ceremony—was upheld.[9] In Virginia, a daily prayer before mealtime within the military environment of the Virginia Military Institute was struck down,[10] while in Nebraska, the formal and official government-sponsored prayer before each legislative session was upheld.[11] These examples serve only as a fractional sampling of the numerous Establishment Clause cases and their often divergent results. Although there are many complex and nuanced factors to be considered, many of which are outside the scope of this Comment, one factor has emerged as particularly influential: audience maturity.

This Comment supports the proposition that audience maturity—when viewed within the appropriate understanding of the Establishment Clause's object—is a relevant factor in determining whether a government activity violates the Establishment Clause.[12] This emerging trend has created a

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3. *See infra* Part II.

4. *See infra* Part II.

5. *See* Stratechuk v. Bd. of Educ., 587 F.3d 597, 598-600, 610 (3d Cir. 2009) (upholding a school's decision to remove all religiously themed music from its Christmas production). This case specifically dealt with a school district that received a challenge from a parent for including certain Christmas songs in its musical program, and in response, removed all religiously themed music from its program. *Id.* at 600-01. It shows the measure of hostility that any form of religion in the public arena encounters under our modern Establishment Clause jurisprudence.

6. *See Lynch*, 465 U.S. at 687.

7. *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 578-79 (1989).

8. *See* Lee v. Weisman, 505 U.S. 577, 580, 599 (1992).

9. *See* Chaudhuri v. Tennessee, 130 F.3d 232, 233-34 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982, 983, 985 (7th Cir. 1997).

10. *See* Mellen v. Bunting, 327 F.3d 355, 360 (4th Cir. 2003).

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

12. *Cf.* Deanna N. Pihos, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, 90 CORNELL L. REV. 1349, 1354 (2005).

bridge between the often disparate Establishment Clause tests,[13] but it has also received criticism in its tendency to allow a greater degree of religious involvement in governmental activities for older, more mature audience members.[14] Because the theme of maturity has become so prevalent in modern Supreme Court opinions, it is necessary to evaluate whether focusing on maturity as a factor of analysis tends to bring Establishment Clause jurisprudence closer to its object or if it instead pushes it further into the realm of subjectivity and makes it even more difficult to know, with any degree of predictability, how any given Establishment Clause issue will be decided.

Part II of this Comment gives a brief history of Establishment Clause jurisprudence, first outlining the four major tests that can be synthesized from the modern Supreme Court holdings, describing the framework through which Establishment Clause theories are most often viewed, and then addressing where the specific issue of audience maturity has been most influential as the central factor of analysis. Part III describes the problems associated with the varying and unpredictable Establishment Clause tests and then outlines the issue of how maturity affects these tests. Finally, Part IV provides a conceptual framework through which audience maturity and a proper understanding of the object of the Establishment Clause may be applied in an evaluation of the various tests described in Part II. This framework is essential for an appropriate understanding of the Establishment Clause—not as a general protection against exposure to others' religious beliefs and practices but as protection against the forcible infringement by the government of an individual's right of conscience and freedom to worship as he deems appropriate.

II. LAYING THE FOUNDATIONS

A. *Establishment Clause Jurisprudence: A Tangle of Standards*

The current Establishment Clause[15] jurisprudence does not lend itself to a simple and conclusive analysis.[16] It is incredibly difficult to predict with

13. *See infra* Part II. The focus on the audience when evaluating whether certain speech or activity becomes a law respecting the establishment of religion is starting to become a unifying theme among several of the Establishment Clause tests.

14. *See infra* Part III.B.

15. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

16. Lynch v. Donnelly, 465 U.S. 668, 679 (1984). Justice Burger posited:

any degree of certainty how the Supreme Court will rule on many of the Establishment Clause cases that go before it; its previous holdings do not provide an easily applicable standard. Even a Justice of the Supreme Court has noted that Establishment Clause jurisprudence is in "hopeless disarray."[17] This has resulted in the strange situation where in different cases involving materially similar issues, the Court has come down on seemingly dichotomous sides based on a wide spectrum of attendant circumstances.[18] The ambiguous nature of the constitutional language itself serves only to complicate this problem.[19]

Although there is no single standard by which Establishment Clause cases are decided, most of the Court's decisions can be condensed into one of three (or sometimes four) primary tests.[20] Although the *Lemon* test[21] still remains one of the most frequently applied tests,[22] the Court has found it

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> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon*, *supra*. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.

Id.

17. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

18. *See Lynch*, 465 U.S. at 671, 687 (holding that a government-owned Christmas display including a crèche was permissible). *But see* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 580, 621 (1989) (holding a Christmas display including a crèche was a violation of the Establishment Clause under slightly different circumstances).

19. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

20. *See* Pihos, *supra*, note 11, at 1354-55 (showing that the Supreme Court has often turned to either some mixture of the *Lemon* Test, the Coercion Test, the Endorsement Test, or the *Marsh* analysis); *see also* Mellen v. Bunting, 327 F.3d 355, 369-70 (4th Cir. 2003) (pointing to the several Establishment Clause tests—*Marsh* analysis, *Lemon* Test, Endorsement Test, and Coercion Test—that have been formulated by the Supreme Court).

21. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

22. Commenting on the state of Establishment Clause jurisprudence in the vacuum left by failing to adhere to only one test, Robert Stelle writes:

> In spite of the high degree of uncertainty regarding these questions, still another issue is even more troubling. Specifically, the Supreme Court has failed in recent years to clearly articulate just exactly what the proper legal test is that is to be applied to alleged violations of the Establishment Clause. There have been many "tests" promulgated in the past, but the current state of the law is unsettled at best.

Robert C. Stelle, *Religious Freedom in the Twenty-First Century: Life Without Lemon*, 23 S. Ill. U. L.J. 657, 658 (1999).

often necessary to deviate from it and has subsequently established several other standards of review.[23]

1. The Infamous *Lemon* Test

In the 1971 case of *Lemon v. Kurtzman*,[24] the Supreme Court established a three-prong test for evaluating and deciding Establishment Clause issues.[25] The Court addressed two statutes—one from Pennsylvania, the other from Rhode Island—that provided supplemental funding to private religious schools.[26] The Pennsylvania statute provided for reimbursement to the school for some of the expenses associated with specific secular subjects, while the Rhode Island statute provided that teachers who taught in private schools would be paid a supplement to their salary from the state for teaching certain secular subjects.[27] The Court reasoned that, had the Establishment Clause merely barred formal establishment of religion, the application of the Clause in law would have been much clearer.[28] Instead, the Establishment Clause prohibits any "law *respecting* an establishment of religion."[29] Because of this "opaque" language,[30] the Court felt it necessary to approach the analysis by examining the three main evils that the Establishment Clause was intended to prevent: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[31] In an effort to address each of these perceived evils—wherein governments are seen as violating the Establishment Clause—the *Lemon* Court created the following three-prong test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[32]

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23. *See supra* note 2.
24. *Lemon*, 403 U.S. 602.
25. *Id.* at 612-13.
26. *Id.* at 606-07.
27. *Id.* at 606-08.
28. *See id.* at 612.
29. U.S. CONST. amend. I.
30. *Lemon*, 403 U.S. at 612.
31. *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (internal quotation marks omitted).
32. *Lemon*, 403 U.S. at 612-13 (citations omitted) (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); *Walz*, 664 U.S. at 674) (internal quotation marks omitted).

The first prong of the test requires that courts determine whether a particular statute has a secular purpose.[33] In determining whether a particular action of government has a secular purpose, courts must look to "whether government's actual purpose is to endorse or disapprove of religion."[34] Additionally, although there must be *a* secular purpose, the Supreme Court has made it clear that the purpose need not be *exclusively* secular.[35] Furthermore, unless the government's secular purpose is clearly a pretext or a "sham," courts must accord deference to the government's purported secular purpose.[36]

The second prong of the test requires courts to ask whether the primary effect of the governmental action is one that advances or inhibits religion.[37] Historically, in evaluating Establishment Clause claims under the *Lemon* test, the Supreme Court has construed this prong as liberally as it has construed the secular purpose prong, thus "permitting intentional accommodations of religion so long as some secular . . . effects are present."[38] In further refining this particular prong, many courts have analyzed it by asking what a "reasonable observer" would think the primary effect of the governmental action was.[39] This observer is also assumed to be informed[40] of "all of the pertinent facts and circumstances surrounding the symbol and its placement."[41] "If a reasonable observer would conclude that the message communicated is one of either endorsement or disapproval of

33. This has since been expanded to include any action of government, not only legislative ones. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 271-72 (1981) (applying the *Lemon* Test to actions taken by a university); Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997) (applying the *Lemon* Test to prayer in a university environment).

34. Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984)); *see also* Wallace v. Jaffree, 472 U.S. 38, 56 & n.42 (1985).

35. *Lynch*, 465 U.S. at 681 & n.6.

36. *Edwards*, 482 U.S. at 586-87.

37. *Lemon*, 403 U.S. at 612-13.

38. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 1086 (Vicki Been et al. eds., 3d ed. 2009); *see also Lynch*, 465 U.S. at 681-82.

39. *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 620 (1989) ("While an adjudication of the display[] . . . must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions . . . the constitutionality of its effect must also be judged according to the standard of a reasonable observer.") (internal quotations omitted); Chaudhuri v. Tennessee, 130 F.3d 232, 237 (6th Cir. 1997) ("If a reasonable observer would conclude that the message communicated is one of either endorsement or disapproval of religion, then the challenged practice is unlawful.").

40. Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003).

41. Salazar v. Buono, 130 S. Ct. 1803, 1819-20 (2010).

religion, then the challenged practice is unlawful."[42] The element of the "reasonable observer" began to bleed into the *Lemon* test analysis after Justice O'Connor penned her concurring opinion in *Lynch v. Donnelly*,[43] and it remains controversial both in its use here as well as in the "endorsement test," as discussed below.[44] This also indicates that a governmental practice that fails the second prong of the *Lemon* test is invalid, even if it passed the first prong.[45]

The third prong of the *Lemon* Test analysis requires a court to evaluate whether a governmental action results in an "'excessive . . . entanglement with religion.'"[46] In assessing entanglement, courts must look to several factors, including "character and purposes" of organizations affected, the "nature of the aid," and type of relationship that is formed between the government and the religious authority.[47] Where certain institutions are benefited, the courts will assess a law's effect by determining whether the institution's character is "predominantly religious."[48] In applying this "excessive entanglement" prong, courts are concerned primarily with situations where there are either excessive connections between government administration and religious organizations or certain actions caused by

42. *Chaudhuri*, 130 F.3d at 237 (citing *Cnty. of Allegheny*, 492 U.S. at 597 (plurality opinion)); *see also* Am. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1543-44 (6th Cir. 1992)).

43. *Salazar*, 130 S. Ct. at 1824.

44. *See infra* Part II(A)(ii).

45. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). It should be noted that Justice O'Connor's position is a sharp turn from what the Court actually held and where analysis under this prong had gone up until now. Although the Court began to incorporate her analysis more and more, *see infra* Part II(A)(ii), the majority opinion in *Lynch*—and the Court up until then—did not endorse Justice O'Connor's approach to determine whether a governmental action has the primary effect of endorsing religion. *Compare Lynch*, 465 U.S. at 681-82 (majority opinion) (using the qualifying adjective "primary" before "effect," indicating that some effect of advancing or inhibiting religion is permissible as long as it is not the primary effect), *with id.* at 690 (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). Justice O'Connor would have had the test changed to strike down any governmental practice that "conveys *a* message of endorsement or disapproval." *Id.* The majority went on to specifically address this point in asserting that, "not every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* at 683 (internal quotations omitted).

46. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

47. Agostini v. Felton, 521 U.S. 203, 232 (1997) (quoting *Lemon*, 403 U.S. at 615).

48. *Id.* at 232 (quoting Meek v. Pittenger, 421 U.S. 349, 363-64 (1975)).

government that are particularly divisive along religious lines.[49] It is also important to note that although the *Lemon* Test has been somewhat emaciated by the implementation of various other tests, many of the other tests incorporate elements of the *Lemon*'s three-pronged analysis.[50]

2. The Endorsement Test

The Endorsement Test, as it has come to be called, first appeared in a concurring opinion by Justice O'Connor in *Lynch v. Donnelly*.[51] Justice O'Connor posited that the Establishment Clause is violated when government makes "adherence to a religion relevant in any way to a person's standing in the political community."[52] She went on to say that this can happen in two primary ways:[53] excessive entanglement[54] and "government endorsement or disapproval of religion."[55] Justice O'Connor also advocated that although "political divisiveness" should not be an independent ground for finding a governmental action unconstitutional, it was an "evil addressed by the Establishment Clause"[56] but should be separated out from the excessive entanglement prong of the *Lemon* Test.[57] The Court has frequently used Justice O'Connor's approach for Establishment Clause analysis in its opinions since *Lynch*[58] and eventually adopted it in the case of *County of Allegheny v. ACLU*.[59]

Despite its somewhat frequent use, this test, in many ways, is nothing more than a re-worked version of the *Lemon* Test—"a derivative of the first

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49. Shahin Rezai, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U.L. REV. 503, 518-19 (1990).

50. *See infra* Parts II(A)(ii-iv).

51. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring).

52. *Id.* at 687.

53. The similarities between Justice O'Connor's test and the *Lemon* test have led many to classify her "endorsement test" as a modification to the *Lemon* Test, whereby she has condensed the first two elements into one (the endorsement element) and kept the third element intact. *See* Pihos, *supra* note 11, at 1357-58.

54. This part of Justice O'Connor's test remains substantially similar to the third prong of the *Lemon* Test. *See supra* Part II(A)(i). Justice O'Connor clarifies that entanglement "may interfere with the independence of the [religious] institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines." *Lynch*, 465 U.S. at 688.

55. *Lynch*, 465 U.S. at 688.

56. *Id.* at 689.

57. *Id.*

58. *See, e.g.*, Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314-16 (2000).

59. Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1037 (9th Cir. 2010).

(secular purpose) and second (primary effect) prongs of Lemon."[60] The major difference between the two tests is that the Endorsement Test takes the position that "any endorsement of religion [is] invalid."[61] In order to understand the effect of the Endorsement Test in light of *Lemon*, one of two things must be true: either *endorsement* of religion is, per se, more egregious than having the primary effect of advancing or inhibiting religion, or the primary effects prong of the *Lemon* Test is overruled. Because the Court has refused to acknowledge that *Lemon* is overruled,[62] we are left with the necessity of employing both *Lemon* and the Endorsement Test, even though some argue that one is merely an expansion of the other.[63]

3. The Coercion Test

In the words of Justice Kennedy, writing for the Court, "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[64] The origin of this so-called Coercion Test is found in *Lee v. Weisman*,[65] where the Court began its analysis of an Establishment Clause issue by laying out the elements of the three-prong *Lemon* Test, but then—based on the inability of *Lemon* to appropriately address the specific issue at hand—shifted its focus and based its holding upon something different.[66] In analyzing the issue of prayer during the graduation ceremony at a public middle school, the Court turned to the question of whether such prayer would have a "coercive" effect on children of this particular age.[67] This Coercion Test attempts to answer whether a governmental action might actually compel some sort of adherence or belief in religion.[68] One author has posited that this test developed because, although "the Lemon test considers the government's purpose, effect, and

60. Benjamin D. Eastburn, *Hold That Line! The Proper Establishment Clause Analysis for Military Public Prayers*, 22 REGENT U. L. REV. 209, 225 (2009).

61. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (citation omitted) (internal quotation marks omitted).

62. *See, e.g.*, *Santa Fe*, 530 U.S. at 314 (applying the *Lemon* Test, but calling the three elements of that test "three factors . . . which guide[] the general nature of our inquiry in this area").

63. Pihos, *supra* note 11, at 1357 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1992)).

64. Lee v. Weisman, 505 U.S. 577, 587 (1992).

65. Eastburn, *supra* note 59, at 223.

66. *Lee*, 505 U.S. at 584-85.

67. *Id.* at 592.

68. Pihos, *supra* note 11, at 1358.

involvement with religious activity,"[69] it fails to address situations where the government's activity actually compels certain religious activity.[70] If a government action compels religious action or participation in religious activities, then it is considered to endorse that religion.[71] This endorsement, in turn, violates the Establishment Clause.

In many ways, the Coercion Test established in *Lee* seems a simplification of the three prongs of the *Lemon* Establishment Clause analysis, and it has become the primary test used for evaluating cases involving school prayer.[72] The idea is that in the context of schools, especially with younger students, peer pressure and the desire to conform to the school authorities might effect a coercive pressure upon a student who is subjected to a formal prayer during a school-sponsored event such as a graduation.[73] The Court emphasized that in determining whether an action might have a coercive effect, the perceptions and character of the audience must be taken into account.[74] "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[75] The Court made it very clear that it was not holding that prayer of this type was *de facto* unconstitutional, but rather that in this particular context, due to the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,"[76] it violated the Establishment Clause.[77]

4. *Marsh v. Chambers*

The Supreme Court took an almost entirely different approach to Establishment Clause jurisprudence in the case of *Marsh v. Chambers*.[78] In *Marsh*, the Court evaluated the practice of using a paid chaplain to open legislative sessions with prayer by asking whether that practice would have

69. *Id.*

70. *Id.*

71. *See Lee*, 505 U.S. at 588-89; Brown v. Gilmore, 258 F.3d 265, 280 (4th Cir. 2001).

72. *See, e.g., Lee*, 505 U.S. at 592-93; Mellen v. Bunting, 327 F.3d 355, 370-71 (4th Cir. 2003); Tanford v. Brand, 104 F.3d 982, 985-86 (7th Cir. 1997); Chaudhuri v. Tennessee, 130 F.3d 232, 238-39 (6th Cir. 1997).

73. *See Lee*, 505 U.S. at 592-93.

74. *Id.*

75. *Id.* at 592.

76. *Id.*

77. *Id.* at 599.

78. Marsh v. Chambers, 463 U.S. 783 (1983).

been seen as a violation of the Establishment Clause at the time the First Amendment was ratified.[79] The Court pointed to the fact that the very same writers who drafted the First Amendment—and in particular, the Establishment Clause—had previously voted in the same week to pass a congressional act authorizing a chaplain for the national Congress.[80] This is at odds with the understanding that the authors of the First Amendment would have considered legislative prayer to be something "respecting an establishment of religion."[81] According to the Court, "[t]his interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view."[82]

The Court found that prayer in this context was not an "'establishment' of religion or a step toward establishment," but rather "simply a tolerable acknowledgement of beliefs widely held among the people of this country."[83] This use of language is significant. Just as the *Lemon* Court emphasized the distinction between a law that would *actually* establish religion and a law *respecting* the establishment of religion,[84] the *Marsh* Court made the distinction between "establishment" of religion and "a step toward establishment."[85] Under this holding, it is plausible to assume that the Court has interpreted a "law *respecting* an establishment of religion"[86] as being a law taking "step[s] toward establishment."[87]

Justice Brennan, dissenting in *Marsh*, attempted to minimize the effect of the holding by relegating it to "an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."[88] Justice Brennan's characterization of the *Marsh* holding was an attempt to limit the effect that it might have on future Establishment Clause cases, claiming instead that *Marsh* upheld legislative prayer only "on account of its 'unique history.'"[89] Because of the majority's use of history in determining whether a certain governmental practice is actually a violation of the Establishment Clause, Justice Brennan claimed that the Court had

79. *Id.* at 790-92.
80. *Id.* at 790.
81. U.S. CONST. amend. I; *see Marsh*, 463 U.S. at 790-91.
82. *Marsh*, 463 U.S. at 792 (citations omitted) (internal quotation marks omitted).
83. *Id.*
84. *See supra* Part II(A)(1).
85. *Marsh*, 463 U.S. at 792.
86. U.S. CONST. amend. I (emphasis added).
87. *Marsh*, 463 U.S. at 792.
88. *Id.* at 796 (Brennan, J., dissenting).
89. *Id.* at 795 (Brennan, J., dissenting).

simply "exempted [legislative prayer] from the First Amendment's prohibition against the establishment of religion."[90]

In his dissenting opinion in *County of Allegheny v. ACLU*, Justice Kennedy took exception to Justice Brennan's position.[91] Justice Kennedy criticized Justice Brennan's comments, pointing out that the premise of Justice Brennan's criticism—that "historical patterns ca[n] justify contemporary violations of constitutional guarantees"[92]—is an erroneous understanding of the Court's holding in *Marsh*.[93] Instead, "*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."[94] Accordingly, the rule adopted in *Marsh* is not some arbitrary exception to an otherwise consistent rule; rather, it is "[a] test for implementing the protections of the Establishment Clause."[95] Regardless of which side of this discussion one comes down on, one thing remains true: under either view, the *Marsh* Court—both the majority and dissenting opinions—was very clear in stating that historical precedence does not, by itself, exempt a practice from Establishment Clause scrutiny, but it is also "not something to be lightly cast aside."[96]

B. *The Doctrinal Foundations: Understanding the Establishment Clause Through the Doctrinal Lens of Strict Separation, Accommodation, and Flexible Accommodation*

For the purposes of this Comment, it is important to understand that some scholars view Establishment Clause jurisprudence through a lens that stands apart from the actual tests the Court has in place for evaluating Establishment Clause issues.[97] This approach views all Establishment Clause issues as being evaluated—no matter which test is applied—based on one of "three schools of thought: strict separation, accommodation, and flexible accommodation."[98] Under the strict separation viewpoint, Jefferson's

90. *Id.* (internal quotation marks omitted).

91. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 669-70 (1989) (Kennedy, J., dissenting in part).

92. *Id.* (quoting *Marsh*, 463 U.S. at 790).

93. *Cnty. of Allegheny*, 492 U.S. at 670.

94. *Id.*

95. *Id.*

96. *Marsh*, 463 U.S. at 790.

97. Rezai, *supra* note 48, at 506.

98. *Id.*

statement regarding a "wall of separation between church and state" has been adopted as the measure of Establishment Clause violations[99] and is interpreted "as prohibiting not only an official establishment of a church but also requiring an absolute bar against governmental actions affecting religion and religious practices."[100] The second and third approaches—accommodation and flexible accommodation[101]—view the Establishment Clause and the Free Exercise Clause as being in a constant state of tension,[102] but that both have the same ultimate goal of "protecting religious freedom.[103] To resolve the tension between the two clauses,

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99. An example of the strict separationist view can be found in the dissenting opinion of *Everson v. Bd. of Educ.*:

> Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth. New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure.

Everson v. Bd. of Educ., 330 U.S. 1, 29 (1947) (Rutledge, J., dissenting). The New Jersey statute at issue involved the use of public funds—through public buses—for transportation of students to private Catholic schools. *Id.* at 29-30.

100. Rezai, *supra* note 48, at 507.

101. In *Lynch*, the Court argued that the "wall between church and state" was "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." Lynch v. Donnelly, 465 U.S. 668, 673 (1984). The Court further emphasized the tension between the two religious clauses and how that tension is resolved in stating:

> [T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. (citations omitted) (internal quotation marks omitted).

102. Rezai, *supra* note 48, at 511. This tension exists because, as one author writes:

> Accommodationists argue that there is an inherent tension between the free exercise and establishment clauses and that if each were taken to its logical conclusion they will inevitably clash. For example, some neutral government actions burden religious practices, compelling the government to either modify its actions or to provide exemptions to avoid hindering the free exercise of religion. Such modifications or exemptions, however, clash with the establishment clause's prohibition against state action based on religious grounds.

Id. at 511-12.

103. *Id.* at 513.

accommodationists have taken the view that "the establishment clause [functions] more as a prohibition against the state's interference in matters of conscience [rather] than as a safeguard against religious encroachment on the political process."[104]

C. *Landing in the Battle Zone: Audience Maturity and the Establishment Clause Tests*

1. Maturity as the Analytical Focus

In her article, *Assuming Maturity Matters: The Limited Reach of the Establishment Clause at Public Universities*, Deanna Pihos addresses the specific issue of school prayer in higher education environments.[105] In particular, she discusses the various Establishment Clause tests[106] and shows how the courts have, both directly[107] and indirectly,[108] attributed a different degree of examination and scrutiny based on differences in audience maturity.[109] She goes on to note that the Supreme Court, in *Marsh v. Chambers*,[110] mentioned that members of the legislature are adults and thus not susceptible to peer pressure and coercion.[111] By comparing the results from cases such as *Lee v. Weisman*[112] and *Marsh v. Chambers*[113] and evaluating the various court holdings and dictum,[114] Pihos arrives at the following conclusion: "it is clear that the level of education at which the prayer occurs is a crucial factor in determining the scrutiny to which the

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104. *Id.*

105. Pihos, *supra* note 11, at 1349.

106. *Id.* at 1356-59.

107. *Id.* at 1363-64. ("The Supreme Court has cited both the age and maturity of the prayer's audience as a justification for why instances of prayer in higher education might demand less exacting scrutiny than prayer in primary or secondary education.").

108. *Id.* at 1363. The author writes:

> Despite a dearth of case law directly addressing prayer in higher education, the reasoning in cases addressing other types of Establishment Clause violations in higher education, as well as dicta in cases addressing school prayer at the primary and secondary levels, reveals that courts are likely to scrutinize prayer differently based on the level of education at which it occurs.

Id.

109. *Id.* at 1363-66.

110. Marsh v. Chambers, 463 U.S. 783, 783 (1983).

111. Pihos, *supra* note 11, at 1365 (quoting *Marsh*, 463 U.S. at 792).

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

113. *Marsh*, 463 U.S. 783.

114. Pihos, *supra* note 11, at 1362-65.

Court will subject the prayer."[115] Regardless of whether the author's underlying assumptions—prayer's appropriate place, whether the level of education is indicative of maturity, and whether maturity should even be an appropriate factor—are correct, it is clear that she has identified an important observation: audience maturity is a significant factor in determining whether a government action violates the Establishment Clause under the modern Court's interpretation of that clause.

2. Maturity and Higher Education: Prayer at Public Universities.

To understand the relevance of maturity in Establishment Clause cases, the three cases of *Tanford v. Brand*,[116] *Chaudhuri v. Tennessee*,[117] and *Mellen v. Bunting*[118] must be more thoroughly discussed.

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115. *Id.* at 1365. The author goes on to state that

> [b]y prominently invoking age and maturity in *Marsh*, and subsequently reiterating in school prayer cases that a prayer's threat may vary depending on the level of education at which the prayer occurs, the Court has created a challenging environment for plaintiffs who wish to contest state-sponsored prayer at public universities. This environment has enabled the circuits that have thus far addressed prayer in a university setting to forego any meaningful discussion about the effects and concerns surrounding prayer in higher education by simply citing the age and maturity of the audience.

Id.

Note the language used in the above quote. The author hits on a very important distinction the courts have looked to in determining establishment clause cases. However, the author points specifically to the "prayer's threat," and the subsequent "challenging environment" that the courts have created through this test as if assuming that a difficulty in challenging this type of action is necessarily wrong. The underlying assumption to her argument, one must presume, is that something closer to an absolute separation of church and state is ideal. Thus, the idea is that a difficulty in challenging this type of behavior is a bad thing only insofar as those specific things are, in-and-of-themselves, violations of the Establishment Clause; if any prayer is assumed to be violative of the Establishment Clause, then her assertion would be absolutely correct, and the implication she gives that such holdings are erroneous would similarly be appropriate. However, if an absolute separation of church and state is not the ideal endpoint, then a critical evaluation and understanding of maturity might warrant a closer look than Pihos would have the court give it, and her critical language regarding the "challenging environment" reflects exactly what it ought to reflect.

It is important to emphasize, however, that she does not prove the assumption of absolute separation or that prayer should absolutely be disallowed. Quite to the contrary, the courts—through the very cases she mentions—have established that certain exhibitions of prayer are *not* violative of the Establishment Clause. The importance of carefully distinguishing "prayer" as a stand-alone violation, and prayer—in the context of the specific situation—will be further addressed in Part III.

116. Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997).

117. Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997).

In *Tanford*, the Seventh Circuit Court of Appeals analyzed the issue of prayer within the public university environment under two different Supreme Court standards, and it found that under either standard, the practices of the university[119] were constitutional.[120] The first standard it looked to was the rule established in the case of *Lee v. Weisman*,[121] where the Court held that the inclusion of an invocation at a middle school commencement ceremony violated the Establishment Clause because it exerted coercive pressure on students of primary and secondary school age to participate in the speaker's prayer.[122] The *Tanford* court held that this standard was inapplicable to the case before it because the plaintiffs were "adults rather than younger students requiring special solicitude."[123] The court reasoned that adult students were not as susceptible to peer-pressure, and that in this case, "there was no coercion—real or otherwise—to participate."[124] The implication is that adults are able to discern and filter for themselves what they do or do not wish to participate in and believe, and thus, there was no longer a sense that participation in the religious exercise was "in a fair and real sense obligatory."[125]

The second standard the *Tanford* court applied[126] was the *Lemon* Test.[127] Using this test, the court found that the invocation and benediction had the legitimate secular purpose of "solemnizing public occasions."[128] The court emphasized that "the First Amendment was not intended to prohibit states [here a university] from sanctioning ceremonial invocations of God. Such action simply does not amount to an establishment of religion"[129] Finally, the court reasoned that the process of inviting a clergy member to give the invocation and benediction was not "excessive entanglement of church and state."[130] The inclusion of a religious invocation and benediction at a public

118. Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).

119. The plaintiffs in *Tanford* filed for an injunction against Indiana University that would prohibit it from giving an invocation or benediction during the May 19, 1995 Commencement Ceremony. *Tanford*, 104 F.3d at 983.

120. *Id.* at 985-86.

121. *Id.* at 985.

122. Lee v. Weisman, 505 U.S. 577, 593 (1992).

123. *Tanford*, 104 F.3d at 985.

124. *Id.*

125. *Id.* (quoting *Lee*, 505 U.S. at 586).

126. *Id.* at 986.

127. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

128. *Tanford*, 104 F.3d at 986.

129. *Id.* (quoting Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992).

130. *Id.*

university or college event was not found to be a violation of the Establishment Clause.[131]

During that same year, the Sixth Circuit Court of Appeals addressed this very issue[132] in the case of *Chaudhuri v. Tennessee*[133] and scrutinized it with an extensive and detailed *Lemon*-test analysis.[134] In addressing the first element, often called the "secular purpose" element, the court emphasized that a government activity need not be exclusively secular, but rather it must only have *a* secular purpose.[135] The court pointed to several Supreme Court decisions showing that a purported secular purpose is entitled to deference "unless it seems to be a sham."[136] The court found that "[a] prayer may serve to dignify or to memorialize a public occasion. . . . These are legitimate secular purposes."[137] Furthermore, the court reasoned that even though the particular prayers under evaluation evoked "a monotheistic tradition not shared by Hindus such as Dr. Chaudhuri,"[138] it was nonetheless valid because, under *Chambers*, if the prayer has not "been exploited to proselytize or advance any one, or to disparage any other, faith or belief," then the specific content of the prayer is not the concern of the court.[139]

In addressing the second prong of the *Lemon* Test, commonly referred to as the "primary effects" prong, the *Chaudhuri* court found that no

131. *Id.*

132. The original complaint in *Chaudhuri* was against the university's practice of including a benediction or invocation at various university functions, such as graduation exercises, faculty meetings, dedication ceremonies, and guest lectures. Chaudhuri v. Tennessee, 130 F.3d 232, 233-34 (6th Cir. 1997). After the plaintiff filed his suit, however, the university changed its policy to include only a moment of silence at these types of events. *Id.* The Sixth Circuit Court of Appeals addressed both of these issues in its opinion; although the claim for an injunctive action against the university had become moot in regard to the actual invocations and benedictions, the plaintiff continued to seek monetary damages, which caused it to remain a live controversy. *Id.* at 235.

133. Both cases were decided in 1997. *Tanford*, 104 F.3d at 982; *Chaudhuri*, 130 F.3d at 232.

134. *Chaudhuri*, 130 F.3d at 236-38.

135. *Id.* at 236 (referencing Lynch v. Donnelly, 465 U.S. 668, 681 & n.6 (1984); Bown v. Gwinnett Cnty. Sch. Dist., 112 F.3d 1464, 1469 (11th Cir. 1997).

136. *Id.* at 236 (referencing Edwards v. Aguillard, 482 U.S. 578, 585 (1987); *Bown*, 112 F.3d at 1469).

137. *Id.*

138. Dr. Dilip K. Chaudhuri, the plaintiff, was a professor of mechanical engineering at Tennessee State University. He was "[a]n adherent of the Hindu religion" and filed suit against "TSU's custom of having prayers offered at university functions such as graduation exercises, faculty meetings, dedication ceremonies, and guest lectures." *Id.* at 233-34.

139. *Id.* at 237 (quoting Marsh v. Chambers, 463 U.S. 783, 794-95); *Id.* at 233-34.

reasonable observer would conclude from the prayer that the university was trying to indoctrinate the audience.[140] Finally, the court disposed of the third prong of the *Lemon* Test—the "excessive entanglement" prong—by reasoning that inviting a local clergyman or a professor at the university to speak at graduation, and requesting that their prayers be nonsectarian in nature, did not constitute "any church-state entanglement at all, let alone 'excessive' entanglement."[141] Without relying exclusively on the issue of maturity, the court undertook a *Lemon*-test analysis and concluded that the Establishment Clause had not been violated by the inclusion of benedictions and invocations at various University events.[142]

The *Chaudhuri* court went on to explain why *Lee v. Weisman* was not applicable to the case before it.[143] While emphasizing that the Supreme Court has specifically declined to address whether this type of prayer was "acceptable if the affected citizens are mature adults," it acknowledged that "the State may not . . . place primary and secondary school children in this position."[144] The *Chaudhuri* court relied on the emphasis of the Supreme Court in *Lee* to distinguish the two cases, by pointing to the increased concerns when dealing with children in primary and secondary school settings, because younger-aged children are more susceptible to pressure and indirect coercion.[145] The court then explained how unreasonable it would be to assume that a mature adult would be indoctrinated by this type of prayer.[146] The court held that, even if Dr. Chaudhuri had been required to attend the events,[147] "he would not have had to participate in the prayers or pay any attention to them."[148] As a result, "[t]here was absolutely no risk that Dr. Chaudhuri—or any other unwilling adult listener—would be indoctrinated by exposure to the prayers."[149]

Only in the context of an authoritarian, military-style university level program has prayer for college-aged adults ever been held to constitute a

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140. *Id.* at 237 ("It would not be reasonable to suppose that an audience of college-educated adults could be influenced unduly by prayers of the sort in question here.").

141. *Id.* at 234, 238.

142. *Id.* at 236-38.

143. *Id.* at 238-39.

144. *Id.* at 238 (quoting Lee v. Weisman, 505 U.S. 577, 593 (1992)).

145. *Id.*

146. *Id.* at 239 ("'[H]ere there was no coercion—real or otherwise—to participate' in the nonsectarian prayers." (quoting Tanford v. Brand, 104 F.3d 982, 985 (7th Cir. 1997)).

147. Graduation ceremonies, faculty meetings, guest lectures, etc. *Id.*

148. *Id.*

149. *Id.*

violation of the Establishment Clause.[150] In *Mellen*, a chaplain led a "supper prayer" every night before the cadets were allowed to eat at the Virginia Military Academy (VMI).[151] Although cadets were not "obligated to recite the prayer, close their eyes, or bow their heads," they were forced to "remain standing and silent while the supper prayer [was] read."[152] The school adhered to a strict militaristic structure where obedience was expected, and conformity and compliance strictly required; it was an "adversative method involv[ing] a rigorous and punishing system of indoctrination."[153] This system allowed for the entire class to be punished for the errors or mistakes of a single individual or, conversely, for the entire class to be praised for the exemplary behavior of a single individual.[154]

Under these facts, the Fourth Circuit Court of Appeals held that prayer recitation before each supper violated the Establishment Clause, because "VMI's adversative method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code."[155] The court emphasized this unique situation in distinguishing this case from the decisions of its sister courts in the Sixth and Seventh Circuits.[156]

Impliedly agreeing with the decisions in *Chaudhuri* and *Tanford*,[157] the Fourth Circuit reasoned that the more appropriate test to apply in this situation was the Coercion Test established in *Lee*.[158] Even though the VMI cadets were college-aged adults, "in VMI's educational system they [were] uniquely susceptible to coercion."[159] Having summarily dismissed *Marsh* as

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150. Mellen v. Bunting, 327 F.3d 355, 371-72 (4th Cir. 2003).

151. *Id.* at 362.

152. *Id.* (alteration in original).

153. *Id.* at 361 (alteration in original).

154. *Id.*

155. *Id.* at 371.

156. Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997); Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997). In drawing this distinction, the *Mellen* court commented:

> It is undoubtedly true that grade school children are particularly "susceptible to pressure from their peers towards conformity." Recognizing a difference between such children and college students, certain of our sister circuits have approved the decisions of public universities to offer an invocation at graduation ceremonies . . . because "an audience of college-educated adults could [not] be influenced unduly by prayers of the sort in question here."

Mellen, 327 F.3d at 371 (quoting Lee v. Weisman, 505 U.S. 577, 593 (1992); *Chaudhuri*, 130 F.3d at 237).

157. *Id.*

158. *Id.* at 371-72.

159. *Id.* at 371 (alteration in original).

a point of analysis,[160] the Fourth Circuit held that prayer in the context of VMI's adversarial system of education was impermissible.[161] "Because of VMI's coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults."[162]

III. THE PROBLEM WITH MATURITY AS THE END-POINT OF ANALYSIS

A. *A Law with no Predictability*

As described above, the current state of Establishment Clause jurisprudence is almost incoherent.[163] One of the law's central purposes is to provide those whom it governs with predictability in knowing whether their actions comport with lawful behavior. A law that lacks predictability becomes ineffective and seemingly arbitrary.[164] The multiplicity of Establishment Clause tests[165] reveals the weakness in our legal system's approach to this very important issue. As a result, case outcomes are largely determined by the personal views of the Justices. Even in situations with

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160. *Id.* at 369-70.

161. *Id.* at 360, 376-77. The court also noted that the "supper prayer" had only been instituted in 1995, *id.* at 362 n.5, possibly attempting to dispel any idea that it was grounded in the historic traditions of this nation. Although the Fourth Circuit summarily dismissed *Marsh v. Chambers* as applicable in its case, it did so by arriving at an incorrect understanding of the *Marsh* holding, implying that the Supreme Court upheld legislative prayer only based on its place in history. *Id.* at 369-70. The correct understanding of this opinion focuses not on the idea that government action might avoid constitutional scrutiny based on its historic precedence, but rather on using the historic precedence to formulate an understanding of the *object* of the Establishment Clause itself. *See supra* Part II(A)(iv).

162. *Mellen*, 327 F.3d at 371-72.

163. *See supra* Part II(A).

164. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing Chicago v. Morales, 527 U.S. 41, 56-57 (1999)); *see also* United States v. Williams, 553 U.S. 285, 304 (2008).

These basic due process principles have been applied by the Court throughout United States history as basic tenets of constitutional law. Although the necessity to accommodate more ambiguous language and tests is understandable when addressing issues as complex as the First Amendment, it seems clear that the basic requirements of due process are at least in question when a single clause of the Constitution garners at least four different and distinct tests, to be used or discarded purely at the discretion of the court before whom an action is brought.

165. *See supra* Part II(A)(1)-(4).

issues and facts that are materially similar, the Court has shown its propensity to arrive at diametrically opposed conclusions.[166] Even if these incongruent opinions could appropriately be distinguishable enough to merit differing conclusions, it still remains clear that there is no agreed-upon standard for adjudicating Establishment Clause issues. It is nearly impossible to find any two cases that apply the same test. Instead, the availability of multiple tests allows judges the discretion to determine a result they would like to see and then to find a test (or make a new one, if needed) that would best get them to that result. It must be noted that this is

166. An example of this kind of contradiction can be found in the two cases of *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989). In both of these cases, the particular government action in question was the display of a crèche as part of a Christmas display on property accessible and open to the public. *Lynch*, 465 U.S. at 671; *Allegheny*, 492 U.S. at 578-79.

In *Lynch*, the Court upheld the display after describing the role of the Establishment Clause in American history and in legal jurisprudence. Specifically, Justice Burger, writing for the Court, emphasized that "[n]o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." *Lynch*, 465 U.S. at 673. He went on to write: "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.*

In direct contrast to *Lynch*, and only 5 short years later, the Court struck down a similar crèche display as violative of the Establishment Clause. *Allegheny*, 492 U.S. at 621. Justice Blackmun, writing for the Court, distinguished the case from *Lynch* by pointing to the fact that the crèche at issue here included the words, "Gloria in Excelsis Deo!" on a banner held by an angel. *Id.* at 580. Although it pointed to several other minor differences, this combined with the fact that there were other, less religious symbols—such as a Christmas tree—that could be used, which made the crèche display a violation of the Establishment Clause. *Id.* at 601-02, 614-21. Ultimately, the Court concluded that the crèche in this case was impermissible: "It [Allegheny County] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. . . . [N]othing more is required to demonstrate a violation of the Establishment Clause." *Id.* at 601-02.

While striking down the display of the crèche, however, the Court upheld the inclusion of a menorah, because although "[t]he menorah, one must recognize, is a religious symbol," its "message is not exclusively religious. The menorah is the primary visual symbol for a holiday [Chanukah] that, like Christmas, has both religious and secular dimensions." *Id.* at 613-14. Furthermore, in attempting to square its holding with that of *Lynch*, the Court glosses over the fact that the crèche at issue in *Lynch* was actually owned by the government, *Lynch*, 465 U.S. at 671, while the crèche at issue in *Allegheny* was owned by a Roman Catholic organization. *Allegheny*, 492 U.S. at 600.

The comparison of these two cases merits a much more in-depth analysis than is briefly discussed here, but such an analysis is outside the scope of this Comment, where it is only important to realize the subjectivity and arbitrariness that comes to the front when the Court addresses an Establishment Clause issue under its modern jurisprudence.

not a one-side-of-the-political-spectrum tendency; an analytical framework that allows for this kind of discretion practically ensures that results-oriented approaches will be taken, and it is evidenced whether the majority is advocating for an expanded capacity of religious expression or more limited government-religion interaction. With no clear standard, the judges and Justices who must decide these complex cases are left to fill in the gaps, and it should be no surprise that the results of such ideologically-oriented opinions have such disparate results.

B. Focusing on Maturity: Arbitrary Distinction or Essential Difference?

Although the Court has never explicitly addressed audience maturity as a stand-alone factor, certain comments indicate that the Justices are taking cognizance of this factor.[167] The Court has specifically mentioned that maturity may change the way it would view things such as school prayer, and it has implied that where such prayer is impermissible at the primary and secondary age levels, it may be permissible with "mature adults."[168] The cases generally agree that prayer or other religious activities within the primary and secondary public schools is impermissible.[169] The Court has also indicated, however, that "young adults" are "less impressionable than younger students," and they are arguably more likely to understand when a government action is actually *establishing* religion rather than merely being "neutral toward religion."[170] Similarly, the Court has pointed to the fact that "college students are less impressionable and less susceptible to religious indoctrination."[171]

It is easy to see the importance that the courts have placed on audience maturity when you combine the language used in these opinions with the language used in cases like *Marsh*. By upholding the inclusion of legislative prayer, the Court showed just how relevant audience maturity was: "[h]ere, the individual claiming injury by the practice is an adult, presumably not

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167. Pihos, *supra* note 11, at 1362-63.

168. Lee v. Weisman, 505 U.S. 577, 593 (1992).

169. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a law that required either the elimination of evolution or the inclusion of intelligent design along with evolution from school curriculum at the primary and secondary level); *Lee*, 505 U.S. at 599 (striking down school prayer at the primary and secondary school level); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down the inclusion of student-led prayer at a high school football game).

170. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

171. Tilton v. Richardson, 403 U.S. 672, 686 (1971).

readily susceptible to 'religious indoctrination,' or peer pressure."[172] Even the previously discussed cases of *Chaudhuri*, *Tanford*, and *Mellen* show that the maturity of the audience has been considered a key factor in determining Establishment Clause issues. *Marsh* simply completes the spectrum by showing the maturity analysis's effects on an audience of adults.

One commentator, Deanna Pihos, decries the mature/immature distinction as leading to the dangerous situation of precluding Establishment Clause challenges in higher education.[173] For example, Pihos specifically claims that the emphasis on maturity by the Supreme Court and the subsequent decisions of the Fourth, Sixth, and Seventh Circuits "reveal the difficulty, if not impossibility, of bringing a successful Establishment Clause challenge."[174] But this assertion assumes that any exposure to religion or religious themes is something that must be protected against.[175] If the Establishment Clause was meant to protect individuals from *exposure* to religion in any form, then Pihos's assertion would undoubtedly be correct. Similarly, if it was the Establishment Clause's purpose to protect the rights of individuals from all religious exposure or religious interaction, then the inclusion of maturity as a factor in the evaluation of whether the Establishment Clause is violated would be irrelevant. If exposure to religion itself violates the Establishment Clause, then the audience's level of maturity should not matter at all. This understanding of the Establishment Clause, however, is completely at odds with the meaning that has actually been ascribed to it throughout this nation's history and is incongruent with the words of the Clause itself. Thus, although Pihos has identified a helpful and informative distinction in recognizing the significance of maturity in addressing Establishment Clause claims, she arrives at the wrong conclusion in regard to whether such an emphasis is appropriate.[176]

Having determined that audience maturity does play a significant role in the Court's current Establishment Clause jurisprudence, it is important to address the relevant question: How should a court appropriately consider

172. Marsh v. Chambers, 463 U.S. 783, 792 (1983) (quoting *Tilton*, 403 U.S. at 686).

173. Pihos, *supra* note 11, at 1366.

174. *Id.*

175. This is evident in Pihos's article by the language that she uses. Even the headings and subheadings of her article evidence the fact that she considers any exposure to prayer improper: "Questioning the Assumption: A Necessary Undertaking to Increase Protection Against Prayer in Higher Education," and "Applying the Assumption: Precluding Protection in Higher Education Under Any Test or Standard," express her assumption that exposure to religion is a potentially harmful experience. *Id.* at 1366, 1371.

176. *Id.* at 1375-76.

the audience's maturity in deciding whether a specific government action violates the Establishment Clause?

IV. SOLUTION: PLACING MATURITY IN ITS APPROPRIATE PLACE

A. *The Object of the Establishment Clause: Freedom of Conscience*

To understand audience maturity in the context of the Establishment Clause, it is necessary to go back to the language of the Establishment Clause,[177] identify the object of the clause, and evaluate the relevance, if any, that maturity has to that object. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion . . . ."[178] Of the three doctrinal positions that comprise how one approaches their understanding of the Establishment Clause's meaning,[179] only those ascribing to the strict separationist viewpoint would contend that this clause represents a mandate to follow what Jefferson so famously titled the wall of separation between church and state.[180] Because that viewpoint has found little to no favor in American jurisprudence outside of scholarly debate, and because the adoption of such a viewpoint would essentially be the same as concluding that the First Amendment provided an affirmative duty of the government to protect individuals from exposure to religion and religious activities, it will not be considered further in this Comment. As long as it is conceded that the Establishment Clause does not require strict separation of church and state, it then becomes necessary to determine when the overlap between government action and religious activities goes from being merely a "public acknowledgment of religion's role in society"[181] to an impermissible establishment of religion.

Chief Justice Story, commenting on the Establishment Clause, drew a clear distinction between governmental encouragement of religion and

177. U.S. CONST. amend. I.

178. *Id.*

179. *See supra* Part II(B).

180. *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984). Justice Burger points to Jefferson's letter to the Danbury Baptist Association and writes:

> The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

Id.

181. Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010).

governmental support of religion when he noted that "the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires," would be a violation of the Establishment Clause.[182] Chief Justice Story emphasized that the Establishment Clause was not intended to prohibit governments from encouraging religion, piety, and virtue,[183] but instead pointed to identifying the limits by which a government could appropriately foster and encourage religion:[184]

> Three cases may easily be supposed. One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.[185]

He goes on to argue that the first of these three situations—that in which a government would afford aid to a particular religion, but leave individuals free to adopt and follow any religion—is clearly appropriate for a government, and thus not violative of the Establishment Clause.[186] The last of these three, wherein the government creates an actual established religion and penalizes those who refuse to participate, is clearly something that the Establishment Clause was meant to protect against.[187] He spends slightly more time on the second hypothetical—the creation of a religious establishment that advocates the "doctrines of a particular sect of that religion" but leaves individuals free to reject that without penalty—and eventually arrives at the conclusion that this is an area that should

182. 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1870 (Fred B. Rothman & Co. Publ'ns 1991) (1833).

183. *Id.* §1865.

184. *Id.* §1866.

185. *Id.*

186. *Id.* §1867. It is informative that Justice Story starts from a presumption that government *will* seek, at the very least, to aid a particular form of religion. The question at the time was not how to remove religion from all state activity; rather, the question was how to determine at what point such overlap became establishment.

187. *Id.* §1870.

appropriately be left to the states.[188] Those reading this article might feel strong approbation toward the views of Chief Justice Story, but it is relevant to any discussion about what the Establishment Clause actually means to understand how it was viewed during its creation and in the years from then until now.

The question of whether a government action is actually one respecting the establishment of religion, as opposed to one that might have the appearance of aiding religion, is an important insight to be gained from an understanding of how Chief Justice Story approached the Establishment Clause.[189] The object of the Establishment Clause is to prevent government from using its inherent power to infringe upon an individual's inalienable right of conscience. This object is what Chief Justice Story was considering when he drew the distinctions between the three hypothetical situations—affording aid to religion, creating an ecclesiastical establishment for the propagation of doctrines, and actual establishment with adherence punitively enforced—where an Establishment Clause issue might arise.[190] This is why maturity *is* relevant to the discussion. The question of audience maturity is actually aimed at something else: namely, whether a specified government action is one that "respect[s] an establishment of religion,"[191] in that it invades an individual's freedom and right of conscience. In this way, several of the tests outlined previously in this Comment[192] are appropriately aimed at the real and appropriate issues. The Coercion Test is nearing this object—protecting the right of conscience—when it attempts to discover whether government action has a coercive effect on individuals, and to this end, maturity is relevant because an individual's maturity level will often dictate the degree to which he is able to discern when his freedom of conscience is being infringed or his conscience forced.

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188. *Id.* §1873. Although not within the scope of this Comment, the reader should note the perspective that the federal government was inherently more limited than the state governments in its reach and authority.

189. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) ("If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display.").

190. STORY, *supra* note 181, at §1866.

191. U.S. CONST. amend. I

192. *See supra* Part(II)(A).

B. *Viewing the Establishment Clause Tests and Audience Maturity Through the Lens of the Object*

Having established that maturity is relevant to the extent that it helps expose whether a law or government action violates the object of the Establishment Clause, it will prove helpful to evaluate the several tests outlined above and show how the factors might be applied under the framework of each of these tests. Although the application of a general object analysis and its application to the following tests would necessitate a more involved analysis, such an analysis exceeds the scope of this Comment inasmuch as it goes beyond the discussion of audience maturity; this means that in some situations, even if the analysis under the various tests may not change significantly with the addition of audience maturity as a relevant factor, the analysis would certainly be different if the entirety of Establishment Clause jurisprudence were shifted to reflect this object-oriented approach.[193] The following discussion of these four tests will be limited to the subject of audience maturity in relation to the object test.

1. The *Lemon* has Turned Sour

The three prongs of the *Lemon* Test—secular purpose, primary effect, and excessive entanglement—are aimed at expanding the meaning of the Establishment Clause to cover the exact situation that Chief Justice Story set up in his first of the three situations.[194] The government affording aid to a particular religion, but leaving individuals free to believe as they would believe, is clearly violative of every prong of the *Lemon* Test. There is no secular purpose for aiding a particular religion. The primary effect—aiding religion—is explicitly one that advances religion, and this type of situation is difficult to defend as being free of entanglement if simple divisiveness along religious lines is sufficient to establish such entanglement.[195]

Each of these prongs focuses only on the existence of religious influence and relationship, to the complete abrogation of an evaluation of actual effect on an individual's freedom of conscience. It might be precisely for this reason that the Court has gone so far out of its way to curtail the effects,

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193. This point cannot be overemphasized. Due to the scope of this Comment, only audience maturity is being evaluated, and it must be understood that many of the Establishment Clause tests include analysis on several other important factors. In order to arrive at what this author believes is an appropriate understanding of the Establishment Clause *en totem*, each of those factors must be subject to analysis through the lens of the object herein described—that of protecting the individual's freedom and right of conscience.

194. *See supra* note 184.

195. *See supra* note 46.

scope, and even application of this test. Because striking a statute down for simply having a religious purpose would be inconsistent with a rational understanding of what the Establishment Clause was actually intended for, the courts have attempted to limit the first prong's reach to require only *a* secular purpose, not an exclusively secular one.[196] The same limitations have been imposed on the second prong, allowing "accommodations of religion so long as some secular . . . effects are present."[197] These requisite limitations are indicative of an understanding in the Court that the *Lemon* Test has simply missed the mark when it comes to the Establishment Clause. Even the existence of many other Establishment Clause tests reflects the Court's general approbation against consistently applying the *Lemon* Test. One very strong possibility is that this marginalization is necessary due to the fact that the *Lemon* Test affords no consideration to audience maturity.[198] By excluding this factor, and other factors that might more adequately gauge a law's effect on an individual's right of conscience—rather than mere exposure to religious activity—the *Lemon* Test fails to adequately guide any court in determining when the Establishment Clause has been violated. Its inadequacy, however, has not prevented it from being retained and resurrected if it is deemed the best tool by which the Court can achieve the result it seeks in any particular case:

> 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 . . . . Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision . . . conspicuously avoided using the supposed "test" but also

196. Lynch v. Donnelly, 465 U.S. 668, 681 & n.6 (1984).

197. MASSEY, *supra* note 37, at 1086; *see also Lynch*, 465 U.S. at 681-82.

198. One possible exception to this statement is found within a more recent change that has been applied to the *Lemon* Test: incorporating the "reasonable observer" in determining what the primary effect of a government action is. *See* Salazar v. Buono, 130 S. Ct. 1803, 1819-20 (2010).

It is important, however, to recognize that the very reason this change was necessary to make the *Lemon* Test more adequate shows its failure to address the core issue: the object of the Establishment Clause. The incorporation of this "reasonable observer" is a too-late attempt to bring the *Lemon* Test in line with that object, but it does show the tendency of the Court to intuitively lean in that direction, even while using the incorrect tests already established. It is this author's assertion that the Court is trying grappling with the reality that these Establishment Clause tests are simply inadequate while preserving the precedent that has been created through their use.

> declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.[199]

Although the *Lemon* Test—and in large part, the Endorsement Test—does not explicitly take audience maturity into consideration, its curtailed application and the incorporation of the various limiting factors listed above indirectly subject this test to the evaluation of audience maturity,[200] particularly in its evaluation of the primary effect of government action. Unfortunately, this small and incremental attempt to salvage an otherwise unworkable test leaves nothing but a sour taste in the mouths of those who see it applied. *Lemon*'s failure to include within its analysis anything that would actually speak to the object of the Establishment Clause renders the lemon unpalatable.

2. Is Coercion Synonymous With Violating the Right of Conscience?

Because the Coercion Test incorporates the perceptions and character of the audience[201] in an analysis of an alleged Establishment Clause violation, the Coercion Test is appropriately viewed as the change in *Lemon* that brought Establishment Clause jurisprudence closer to adequately reflecting the object of the Establishment Clause. This test appropriately considers the context of a governmental action to determine if "subtle coercive pressure"[202] amounted to an abridgment of an individual's freedom of conscience. Accordingly, the incorporation of audience maturity as a recognized factor under the Coercion Test would be unlikely to affect a great change in the cases that have been evaluated under this test.

One result of an official acknowledgment of audience maturity as a relevant consideration would be the increasing permissibility of government-religion interaction as the audience of the action becomes more mature. Many actions that might be appropriately considered impermissible coercion in primary and secondary education institutions—due to the immaturity of students, the parents' continued authority over their children, and other inherent legal limitations based on age—would be absolutely permissible, both in the general public arena and in the higher

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

200. Pihos, *supra* note 11, at 1368-70.

201. Lee v. Weisman, 505 U.S. 577, 592-93 (1992).

202. *Id.* at 592.

education fora.[203] It is possible that the advent of public primary and secondary education would in fact create a unique forum wherein an increased level of Establishment Clause scrutiny might be required.[204]

3. The *Marsh* Approach Lands Close, But Does so Blindly

The Court in *Marsh*, through its application of historical practices and understandings, concluded that official prayer before a state legislative session was not a violation of the Establishment Clause.[205] This test, like the Coercion Test, comes very close to focusing on the object of the Establishment Clause, but it misses the mark in the end. Instead of evaluating whether such legislative prayer actually forces man's conscience—a question the *Marsh* Court answered in the negative—the Court attempts to justify the conclusion it believes is correct by pointing only to the history and traditions of the country.[206] Although such an analysis is not without warrant, to stop at the point of discovering that such practices were accepted by the very people who passed the First Amendment completely fails to address *why* such practices were not considered to be an establishment of religion in the first place, and thus provides little-to-no aid in determining future Establishment Clause claims. An understanding of audience maturity—those who were subjected to the prayer are appropriately considered to be the best and brightest among us, a people not readily prone to having their beliefs changed and their consciences forced through the simple hearing of another's prayer—gives a more appropriate understanding of why such an action is not a violation of the First Amendment. When the factor of audience maturity is viewed in

203. Although the issue of Establishment Clause application in public schools is obviously of great importance, this author argues that the issue inappropriately focuses on whether the actions of public school officials violate the Establishment Clause. A more appropriate evaluation and analysis would be on whether the very existence of public schools necessarily violates—or at the very least raises serious concerns about—the Establishment Clause. Unfortunately, however, a discussion of this subject would demand an entire article of its own, and as such, is well outside the scope of what is intended to be covered here.

204. This "increased scrutiny" is only in reference to what would appropriately be the level of scrutiny in a jurisprudence that approached the Establishment Clause from the object-oriented analysis. It would not be increased beyond its current standard, a standard which is at, or extremely close to, the limit of what the Establishment Clause should actually prohibit. In other words, the unique environment that is created by primary and secondary public education is the only justification for the increased scrutiny such Establishment Clause claims have earned. In addition, the standard should necessarily be much lower for government actions that affect an audience outside of the unique forum of public education.

205. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

206. *Id.*

light of the object of the Establishment Clause, it becomes evident that such a unique and particularized justification for the Court's holding in *Marsh* was unwarranted.

V. CONCLUSION

The approach that should be taken when evaluating an Establishment Clause claim is one that is rarely agreed upon, even by the Justices who sit on our highest Court. Because this analysis deals with one of the most intimate areas of human life—religion, individual spirituality, and civic interaction—it will always be, in the words of Justice O'Connor, a "sensitive matter."[207] In an effort to create a method of evaluating this difficult and sensitive area, the Court has delivered a perpetually changing line of opinions that has given little in the way of stability or predictability to this hugely important area of constitutional law. Part of the reason for this confusion has resulted from losing sight of the actual purpose, or object, of the Establishment Clause: to prohibit the National Government—and through the Fourteenth Amendment, the States—from infringing on a citizen's freedom and right of conscience. This right is not violated by simple exposure to religious beliefs and practices that one does not agree with; there is no general protection in the First Amendment against being offended, engaged, or even persuaded by others in their desire to share their religious convictions. The First Amendment, specifically the Establishment Clause, only promises that the government will not engage in activity that effectively forces an individual to do anything other than "worship[] God in the manner, which, they believe, their accountability to him requires."[208] To punish someone for his beliefs, to force his conscience, or to otherwise penalize him for worshiping God as he would chose, and to use the government to achieve this end, is an absolute violation of the Establishment Clause. For a government of the people to merely acknowledge the religions and faiths of its people—yes, even to endorse those religions—is not, however, synonymous with establishing religion. This remains true even where the government would make resources available or accommodate certain religious activities.

The issue of audience maturity may be relevant in a discussion of whether a government activity or law violates the Establishment Clause, but only insofar as it exposes the degree to which such a law or activity infringes

207. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring).

208. STORY, *supra* note 181, at §1870.

upon an individual's right of conscience. If government activity forces children to either profess Allah as their god or disclaim their belief that he is, then it has infringed upon that freedom of conscience, and must be restrained. Nevertheless, the expressed will of the people to conduct prayers of which none are forced to join, although potentially offensive to those of us who believe differently, must not be struck down at the whims of the select few—whether the offended high school student or the Justices presiding on the bench.

Does this mean that each of us might have to sit at a graduation ceremony and respectfully listen to a prayer or other religious expression with which we do not agree or by which we are even offended? Yes. But it will also ensure that we, as the American people, will always be free to advance our faith and entreat others to discourse and dialogue on those things we deem so important. The alternative is where we have been heading and will likely continue to go absent a dramatic shift: the slow sterilization of religion from the public arena will eventually turn into the sterilization of our society from all things religious. For those of us who profess faith in Jesus Christ, an increase of freedom in the public arena for religious discussion and involvement—even of religions that we know are in error—should not frighten us, but rather embolden and excite us. If we believe that Christ is the truth, then affording people the freedom to make their own choices and to voice their own beliefs actually gives us the opportunity to see where their hearts and minds truly are, and only then can we engage them with the Word, which never comes back void.[209]

209. *Isaiah* 55:11 (King James) ("So shall My word be that goeth forth out of my mouth: it shall not return unto me void, but it shall accomplish that which I please, and it shall prosper whereto I sent it.").