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God Is Dead: Killed by Fifty Years of Establishment Clause Jurisprudence.

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COMMENT

God Is Dead:[1] Killed by Fifty Years of Establishment Clause Jurisprudence.

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1. Fredrich Nietzsche, Thus Spake Zarathustra *in* THE PHILOSOPHY OF NIETZSCHE 6 (1954). By the expression "God is dead," Nietzsche meant that belief in God had declined to such a degree that God was no longer a force of consequence in the minds of men. Nietzsche believed that, once men realized that their moral principles were founded on the belief in a God which no longer existed (i.e. one in which they had lost faith), they would abandon the moral principles associated with that God in search of new ones. Nietzsche feared that the growing acceptance of the theory of evolution would lead men to conclude that there was no distinction between man and animal, and he attempted to propose an alternate foundation for the new morality. SAMUEL ENOCH STUMPF, SOCRATES TO SARTRE 372 (1975). The Court's jurisprudence in Establishment Clause cases since 1947 has excluded religion from the public sector, killing God metaphorically, while attempting to preserve the ideals which flow from belief in God.

INTRODUCTION

You say that I am a king. For this I have been born and for this I have come into the world in order to witness to the truth. Everyone who is of the truth hears my voice. Pilate said to him, "What is truth?"[2]

In 1980, the Supreme Court in *Stone v. Graham*[3] addressed the issue of whether a statute requiring the display of the Ten Commandments[4] in all public school classrooms was an unconstitutional establishment of religion.[5] Applying the *Lemon* test,[6] which requires a secular purpose in order to pass Establishment Clause[7] scrutiny, the Court found the statute's purpose to be religious and ruled it unconstitutional.[8] The Court stated, "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no claim of secular legislative purpose can change this."[9] Yet, had the state required the placement of the following "secular commandments" in every classroom, it is unlikely that the Court would have found an Establishment Clause violation.[10]

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2. *John* 18:37-38 *as quoted in* JOHN T. NOONAN, THE BELIEVER & THE POWERS THAT ARE 10 (1987).

3. 449 U.S. 39 (1980).

4. *Exodus* 20:1-17 (New American).

5. *Stone*, 449 U.S. at 39-40 (effective June 17, 1978). The statute provided:

(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection 3 of this section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western civilization and the Common Law of the United States."

(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.

Id. (citing Kentucky Statute).

6. 403 U.S. 602, 612-13 (1971). The *Lemon* test asks three questions of state action: (1) does the action have a secular or religious purpose, (2) is the primary effect of the action one which neither advances nor inhibits religion, and (3) does the statute create unnecessary entanglement between church and state? *Id.* If any one of these elements favors religion or entangles the State with religion, the action is unconstitutional. *Id.*

7. U.S. CONST. amend. I. The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion." *Id.*

8. Stone v. Graham, 449 U.S. 39, 41 (1980).

9. *Id.*

10. One wonders whether the Court would still have found the statute unconstitutional if the state had required portions of Hammurabi's Code, which was revealed to him by Manu, the sun god, to be posted in classrooms for the same secular purpose, viz. education.

THE TEN "SECULAR" COMMANDMENTS

A person commits an offense if he knowingly or intentionally desecrates a place of worship.[11]

(You shall not have other gods besides Me.)[12]

Before testifying, a witness shall by oath or affirmation, declare that he will testify truthfully.[13]

(You shall not take the name of the Lord, your God, in vain.)[14]

No suit shall be commenced, nor process served on Sunday; and all legal holidays shall be treated as though they were Sunday.[15]

(Remember to keep holy the sabbath day.)[16]

The rights of the elderly are to be preserved.[17]

(Honor your father and your mother.)[18]

A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.[19]

(You shall not kill.)[20]

Everyone guilty of adultery shall be fined not less than one hundred and no more than one thousand dollars.[21]

(You shall not commit adultery.)[22]

A person commits an offense if he unlawfully appropriates property with the intent to deprive the owner of that property.[23]

(You shall not steal.)[24]

A person commits an offense if he intentionally makes a false statement under oath with the intent to deceive.[25]

(You shall not bear false witness against your neighbor.)[26]

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11. TEX. PENAL CODE ANN. § 42.09(a)(2) (Vernon Supp. 1992).

12. *Exodus* 20:3 (New American).

13. TEX. R. CIV. EVID. 603; *see also* TEX. R. CIV. P. 226 (requiring that jurors swear to answer questions truthfully on voir dire "so help you God").

14. *Exodus* 20:7 (New American).

15. TEX. R. CIV. P. 6; TEX. REV. CIV. STAT. ANN. § 4591 (Vernon 1976).

16. *Exodus* 20:8 (New American).

17. *See* TEX. HUM. RES. CODE ANN. § 102.003 (Vernon 1990) (setting out twenty-three rules regarding how the elderly are to be protected in general).

18. *Exodus* 20:12 (New American).

19. TEX. PENAL CODE ANN. § 19.01(a) (Vernon 1989).

20. *Exodus* 20:13 (New American).

21. Former TEX. PENAL CODE ART. 502, *repealed by* Act of Jan. 1, 1969, 61st Leg., ch. 888, § 6, 1969 Tex. Gen. Laws 2707.

22. *Exodus* 20:14 (New American).

23. TEX. PENAL CODE ANN. § 31.03(a) (Vernon 1989).

24. *Exodus* 20:15 (New American).

25. TEX. PENAL CODE ANN. § 37.02 (Vernon 1989).

26. *Exodus* 20:16 (New American).

> A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation to commit sexual assault, but fails to complete the act.[27]
>
> (You shall not covet your neighbor's wife.)[28]
>
> A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation to unlawfully deprive an individual of property, but fails to complete the act.[29]
>
> (You shall not covet your neighbor's goods.)[30]

These "secular commandments" mirror the Ten Commandments, with one major exception: they do not take their authority from a supreme being, but, rather, from the secular state.[31] Yet it is obvious that these statutes reflect the Judaeo-Christian roots of our society,[32] roots in which the majority of Americans still believe.[33]

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27. *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1992) (defining criminal attempt); TEX. PENAL CODE ANN. § 22.021 (Vernon 1989) (defining and proscribing sexual assault). The analogous commandment to this provision refers to "covet[ing] thy neighbor's wife." *Exodus* 20:17 (New American). Coveting is defined: "to have *or to satisfy* an extreme desire." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 421 (1979) (emphasis added). Because it is impossible for positive (human) law to punish intent without the manifestation of some act, the most that positive law can prevent or punish is the outward manifestation of intent. This is one reason why a divine law (laws based on revealed truths) is necessary—to proscribe internal violations of law which demean the dignity of the human being. THOMAS AQUINAS, SUMMA THEOLOGIAE Ia-IIae, Q. 91, art. 4.

28. *Exodus* 20:17 (New American).

29. *See* TEX. PENAL CODE ANN. § 15.01(a) (Vernon Supp. 1992) (defining criminal attempt); TEX. PENAL CODE ANN. § 22.01 (Vernon 1989) (defining and proscribing theft).

30. *Exodus* 20:17 (New American).

31. These two sources of law, God and the state, are the foundations of the two principal types of legal philosophy, natural law and positivism. JOHN FINCH, INTRODUCTION TO LEGAL THEORY 22, 29 (3d ed. 1979). *See generally* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 1-24 (1963) (outlining historical shifts from natural law to positive law).

32. These roots are displayed by numerous legislative enactments with clearly religious origins. *See, e.g.*, 5 U.S.C. § 6103(a) (1980) (declaring Thanksgiving and Christmas national holidays); 36 U.S.C. § 172 (1988) (placing reference to God in "The Pledge of Allegiance"); 36 U.S.C. § 169h (1988) (authorizing a National Day of Prayer); 36 U.S.C. § 186 (1985) (declaring "In God We Trust" the national motto); Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting) (pointing out religious statements in "The Star-Spangled Banner").

33. *See Religion in America: 50 Years: 1935-1985*, *in* THE GALLUP REPORT 50 (May 1985) (ninety-five percent of Americans believe in the existence of a supreme being). The religious roots of our society link democratic principles to transcendent aspirations. Yehudey Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237, 1249-51 (1986); *see also Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1652 (1987) ("The entrenchment of religion in American public life—its presence in the dominant moral, and cultural fabric of society—has been termed a *de facto* establishment of religion

Stone v. Graham illustrates in small what the Supreme Court's Establishment Clause jurisprudence has become. The Court has misconstrued the meaning of "establishment of religion" to require a complete separation between religion and government.[34] At the same time, the Court has attempted to preserve the ethical principles which naturally spring from religion.[35] This cannot be done, for belief in a supreme being is the foundation of all the rights—life, liberty, the pursuit of happiness—which the framers held, and Americans today hold dear.[36] As Alexis de Tocqueville

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prevail[ing] throughout the land" *quoting* M. HOWE, THE GARDEN AND THE WILDERNESS II (1965)).

34. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting); *see also* John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 22-23 (1978) (the Court's construction of the Establishment Clause has replaced religion with secular humanism). Interpretation of the Establishment Clause has gone so far as to say that the word "respecting" in the phrase "no law respecting an establishment of religion" includes laws which show reverence, regard, or good will toward religion. County of Allegheny v. ACLU, 492 U.S. 573, 648-49 (1989) (Stevens, J., dissenting). *But see* Zorach v. Clauson, 343 U.S. 306, 313-14 (1952). "When the state encourages religious instruction . . . it follows the best of our traditions . . . [f]or it then respects the religious nature of our people and accommodates the public service to their spiritual needs". *Id.*

35. *See* Everson v. Board of Educ., 330 U.S. 1, 23-24 (1946) (Jackson, J., dissenting) (stating that basic premise underlying public schools is "that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality towards religion"). The language from *Everson* has been interpreted to mean that only secular morality should be taught in the public school. John C. Polifka, *Use of the Lemon Test in the Review of Public School Curricular Decisions Concerning "Secular Humanism" Under the Establishment Clause*, 33 S.D. L. REV. 112, 112 n.* (1988). *Contra* Church of the Holy Spirit v. United States, 143 U.S. 457, 471 (1892) (stating that civil government is dependent upon religious principles); John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 60-61 (1978) (stating that roots of American law are based on theistic truths).

36. *See* Griswold v. Connecticut, 381 U.S. 479, 529 n.2 (1965) (Stevens, J., dissenting) (alluding to impossibility of completely separating religion from law). Justice Rehnquist noted that everything of value in our culture is saturated with religious influences. *See Stone*, 449 U.S. at 46 (Rehnquist, J., dissenting) (quoting Justice Jackson's concurrence in *McCollum v. Board of Education*, 333 U.S. 203, 235-36 (1948). Justice O'Connor has also argued that religion cannot be separated from the law by pointing out the absurdity of holding a murder statute unconstitutional under the Establishment Clause simply because the Ten Commandments proscribe murder. *See Wallace*, 472 U.S. at 70 (O'Connor, J. concurring); *see also* Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (recognizing that the Ten Commandments played more than a religious role in western civilization). The Court's language in *Stone* regarding the Ten Commandments demonstrates the difficulty experienced by the Court in attempting to justify the separation of religion from principles with religious origins. The Court found the posting of the Ten Commandments on classroom walls unconstitutional because the purpose in posting them was "to induce [children] to read, meditate upon, [and] perhaps venerate and obey [them]." *Stone*, 449 U.S. at 42.

observed:

> What has struck me most about my country [France], more especially these last few years, is to see ranged on one side men who prize morality, religion, and order; and upon the other, those who love liberty and the equality of men before the law. This spectacle has struck me as the most extraordinary and the most deplorable ever offered to the eyes of man; for all the things that we separate in this way, are, I am certain, united indissolubly in the eyes of God. They are *holy* things.[37]

Rather than favoring religious belief, the Supreme Court's Establishment Clause jurisprudence has transformed the laudable goal of religious toleration into a requirement of non-endorsement of religion by the government.[38] However, all of this may soon change.

On November 6, 1991, the Supreme Court heard oral argument in the case of *Lee v. Weisman*.[39] Deborah Weisman, a high school student, challenged the constitutionality of a prayer said at a public high school graduation ceremony.[40] Both the district court and United State Court of Appeals for the First Circuit found the prayer to be an unconstitutional establishment of religion.[41] *Lee* gives the Court an excellent opportunity to re-ana-

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37. ALEXIS DE TOCQUEVILLE, OUVRES ET CORRESPONDANCE INÈDITES 1, 432 (1861) (emphasis added), *quoted in* JOHN T. NOONAN, THE BELIEVER & THE POWERS THAT ARE 160-61 (1987).

38. *See Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting) (deviation from framers' intent of prohibition of a national religion has led to decisions preventing government from endorsing religion generally); John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1, 23 (1978) (theism has been disestablished and replaced by secular humanism).

39. Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, __ U.S. __, 111 S. Ct. 1305, 113 L. Ed. 2d 240 (Mar. 18, 1991) (No. 90-1014). For partial transcript of the oral argument see *Schools and Colleges: Benediction at Graduation Ceremony—Establishment Clause*, 60 U.S.L.W. 3351, 3351 (Nov. 12, 1991).

40. Weisman v. Lee, 728 F. Supp. 68, 69 (D.R.I. 1990). The invocation was given by a rabbi who prayed:

> God of the Free, Hope of the Brave: For the legacy of America, where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all can seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Id. at n.2.

41. Weisman v. Lee, 728 F. Supp. 68, 75 (D.R.I. 1990), *aff'd*, 908 F.2d 1090, 1099 (1st Cir. 1990). The district court applied the *Lemon* test and found that the prayer given at the

lyze and bring its present jurisprudence into better harmony with the framers' original intent.[42] Part I of this comment will discuss the framers' intent in enacting the Establishment Clause. Part II will show how the present construction of the Establishment Clause under *Lemon v. Kurtzman* is flawed. Part III will then address itself to two possible alternatives, the endorsement test and the coercion test, each of which is favored by various members of the Court.

I. THE FRAMERS' INTENT

More than in other areas of constitutional law, the Supreme Court has attempted to ensure that the application of the Establishment Clause comports with the original intent which motivated its adoption.[43] As Justice Rehnquist stated, "The true meaning of the Establishment Clause can only be seen in its history."[44] The present state of Establishment Clause jurisprudence evolved from the Supreme Court's 1941 decision in *Everson v. Board of Education*.[45] In *Everson*, the Court upheld a New Jersey program reimbursing the parents of children attending private schools for transportation costs.[46] Yet, borrowing language from Thomas Jefferson, the court stated that the Establishment Clause was intended to "erect a wall of separation between Church and State."[47] Jefferson's metaphor intimates a stark line

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graduation ceremony violated *Lemon*'s second prong by involving the state in the endorsement of religion. Weisman v. Lee, 728 F. Supp. 68, 71 (D.R.I. 1990). The Court of Appeals reluctantly affirmed. Weisman v. Lee, 908 F.2d 1090, 1094 (1st Cir. 1990).

42. *See Interview with Dean Choper*, 60 U.S.L.W. 2253, 2253-54 (Dec. 3, 1991) (stating that *Lee* gives the "new" Court an opportunity to indicate the direction it will take concerning the Establishment Clause); L. Anita Richardson, *Overruling Lemon v. Kurtzman?*, 1991-92 SUP. CT. PREV. 93, 93 (Nov. 6, 1991) (Westlaw, SCT-PREVIEW database) (outlining arguments of petitioner which include request that *Lemon* be abandoned).

43. *See* Wallace v. Jaffree, 472 U.S. 38, 107-14 (1985) (Rehnquist, J., dissenting) (looking to history of Religion Clause in order to determine its proper application); Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (*quoting* Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970) (refusing to construe Religion Clause so as to defeat its historical purposes); Walz v. Tax Comm'n, 397 U.S. 664, 667 (1970) (stating that Court will not undermine constitutional objective of Religion Clause by overly literal interpretation); Stuart W. Bowen, Jr., Comment, *Is* Lemon *a Lemon? Crosscurrents in Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 136-39 (1990) (analyzing history surrounding enactment of Establishment Clause to determine true intent of the framers).

44. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

45. 330 U.S. 1 (1947).

46. *Everson*, 330 U.S. at 16. The *Everson* Court borrowed this metaphor from *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878), which borrowed it from Jefferson's letter to the Danbury Baptist Association. *See* JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 130-31 (1987) (reproducing the letter from Jefferson to the Danbury Baptist Association).

47. *Everson*, 330 U.S. at 16.

between government and religion,[48] and has become the touchstone of Establishment Clause jurisprudence.[49] However, many critics point out that when one looks into the history surrounding the adoption of the clause, a different picture emerges.[50]

At the time that the Constitution was ratified, many of the states feared that Congress might use the Necessary and Proper Clause[51] to establish a national religion.[52] To prevent this, the framers proposed placing a clause in

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48. *See Everson*, 330 U.S. at 18 (stating that First Amendment erected a wall between church & state); *see also* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 1 (1987) (stating that *Everson* "opened the modern era of church-state jurisprudence); Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 31 (1962) (stating that *Everson* was the most influential decision in the history of American church-state jurisprudence). Justice Black stated that the wall erected by the First Amendment between church and state "must be kept high and impregnable." *Everson*, 330 U.S. at 18. The slightest breach of this wall should not be allowed by the Court. *Id.*

49. *See, e.g., Lynch*, 465 U.S. at 673 (citing *Everson* and the "wall" metaphor in beginning majority's analysis); Marsh v. Chambers, 463 U.S. 783, 802 (1983) (mentioning wall of separation); Larkin v. Grendel's Den, 459 U.S. 116, 123 (1981) (citing to wall of separation); Lemon v. Kurtzman, 403 U.S. 602, 611 (1971) (citing *Everson* with approval, then setting out new Establishment Clause test which would become known as the *Lemon* test). *But see Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting) (stating that *Everson*'s use of Jefferson's "wall between church and state" metaphor has led Establishment Clause jurisprudence down roads never intended by the framers); Stuart W. Bowen, Jr., Comment, *Is* Lemon *a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 132 (1990) (*Lemon* test resulting from "wall metaphor" has been unwieldy in application).

50. Several justices have suggested that the understanding of the framer's intent as expressed in *Everson* does not seem to be what the framers truly had in mind. *See* Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 909, 103 L. Ed. 2d 1, 25-32 (1989) (Scalia, J. dissenting) (attacking *Lemon* test as unfounded in Constitution, history, or precedent); *Wallace*, 472 U.S. at 92 (Rehnquist, J. dissenting) (stating that Establishment Clause jurisprudence has been built on the foundation of a misleading metaphor); *Wallace*, 472 U.S. at 91 (White, J. dissenting) (reviewing history of Religion Clauses demonstrates the need to revise *Lemon*). Many academians also believe that it is beyond question that the generation of Americans which enacted the First Amendment believed that government must aid religion to secure its own survival. *See, e.g.*, GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 5 (1987) (Christianity has "united", if not defined the United States government); Edward M. Gaffney, Jr., *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205, 220-21 (contemplating legitimate relationship between political activism & religious groups) (1980). *See generally* DAVID BARTON, THE MYTH OF SEPARATION 115-24 (1989) (listing quotations from the founding fathers which indicate their understanding of the role which religion should play in society).

51. U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause states: "Congress shall have the power. . . . To make all laws necessary and proper for carrying into execution the forgoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." *Id.*

52. 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789). Madison stated that this was the driving force behind the adoption of the Religion Clause. However, he refused to comment on whether the amendment was necessary. *Id.*

the Bill of Rights to protect freedom of conscience from governmental coercion.[53] The framers proposed the Establishment Clause and the Free Exercise Clause—not as two separate clauses, but—as a single guarantee to preserve freedom of religion.[54] During the debate concerning the adoption of a Religion Clause, however, some of the framers expressed opposition, because, as they saw it, the Constitution created a government of limited powers—anything not granted being withheld.[55] The government, therefore, could not establish a national religion because the Constitution did not expressly grant the power to do so.[56] Nonetheless, the majority of the colonies favored placing some sort of protective provision in the Constitution.[57] During the debate, James Madison summarized the thrust of the Religion Clause: "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to

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53. 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789). Representative Carroll spoke for those in favor of adopting a provision concerning religion saying: "As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred that they are not well secured under the present constitution [I am] much in favor of adopting the words." *Id.*

54. *See Walz*, 397 U.S. at 668 (implying that Religion Clauses were written as guarantee of freedom of religion). Chief Justice Burger stated: "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not write a statute." *Id.*; *see also Wallace*, 472 U.S. at 68 (O'Connor, J., concurring) ("Although a distinct jurisprudence has enveloped each of these Clauses, their common purpose is to secure religious liberty."); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 274 (1986) (suggesting that the Establishment and Free Exercise Clauses should be read as one). Neither American history nor tradition "justifies an apportionment of values between disestablishment and freedom or indeed the dichotomy itself." LEO PFEFFER, CHURCH, STATE, AND FREEDOM 122 (1953).

55. *See* 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789) (Representative Sherman stated that Congress could not enact laws concerning religion because it had not been given the power to do so).

56. *Id.*

57. *See Wallace*, 472 U.S. at 93 (Rehnquist, J., dissenting) (stating that many of the colonies favored the enactment of a religion clause). Out of the thirteen colonies, ten proposed amendments to the Constitution—some colonies did so after ratifying the Constitution, while some refused to ratify unless the amendments were made. New Hampshire and New York proposed a declaration of religious freedom, 3 JONATHON ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 659 (1891), as did Virginia. 1 JONATHON ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION at 328 (1891). Rhode Island and North Carolina would not ratify unless the Bill of Rights was added to the Constitution. *Id.* at 334; 4 JOHATHON ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 244 (1891). *Cf.* H.R. Res. 4, 1st Cong. (1789) (the text of the resolution to amend the Constitution was approved by a two-thirds majority in each house of Congress).

their conscience."[58] Madison suggested that the word "national" be placed before "religion" (i.e. Congress shall establish no *national* religion), to "point the amendment directly to the object it was intended to prevent."[59] Although agreeing in principle, Federalists opposed this language for fear that those favoring a centralized, rather than federal, government might twist the use of the word "national" to that end.[60] The clause as adopted reads "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof."[61]

From reading the debate, it is clear that the Establishment Clause was intended to protect religion from government by preventing the establishment of a national religion.[62] This is a far cry from a "wall of separation" in that the framers in no way intended to exclude religion, but rather to include and protect it—to protect freedom of conscience from coercion by the majority.[63] Examination of legislation favoring religion which the framers en-

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58. 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789). Thomas Jefferson, who is the source of the "wall" metaphor, expressed a similar understanding:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines [etc]. This results not only from the provision that no law shall be made respecting the establishment, or free exercise of religion, but also from that which reserves to the states the powers not delegated to the U.S.

Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON 174 (P. Ford ed. 1898); *see also* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 210 (1986) (concluding that Americans from the colonial period understood establishment "as an exclusive government preference for one religion").

59. 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789).

60. *Id.* The United States government was intended to be a government of limited powers with most power remaining in the states. Many feared a centralization of power at the federal level, which is revealed by their apprehension in placing the word "national" in the Establishment Clause. *Id.*

61. U.S. CONST. amend. I.

62. *See* 1 ANNALS OF CONG. 730 (Joseph Gales, ed., 1789) (Madison suggested that religion be modified by word national—Congress shall establish no national religion); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 660 (1989) (framers understood establishment as direct interference with religious liberty); *Lynch*, 465 U.S. at 686 (holding Christmas display constitutional because it does not tend to establish a state religion). The main evil the framers hoped to prevent was the coercion of Americans to act contrary to the dictates of their conscience. *See Wallace*, 472 U.S. at 68 (O'Connor, J., concurring) (Religion Clause aimed at securing religious liberty).

63. *See Allegheny*, 492 U.S. at 660 (framers considered coercing one to practice or believe in religion and establishing of religion synonymous); *Wallace*, 472 U.S. at 67-68 (O'Connor, J., concurring) (Religion Clause seeks to secure religious liberty); 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789) (emphasizing need for care in drafting clause lest it be taken in such a way as to be hurtful to cause of religion); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1868 (1970) (commenting on Framers' intent). Story stated that "when the First Amendment was adopted, the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as it was

acted after the Religion Clause illustrates this point. One obvious example is the enactment of legislation allocating money for the support of missionaries to convert the Indians.[64] Proclamations by several presidents of a national holiday of fasting and prayer in thanksgiving "to Almighty God,"[65] and Congress' employment of a chaplain—paid with tax dollars—to open each legislative session with a prayer, are other examples of acts by the framers endorsing religion.[66] Even Thomas Jefferson, author of the "wall" metaphor, mentioned God four times in the Declaration of Independence[67] and, in his inaugural address, encouraged Americans to give thanks to God.[68]

Having looked briefly over the history of the Establishment Clause, the next logical question is: Does the present jurisprudence conform with the original intent? Let us take Madison's understanding as the ruler against which to measure present Establishment Clause jurisprudence: "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[69]

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not inconsistent with the private rights of conscience and the freedom of worship." *Id.*; *see also* Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 274 (1986) (arguing that level of judicial intervention resulting from Court's application of Religion Clause is directly proportionate to risk of governmental oppression of religion).

64. *See* Treaty between the United States of America and the Kaskaskia Tribe of Indians, Aug. 13, 1803, 7 Stat. 78, 79 (providing for payment of $100 annually towards support of a Catholic Priest "who will engage to perform for the said tribe [of Indians] the duties of his office and also to instruct [the children of the tribe] in the rudiments of literature"); Act of June 1, 1796, ch. 46, 1 Stat. 490-91 (providing funds for propagating gospel among Indians). The Northwest Ordinance of 1787 was re-enacted by the First Congress. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. The statute included language both protecting and endorsing religion. *Id.* at 52, Art. I, Art. III; *see also* Act of Feb. 20, 1833, ch. 42, 4 Stat., 618, 619 (authorizing sale of land for support of religion, and for no other purpose).

65. The first such proclamation was issued by President George Washington. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 64 (James D. Richardson, ed., 1897). John Adams also issued such a proclamation which called for "fasting, and prayer" and mentioned God, "the Redeemer of the World," and the Holy Spirit. *Id.* at 268-69.

66. Both the House of Representatives, H.R. JOUR., 1st Cong., 1st Sess., 26 (1826 ed.), and the Senate, S. JOUR., 1st Cong., 1st Sess., 10 (1820 ed.), elected chaplains to open their respective legislative sessions with prayer. *See Marsh*, 463 U.S. at 788 (citing House & Senate Journals). Additionally, on September 22, 1789, Congress enacted a statute to provide for the payment of these chaplains. Act of Sept. 22, 1789, ch. 17, 1 Stat. 70, 71 (1789).

67. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (mentioning God four times throughout).

68. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 at 323 (James D. Richardson ed., 1897). Counting the blessings of Americans, Jefferson encouraged them to give thanks to divine providence which grants happiness in this life and the next. *Id.*

69. 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789).

II. PRESENT ESTABLISHMENT CLAUSE JURISPRUDENCE

Present Establishment Clause jurisprudence dictates a three-part test for determining when state action constitutes an establishment of religion. The *Lemon* Test, formulated in *Lemon v. Kurtzman*,[70] asks: (1) is the purpose of the state action religious; (2) is its principal or primary effect one that establishes or inhibits religion; and (3) does the state action foster "an excessive government entanglement with religion?"[71] If the answer to any one of these elements is "yes," the state action is deemed an unconstitutional establishment of religion.[72] While deceptively innocuous on its face, the *Lemon* test has yielded inconsistent results,[73] and its application by the Court has been erratic.[74] Many of the justices on the Court, six of them in fact, have

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70. 403 U.S. 602 (1971).

71. *Lemon*, 403 U.S. at 612-13; *see also Wallace*, 472 U.S. at 55-56 (applying *Lemon* test to hold unconstitutional a required moment of silence before beginning class at public school, during which students may pray); Stone v. Graham, 449 U.S. 39, 41 (1980) (applying *Lemon* test to hold posting Ten Commandments in public school classrooms unconstitutional); *Developments—Religion and the State*, 100 HARV. L. REV. 1606, 1644-46 (1987) (outlining and criticizing *Lemon* test).

72. *Stone*, 449 U.S. at 40-41. Often, whether a *Lemon* violation exists hinges on whether the state action in question has a religious rather than secular purpose, thus violating the first prong of the test. *See, e.g.*, *Wallace*, 472 U.S. at 56 (holding moment of silence for prayer at public school unconstitutional due to religious purpose); *Lynch*, 465 U.S. at 687 (finding a secular as well as religious purpose in the display of a crèche in a city's Christmas display and holding the display constitutional); *Stone*, 449 U.S. at 41 (holding that display of Ten Commandments in classrooms violated "secular purpose" prong of *Lemon* test). This element of the test has been criticized because, whether an act satisfies or violates it depends on how the Court chooses to characterize the state action in question. This allows the Court to pick and choose what will be held constitutional. *See Developments—Religion And The State*, 100 HARV. L. REV. 1607, 1646-47 (1987) (*Lemon* test allows majority to place an imprimatur on those practices which it believes are acceptable).

73. *See Allegheny*, 492 U.S. at 580, 594 (applying *Lemon* test, majority and dissent reached diametrically opposed conclusions). *Compare* Wolman v. Walter, 433 U.S. 229, 250-54 (1977) (holding loan of books containing maps by state to parochial schools not violative of Establishment Clause) *with* Meek v. Pittenger, 421 U.S. 349, 373 (1975) (holding loan of maps by state to parochial schools violates Establishment Clause). With regard to the inconsistency of Establishment Clause decisions, one critic states "Commentators have been irresistibly drawn to 'Alice in Wonderland' allusions." Steven D. Smith, *Symbols, Perceptions, And Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 269 (1987) *citing* G.GOLDBERG, RECONSECRATING AMERICA 75 (1984) (stating that "Burger's opinion in *Lemon v. Kurtzman* seems to have been written by the Mad Hatter); LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 181 (1986) (establishment decisions seem to come from "a Humpty Dumpty Court, which, as Humpty told Alice, thinks words can mean anything it says they mean"); Phillip Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. L. REV. 1, 10 (1984) (Establishment decisions seem "derived from Alice's adventures in Wonderland").

74. Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J. dissenting); *see also* Board of Educ. of the Westside Community Schs. v. Mergens, __ U.S. __, __, 110 S. Ct. 2356,

expressed their dissatisfaction with the *Lemon* test for varying reasons.[75] In a scathing dissent in *Wallace v. Jaffree*,[76] then Justice Rehnquist recited a litany of self-contradictory decisions all of which were fruits of the *Lemon* test.[77] For example,

> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. . . . A state may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or the museum for a field trip. . . . Religious instruction may not be given in public schools, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[78]

While critics have attacked the unpredictability of the *Lemon* test and the difficulty which courts have had applying it,[79] the primary criticism leveled

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2371, 110 L. Ed. 2d 191, 197 (1990) (majority gave *Lemon* lip service, but applied endorsement standard); Marsh v. Chambers, 463 U.S. 783, 792-95 (1983) (ignoring *Lemon* test entirely); Mueller v. Allen, 463 U.S. 388, 394 (1983) (Rehnquist, J.) (calling *Lemon* "nothing but a helpful signpost"); Larson v. Valente, 456 U.S. 228, 252 (1982) (declining to apply *Lemon*); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 100 (1980) (stating that under *Lemon* the Court has "sacrificed clarity and predictability for flexibility"); *Meek*, 421 U.S. at 358 (stating that *Lemon* is not easily applied); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 799 (1973) (calling *Lemon* a guideline); William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY'S L.J. 1, 8 (1984) (stating that critics are almost unanimous in finding Court's handling of Establishment Clause "inconsistent and unprincipled"); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 252 (1986) (stating that Court's approaches and results are impossible to reconcile).

75. *See, e.g.*, *Bullock*, __ U.S. at __, 109 S. Ct. at 909, 103 L. Ed. 2d at 25 (Scalia, J. dissenting) (Justice Scalia failed to find a constitutional, precedential, or historical basis for *Lemon*); *Allegheny*, 492 U.S. at 589 (Blackmun, J.) (mentioning *Lemon* test in passing, then applying endorsement test); *Allegheny*, 492 U.S. at 655 (Kennedy, J. dissenting) (applying *Lemon* test, but repudiating it as primary guide in Establishment Clause cases); *Wallace*, 472 U.S at 69 (O'Connor, J. concurring) (urging "a refinement of the *Lemon* test); *Wallace*, 472 U.S. at 112 (Rehnquist, J. dissenting) (criticizing *Lemon* test as confused and historically unfounded); *Regan*, 444 U.S. at 662 (White, J.) (stating that unpredictability will be the rule in Establishment Clause cases until "interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter with seeking to provide education for their youth—produce a single, more encompassing construction of the Establishment Clause.").

76. *Wallace*, 472 U.S. 38.

77. *Id.*, at 110-11 (Rehnquist, J., dissenting).

78. *Id.* (citing *Wolman*, 433 U.S. at 249; *Meek*, 421 U.S. at 362-66; *Zorach*, 343 U.S. at 306; Illinois *ex rel.* v. Board of Educ., 333 U.S. 203, 203 (1948)).

79. *See, e.g.*, Mark Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 997 (1986) (noting that "virtually everyone

against *Lemon*, by the Court and academians alike, is the inaccurate reading of the historical understanding of the term "establishment" which formed the foundation for the decision in *Lemon*.[80] Contrary to the framers' understanding that the Religion Clause was intended to prevent the establishment of a national religion,[81] many acts, which in no way establish a national religion, have been found to violate the Establishment Clause under *Lemon*. The Court has held that the display of a crèche on public property establishes religion.[82] Requiring display of the Ten Commandments in public school classrooms is also unconstitutional.[83] Even requiring a moment of silence in public schools during which students may *voluntarily* pray constitutes the establishment of a religion under *Lemon* analysis.[84]

The Supreme Court's most recent Free Exercise Clause decision mirrors the anti-religious slant of its Establishment Clause decisions. During the history of free exercise jurisprudence, the Court has changed its approach to

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who has thought about the religion clauses finds the Supreme Court's treatment of religion clause issues unsatisfactory"); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 129-40 (1986) (discussing problems with the concept of neutrality and the *Lemon* test); Larry Preece, Note, *Wallace v. Jaffree: A New Twist on the Old Lemon?*, 13 W. ST. U. L. REV. 659, 662-67 (1986) (addressing failures of *Lemon* test in light of *Wallace* decision).

80. *See, e.g.*, *Bullock*, __ U.S. at __, 109 S. Ct. at 909-15, 103 L. Ed. 2d at 25-32 (Scalia, J., dissenting) (attacking historical basis of *Lemon*); *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting) (criticizing *Lemon* test as blurred and historically unfounded); *Wallace*, 472 U.S. at 91 (White, J., dissenting) (stating that history does not support *Lemon*); Ivan E. Bodensteiner, *The "Lemon Test," Even with All its Shortcomings, is not the Real Problem in Establishment Clause Cases*, 24 VAL. U. L. REV. 409, 409 (1990) (arguing that precision would "take some of the fun out of constitutional law" and "decrease the need for creative lawyers," and that, despite *Lemon*'s shortcomings, the fact that its elements "encourage us to discuss the same issues" may be all we can expect of any constitutional standard); Stuart W. Bowen, Jr., Comment, *Is* Lemon *a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 159 (1990) (pointing out that present Establishment Clause jurisprudence does not conform with original understanding).

81. 1 ANNALS OF CONG. 730 (Joseph Gales, ed., 1789) (suggesting wording Establishment Clause to prevent "establishment of a national religion"); *see also Lynch*, 465 U.S. at 686 (basing decision of fact that governmental action at issue did not tend to establish a state religion).

82. *Allegheny*, 492 U.S. at 598. The Court per Justice Blackmun found display of a crèche in a county courthouse unconstitutional. *Id.* This decision is worthy of note in that Blackmun applied both the *Lemon* test and the endorsement test, and found the display unconstitutional under both. *Id.* at 592-93.

83. *Stone*, 449 U.S. at 42-43. The Court emphasized that the purpose of placing the Ten Commandments in the classroom was to encourage students to venerate them. Because they are sacred text in the Judaeo-Christian traditions, requiring their display in public school classrooms was an establishment of religion. *Id.* at 41-42.

84. *Wallace*, 472 U.S. at 61. The majority held that the amendment of the "moment of prayer" statute's language from requiring a moment of silence for "meditation" to "meditation or voluntary prayer" was an establishment of religion. *Id.* at 58-60.

free exercise cases from one allowing indirect burdens on religion,[85] to one which balanced the burdens on religious practice against state interests,[86] and, recently, back to one which will tolerate legislation placing an indirect burden on religion.[87] In *Employment Division, Department of Human Resources v. Smith*,[88] the Supreme Court struck down a challenge to an Oregon law which criminalized the use of peyote.[89] The petitioner, a Native American Church member, protested that use of peyote was a part of religious ceremonial rites practiced by church members.[90] The Court did not deny

85. *See Reynolds*, 98 U.S. at 152-53 (holding bigamy statute as applied to Mormons constitutional). In the earliest Free Exercise case, the Court interpreted the Free Exercise Clause to mean that government could not interfere with religious beliefs, but could affect religious practices. *Id.* This interpretation of the clause was maintained as late as 1961. *See* Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961) (holding that Sunday closing laws did not discriminate against Orthodox Jewish merchants who kept Sabbath on Saturday); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1607, 1706 n.9 (1987) (detailing Court's reasoning as to indirect impacts in *Braunfeld*).

86. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (allowing Seventh Day Adventist who refused to work at a job which required her to work on Sunday in violation of her religious beliefs to receive unemployment compensation). The balancing test in *Sherbert* requires the state to show a compelling interest before it could inhibit free exercise. *Id.* at 407-09. The *Sherbert* test was applied mostly to unemployment compensation cases and to allow Amish children to be educated at home after the eighth grade. *See Yoder*, 406 U.S. at 233 (Amish may remove children from public school after eighth grade); Thomas v. Review Bd. of the Ind. Employment Security Division, 450 U.S. 707, 719 (1981) (granting Jehovah's witness unemployment compensation after he refused to work for religious reasons). *But see* United States v. Lee, 455 U.S. 252, 261 (1982) (denying Amish right to be exempt from social security tax). The Court slowly drifted away from the broad reading of Free Exercise accommodation in *Sherbert*. *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1607, 1709 (1987).

87. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990) (holding that conviction of Native American Church members for ingesting peyote during a religious ceremony in violation of a criminal statute proscribing use of peyote was constitutional). The Court held that the law was generally valid and neutral, and only impacted religion indirectly. *Id.* at 878. Although this decision changes the standard used in determining whether government action violates free exercise, it is questionable whether the decision works a serious change on the results of free exercise attacks when one considers the restricted application of *Sherbert* and the high probability that any challenge to governmental action would fail *Sherbert* analysis. Douglas Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 596-97 (1991).

88. 494 U.S. 872 (1990). *Smith* involved a free exercise challenge of an Oregon statute criminalizing the use of peyote. *Id.* at 874. The statute was challenged by two members of the Native American Church who were fired from their jobs for using peyote. *Id.* They were refused unemployment benefits because they had been fired for work-related misconduct and brought suit under the Free Exercise Clause. *Id.*

89. *Smith*, 494 U.S. at 890. The Court stated that the law was nondiscriminatroy and refused to overturn it. *Id.*

90. *Smith*, 494 U.S. at 874. The use of peyote by Indians in religious ceremonies has been documented since the 1700s. OLIVER STEWART, PEYOTE RELIGION: A HISTORY 27-28

the legitimacy of his religion, nor the sincerity of his belief; it simply held that the state may pass laws inhibiting the free exercise of religion if the law's primary purpose is secular, and is rationally related to a legitimate state interest.[91] The decision in *Smith* smacks of that tyranny of the majority over the minority which is one of the great perils of representative government.[92] A very similar situation arose in 1919 under the Eighteenth Amendment—prohibition.[93] In the case of alcohol, however, federal legislation exempted the use of alcohol for sacramental purposes.[94] *Smith* puts Native American Church members in a dilemma akin to that of Thomas More, to follow conscience or the law.[95] Requiring Americans to choose between obeying their religion or the law does not seem to be what the Framers understood from the words "freedom of conscience."[96] However, the *Smith* decision is a fairly recent one, and it is unclear whether or when the Court will again alter its approach to the Free Exercise Clause.[97]

(1987). Early on, the Europeans on the North American continent attempted to outlaw peyotism; the Oregon statute is simply the latest attempt. *See generally* Craig J. Dorsay & Lea A. Easton, *Employment Division v. Smith: Just Say "No" to the Free Exercise Clause*, 59 UMKC L. REV. 555, 565-69 (1991) (outlining a general history of peyotism).

91. *See id.* at 885-88. The majority, per Justice Scalia, refused to apply strict scrutiny and require the showing of a compelling governmental interest before legislation infringing on free exercise could be found constitutional. *See id.* Justice O'Connor dissented, favoring adherence to *Sherbert*'s requirement that the state show a compelling interest outweighing the imposition on religious liberty before it could interfere with the exercise of religion. *Id.* at 899.

92. *See* JOHN S. MILL, ON LIBERTY 1-19 (1984) (explaining the dangers of tyranny of the majority). Mill warned that democracy, if not closely watched, could lead to the oppression of minorities who lacked the representative power to change the law. *Id.* (see especially pp. 5-11).

93. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI, § 21. The Eighteenth Amendment outlawed "intoxicating liquors" nationwide and gave Congress and the states the power to enforce the prohibition. *Id.* at § 2.

94. *See* National Prohibition Act, 41 Stat. 305, 308 (1919). "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided." *Id.*

95. *See generally* THE NEW ENCYCLOPEDIA BRITANNICA 313-14 (1988) (detailing the life of Thomas More). More was an English official under King Henry the Eighth. *Id.* at 313. As a Catholic, he refused to profess under oath that King Henry was the head of the Church on earth. *Id.* The choice cost him his life. *Id.*

96. *See James Madison's Letter to William Bradford, in* JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 97-98 (1987) (detailing religious persecution in the colonies); 1 ANNALS OF CONG., 730 (Joseph Gales, ed., 1789) (Representative Carroll stated clearly that the Religion Clause should be enacted to protect religion which "will little bear the gentlest touch of governmental hand").

97. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). *Smith* was decided on April 17, 1990.

III. CHANGE IN THE AIR: THE ALTERNATIVES

In its more recent Establishment Clause decisions, the Supreme Court has "tried to clarify, if not find a better approach than, *Lemon*."[98] In *Marsh v. Chambers*,[99] the Court ignored the *Lemon* test altogether and held that the opening of Nebraska legislative sessions with a prayer, and paying a chaplain out of tax dollars to lead it, was not an Establishment Clause violation.[100] The Court based its decision on the history supporting this practice.[101] One year later, in *Lynch v. Donnelly*,[102] the Court, per Chief Justice Burger, again emphasized the role of religion in American history holding that the display of a crèche on public property, as part of an annual Christmas display, was constitutional as an acknowledgement of a celebration recognized in the western world for two thousand years.[103] The Chief Justice noted that the crèche in no way "pose[d] the danger of establishment of a state church."[104] This language seems to mirror Madison's which placed the

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98. *See* Murray v. City of Austin, 947 F.2d 147, 153-57 (5th Cir. 1991) (stating that recent Supreme Court decisions attempt to clarify or revise *Lemon*); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) (stating that renewed attention given to the element of coercion suggests that the present test should be changed).

99. 463 U.S. 783 (1983).

100. *Id.*, at 795. The Court outlined the history underlying the practice, emphasizing that the framers provided for such prayer at the opening of congressional sessions. *Id.*

101. *Id.* at 790. While the Court stated that history alone was insufficient to require a finding of constitutionality, it went on to explain that in this case it was sufficient because, in addition to Nebraska's long history of prayer opening each legislative session, the framers themselves chose to open sessions of the federal legislature with prayer. *Id.* Thus, this practice must clearly have been within the bounds of the framers' understanding of the Establishment Clause. *Id.* Basing constitutionality on the history of a practice has met with mixed applications. *Compare* Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829 (11th Cir. 1989) (holding prayer at public school commencement violated *Lemon* irrespective of the history of the tradition and was therefore unconstitutional) *with* Stein v. Plainwell Community Sch., 822 F.2d 1406, 1410 (6th Cir. 1987) (holding prayer at commencement ceremony sufficiently grounded in tradition to withstand Establishment Clause scrutiny). Courts have refused to apply the historical analysis of *Marsh* in other contexts as well. *See* North Carolina Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1152 (1991) (holding opening court sessions with prayer violates Establishment Clause). *See generally* James J. Dean, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U. L. REV. 1001 (1989) (analyzing the court's application of *Marsh* in *Stein* and the court's refusal to apply *Marsh* in *Jager*, and concluding that prayer at commencement ceremonies will not survive Establishment Clause scrutiny at the Supreme Court level.

102. 465 U.S. 668 (1984).

103. *Id.* at 687.

104. *Id.* at 686. The Court in *Lynch* applied the *Lemon* test, focusing its analysis on whether there was a secular purpose for the display of the crèche and concluded that there was. *Id.* at 680-81. But, five years later, in *County of Allegheny v. ACLU*, Justice Blackmun held the display of a crèche in a county courthouse to be unconstitutional. *Allegheny*, 492 U.S. at 579. In the same opinion, however, Blackmun held constitutional the display of an 18 foot

word "national" before "religion," rather than Jefferson's "wall metaphor" which gave birth to *Lemon*.[105]

Based on the number of Justices voicing their dissatisfaction with *Lemon*, it seems likely that there will be a change in the standard used to determine whether state action constitutes an establishment of religion.[106] Among those justices who have suggested an alternative to *Lemon*, three camps exist: those favoring an endorsement test,[107] those favoring a coercion test,[108]

Menorah and a 45 foot Christmas tree. *Id.* at 616. Blackmun emphasized that the 40 foot tree validated the Menorah by secularizing it, since the Christmas tree has become a secular symbol for the winter season. *Id.* at 616. In his concurrence, Justice Brennan seemed fascinated by Blackmun's logic in concluding that an 18 foot tall Menorah would attract less attention than an average size Christmas tree. *Id.* at 642 (Brennan, J., concurring). Brennan believed that the religious nature of the 18 foot Menorah would spill over onto the tree, rather than vice-versa. *Id.* Justice Kennedy dissented from Blackmun's opinion emphasizing that "[w]hether the crèche be surrounded by poinsettias, talking wishing wells, or carolers, the conclusion remains the same, for the relevant context is not the items in the display itself but the season as a whole," and would have held the crèche constitutional. *Id.* at 666 (Kennedy, J., dissenting).

105. *Compare* Lynch v. Donnelly, 465 U.S. 668, 686 (1984) ("Any notion that these symbols pose a real danger to the establishment of a *state* church is far-fetched indeed") (emphasis added) *with* 1 ANNALS OF CONG. 731 (Joseph Gales ed., 1789) (Madison suggesting that "national" modify "religion" in Establishment Clause to aim the amendment at the evil it was intended to prevent).

106. *See e.g.* Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S.Ct. 890, 909, 103 L. Ed. 2d 1, 25-32 (1989) (Scalia, J. dissenting) (attacking *Lemon* test as unfounded in Constitution, history, or precedent); *Allegheny*, 492 U.S. at 591 (Blackmun, J.) (mentioning *Lemon* test in passing, then applying endorsement test); *Allegheny*, 492 U.S. at 655 (Kennedy, J. dissenting) (applying *Lemon* test, but repudiating it as primary guide in Establishment Clause cases); Wallace v. Jaffree, 472 U.S 38, 68-69 (1985) (O'Connor, J. concurring) (urging "a refinement" of the *Lemon* test); *Wallace*, 472 U.S. at 112 (Rehnquist, J. dissenting) (criticizing *Lemon* test as confused and historically unfounded); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980) (White, J.) (stating that *Lemon* is unpredictable and should be changed). Only three justices have failed to comment on *Lemon*'s inadequacy: Stevens, Souter, and Thomas. Justices Souter and Thomas have not had the opportunity. Justice Stevens has been called the Court's strictest separationist, Synopsis of United State Law Week Constitutional Law Conference, 60 U.S.L.W. 2253, 2256 (Dec 3, 1991), and it is likely that he will favor the stricter of the tests available. *See* Board of Educ. of Westside Community Sch. v. Mergens, __ U.S. __, __, 110 S. Ct. 2356, 2366-67, 110 L. Ed. 2d 191, 200 (1990) (holding eight to one that use of public school facilities for meetings of extracurricular religious organization was required under the Equal Access Act and was constitutional—Justice Stevens was the only dissenter).

107. Justices O'Connor and Blackmun favor the endorsement test. *See Mergens*, __ U.S. at __, 110 S. Ct. at 2371-73, 110 L. Ed. 2d at 215-17 (Justice O'Connor, joined by Justices Blackmun, White, and Chief Justice Rehnquist applied the endorsement test after reviewing constitutionality under *Lemon*); *Allegheny*, 492 U.S. at 591 (Blackmun applies the endorsement test in the majority opinion). Justice O'Connor is the author of the endorsement test. *See Lynch*, 465 U.S. at 687-94 (Justice O'Connor first proposes the endorsement test); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1607, 1647 (1987) (explaining Justice O'Connor's reformulation of *Lemon* as non-endorsement test). *See generally* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No*

and those who are undecided.[109]

A. *Non-endorsement of Religion*

The Court's strongest proponent of the endorsement test as a refinement of *Lemon* has been Justice O'Connor.[110] Recently, Justice Blackmun, joined the bandwagon by applying the endorsement test in his majority opinion in *County of Allegheny v. ACLU*.[111] Justice White has also expressed approval

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Endorsement" Test, 86 MICH. L. REV. 266, 268-76 (1987) (outlining evolution of endorsement test).

108. Justices Kennedy and Scalia favor the coercion test. *See Mergens*, __ U.S. at __, 110 S. Ct. at 2376-77, 110 L. Ed. 2d at 212-14 (Kennedy, J., concurring) (joined by Justice Scalia, Justice Kennedy criticizes endorsement test in favor of a coercion analysis); *Allegheny*, 492 U.S. at 655-670 (Kennedy, J., dissenting) (Justice Kennedy proposes coercion test as substitute for *Lemon* joined by the Chief Justice and Justices Scalia and White); James E. Ellsworth, *"Religion" in Secondary Schools: An Apparent Conflict of Rights—Free Exercise, the Establishment Clause, and Equal Access*, 26 GONZ. L. REV. 505, 525 (1990/91) (Justices Scalia and Kennedy favor coercion standard). The coercion test appears to have been taken in large part from a dissenting opinion by Judge Easterbrook of the Seventh Circuit Court of Appeals. *See* American Jewish Congress v. City of Chicago, 827 F.2d 120, 132-40 (7th Cir. 1987) (Easterbrook, J., dissenting) (proposing coercion as Establishment Clause standard).

109. Justices Rehnquist and White have joined in opinions applying both tests. *Compare Mergens*, __ U.S. at __, 110 S. Ct. at 2371-73, 110 L. Ed. 2d at 215-17 (Justice O'Connor, joined by Justices Blackmun, White, and Rehnquist, applies the endorsement test after reviewing constitutionality under *Lemon*) *with Allegheny*, 492 U.S. at 655-70 (Kennedy, J., dissenting) (Justice Kennedy proposes coercion test as substitute for *Lemon* and is joined by Chief Justice Rehnquist and Justices Scalia and White). Although attacking Justice Kennedy's criticisms of the endorsement test, Justice Stevens does not seem to prefer one test over the other. *Allegheny*, 492 U.S. at 650 n.6 (Stevens, J., concurring).

110. Justice O'Connor first proposed the endorsement test in *Lynch v. Donnelly*. *See Lynch*, 465 U.S. at 687-94 (proposing endorsement as an alternative to *Lemon*); *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1607, 1647 (1987) (stating that Justice O'Connor prefers an endorsement analysis to *Lemon*); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 271 (1987) (analyzing Justice O'Connor's endorsement test). Since proposing the test, Justice O'Connor has applied it frequently in Establishment Clause cases. *See, e.g., Allegheny*, 492 U.S. at 620-21 (O'Connor, J., concurring) (applying endorsement test and finding crèche display unconstitutional); Corporation of The Presiding Bishop v. Amos, 483 U.S. 327, 348-49 (1987) (O'Connor, J., concurring) (Free Exercise benefits to religion do not violate or implicate endorsement test); School Dist. v. Ball, 473 U.S. 373, 391-92 (1985) (O'Connor, J., concurring) (giving benefits to private school students at public expense is unconstitutional endorsement of religion).

111. *See Allegheny*, 492 U.S. at 591-93 (applying endorsement test to hold display of crèche in county courthouse unconstitutional). The endorsement test has been applied by the majority on other occasions. *See Mergens*, __ U.S. at __, 110 S. Ct. at 2371-73, 110 L. Ed. 2d at 214-18 (using endorsement test to find use of public school facilities for meetings of religious organizations pursuant to the Equal Access Act constitutional); *Bullock*, __ U.S. at __, 109 S. Ct. at 896, 103 L. Ed. 2d at 25 (stating that at the very least Establishment Clause prevents

of endorsement as a replacement for the *Lemon* test.[112] O'Connor's version of the endorsement test proscribes, "[d]irect government action endorsing religion or a particular religious practice . . . because it sends the message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[113]

Analysis reveals that the endorsement test is inadequate in several ways, the first being its inconsistency with existing jurisprudence defining religion. The Supreme Court's early definitions of religion all included some allusion to a supreme being.[114] In 1961, the Court first stepped away from requiring belief in God as an element of religion.[115] The Court's most recent definition describes religion as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God [in traditional religions].[116] By applying this definition, the Court has exempted persons from military service who would otherwise have had to serve in the armed forces.[117] It is questionable whether this understanding of the breadth of conscientious objector status is in conformity with the framers' intent.[118]

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endorsement and holding that tax exemption for religious publications violates Establishment Clause).

112. *Mergens*, __ U.S. at __, 110 S. Ct. at 2371-73, 110 L. Ed. 2d at 211-12 (Justice White joins Justice O'Connor's opinion applying the endorsement). *Contra Allegheny*, 492 U.S. at 655-70 (Kennedy, J., dissenting) (Justice Kennedy's dissent proposes coercion test as substitute for *Lemon* and is joined by Justice White).

113. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring). Justice O'Connor stated: "The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 70.

114. *See* United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting) (religion is "belief in a relation to God involving duties superior to those arising from any human relation"); Davis v. Beason, 133 U.S. 333, 342 (1890) (defining religion as "one's views of his relations to his Creator, and . . . the obligations they impose of reverence for his being and character, and obedience to his will").

115. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (including Buddhism, Taoism, ethical culture, and secular humanism in the definition of religions which do not teach belief in the existence of a God).

116. Welsh v. United States, 398 U.S. 333, 339 (1970); *see also* United States v. Seeger, 380 U.S. 163, 176 (1965) (first stating the definition used in *Welsh*). The Court in *Welsh* found that even though Welsh had denied that he was "religious," his conclusion that war was ethically immoral, without any reference to God or a supreme being, was sufficient to qualify as religious belief. *Welsh*, 398 U.S. at 338.

117. *Welsh*, 398 U.S. at 343; *Seeger*, 380 U.S. at 186-88. Both of these cases required the Court to determine whether non-traditional religious beliefs satisfied the definition of "religion" for purposes of determining conscientious objector status. In both cases the Court held that purely secular ethical systems were "religious." *Welsh*, 398 U.S. at 342; *Seeger*, 380 U.S. at 166.

118. *See* 1 ANNALS OF CONG. 749-50 (Joseph Gales ed., 1789) (discussing inclusion of a

However, focusing for a moment on how the Court has chosen to define religion, an inconsistency appears with regard to the application of that definition to the endorsement test.[119] The Supreme Court has explicitly included secular humanism, an ethical system based on evolution, science, and the belief that all men have inalienable rights by their nature,[120] within the definition of religion.[121] Under an endorsement analysis, any state action which endorses religion or a particular religion is unconstitutional.[122] Yet the government endorses secular humanism in that secular humanist principles form the foundation for education in public schools.[123] Thus, the prob-

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conscientious objector provision in the Bill of Rights). The framers debated placing a clause in the Bill of Rights which stated: "no person religiously scrupulous shall be compelled to bear arms." *Id.* at 750. Throughout the debate, the discussion speaks in terms of those being religiously scrupulous. *Id.* at 749-50. Whether the framers would have agreed with the Court's definition of religion cannot be determined.

119. *See generally* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 295-300 (1987) (analyzing problems with definition of religion as applied to endorsement test). Smith's analysis discusses only two problems concerning the definition of religion: viewpoint and standing. Smith concludes that the endorsement test will (1) create an avenue by which persons with unconventional views of religion may attack governmental policy on religious grounds and (2) force the Court into more clearly defining religion, which will undoubtedly muddy the already murky waters surrounding the Establishment Clause. *Id.* at 300.

120. *See* John W. Whitehead & John Conlan, *The Establishment of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 37-54 (1978) (defining secular humanism). This definition is a composite. Whitehead and Conlan list the following as the main tenets of secular humanism: the denial of the relevance of a deity, the supremacy of human reason, the inevitability of progress, science as a guiding force for progress, adherence to the theory of evolution, and the centrality and autonomy of man. *Id.*

121. *See* School Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (calling secular humanism a religion); Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (including secular humanism in the definition of religion). Courts have gone so far as to say that atheism may be a religion under the Establishment Clause. Theriault v. Silber, 547 F.2d 1279, 1281 (1977); Malnak v. Yogi, 440 F. Supp. 1284, 1326 (1977).

122. *See Wallace*, 472 U.S. at 69 (O'Connor, J., concurring) (clarifying definition of endorsement test).

123. When the tenets of secular humanism are measured against public school curricula, it seems that many of them are promoted in the place of belief in a theistic religion. *See Everson*, 330 U.S. at 23-24 (Jackson, J., dissenting) (stating that basic premise underlying public schools is "that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality towards religion"). *Compare* Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding that there is no valid secular reason for not teaching evolution in public schools) *with Edwards*, 482 U.S. at 593 (holding statute which required teaching creationism whenever evolution is taught unconstitutional). Yet only one case thus far has found an establishment of secular humanism in the classroom. *See generally* Smith v. Board of Sch. Commr's of Mobile County, 655 F. Supp. 939 *reversed* 827 F.2d 684 (11th Cir. 1987) (finding that many books used in public school omitted references to Judaeo-Christian history to the point of discrimination and requiring their removal from schools).

lem becomes: if secular humanism is a religion, and the endorsement test prohibits the endorsement of any religion, then the endorsement test prohibits the endorsement of secular humanism.[124]

This inconsistency cannot be remedied, because it is impossible for government not to endorse something by its actions. Every act of government is grounded in certain fundamental principles which determine what is good and what is evil.[125] Government must, and does, endorse a certain world view every time it acts.[126] If government endorses purely secular ethical principles intended to be religiously neutral, those principles constitute a religion—they are a system of values which can take the place of belief in a supreme being in the life of their possessor, and that, by the Court's definition, is a religion.[127] The endorsement test is unworkable because it is im-

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124. *See Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., dissenting and concurring) (stating that endorsement test would require the separation of all religious symbolism from government); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 295-300 (1987) (pointing out that under endorsement test, how one defines religion will determine what views government can support).

125. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (law is constantly based on morality); *cf.* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting) (analyzing the theory underlying the majority's decision); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 9 (1965) (law and legal systems are based on moral principles). Before a legislator can identify a problem which needs to be remedied, he must have some standard by which he to judge whether something is right or wrong, appropriate or inappropriate—in other words, he must have certain beliefs. *See* Anselm of Canterbury, *Proslogion*, *in* PHILOSOPHY IN THE MIDDLE AGES 150 (Arthur Hyman & James Walsh eds., 1987) ("For I do not seek to understand so that I may believe; but I believe so that I may understand. For I believe this also, that 'unless I believe, I shall not understand.' "); *cf. Welsh*, 398 U.S. at 341-44 (court's holding that individual claiming to be irreligious was religious because his ethical principles were the foundation for his choices between right and wrong implied that everyone has to believe in something); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 255 (1986) (paraphrasing Justice Black, "Any governmental interference with religion necessarily would involve at least an implicit approval of establishment of other beliefs or practices considered acceptable").

126. *See* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting) (majority's decision endorsed economic theory to which majority of Americans did not subscribe); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 287-88 (1987) (describing fictitious conversation between opponent of aid to parochial schools and devout legislator who sponsored such aid, showing that the legislator's religious beliefs affected his vote); John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 64-65 (1978) (arguing that prevalence of secular humanism is promoted by judicial relativism).

127. *See Welsh*, 398 U.S. at 338 (holding that belief system taking place of traditional religion in person's life is a religion). The Court held that, even though an individual denied belief in a religion, he did believe in a religion—although he did not know it. This was true because his conclusion that war was ethically immoral, although drawn solely from ethical

possible for government to take a position which does not endorse some ethical belief system.[128]

Not only does the endorsement test promote secular humanism, it has the actual effect of opposing theism almost to the point of coercion in two ways. For example, the Court's decision in *Marsh v. Chambers*,[129] as well as application of the endorsement test in other cases, allows governmental participation in religious expressions and practices, but only when they have become so secularized that they have no religious value.[130] The Court in *Marsh* upheld opening the legislative session with a prayer because the practice had a strong historical foundation.[131] The opinion states implicitly, "When prayer comes to be only a formalistic adherence to past practice, rather than an invocation of a supreme being, then it is acceptable." This treatment of prayer amounts to coercion of belief in secular humanism.[132] It appears that

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principles without appeal to a supreme being, took the place of traditional religious beliefs in his life. *Id.*

128. *See Allegheny* 492 U.S. at 675 (Kennedy, J., dissenting) (government must choose either absolute separationism or complete accommodation to create a bright line rule); PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 9 (1965) (law and legal systems are based on moral principles); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 255 (1986) (whenever state action interferes with religion, it is because government is making decisions based on a belief system not completely aligned to that religion); *cf. Bowers*, 478 U.S. at 196 (choosing traditional morality as foundation for decision).

129. 463 U.S. 783 (1983).

130. *See, e.g., Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring) (religious practices which, through their "history and ubiquity" have come to serve secular ends, do not violate Establishment Clause); *Lynch*, 465 U.S. at 716 (stating that many religious practices are shielded from Establishment Clause scrutiny because they have lost their religious significance through rote repetition); McGowan v. State of Md.,366 U.S. 420, 503-04 (1961) (religious practices which lose their significance over time often retained for secular purposes). The system composed of these practices has been called "American civil religion." *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1647 (1987).

131. *Marsh*, 463 U.S. at 793-94. The Court emphasized that the history of the practice was relevant in determining the framers' intent as to the scope of the Establishment Clause. *Id.* at 794-95.

132. *See Wallace*, 472 U.S. at 76-77 (O'Connor, J., concurring) (stating that encouragement of meditation is permissible under endorsement test while prayer is not). In *Jaffree*, O'Connor applied the endorsement test and found a statute unconstitutional which required a moment of silence in schools during which students could meditate or voluntarily pray because "prayer" was included as an option. *Id.* at 77. She points out that the statute appears constitutional because it does not favor the child who chooses to pray over the child who chooses to meditate. *Id.* at 76-77. However, she finds the statute unconstitutional solely because it endorses prayer, and states that a similar statute excluding the word "prayer" would be constitutional. *Id.* at 72-73. The effect of this reasoning is to favor the meditating child over the praying child, or the secular over the religious. *See* John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 22-23 (1978) (stating "Once the state moves in the direction of adopting

under the endorsement test, a state could post the "secular commandments" in classrooms since they have been stripped of all religious value, but the Ten Commandments would still be unconstitutional.[133]

Another inconsistency arises from the fact that the endorsement test appears more "religion-friendly" than *Lemon*.[134] Justice O'Connor pointed out that the proposed endorsement test would not be unfavorable to religion, but would allow government to acknowledge religion and take religion into consideration while making policy.[135] But, if the endorsement test treats religion more favorably than the *Lemon* test, existing jurisprudence indicates that the shift from one test to the other might be an establishment of religion.[136] In *Reitman v. Mulkey*,[137] the Supreme Court addressed the effect of a California anti-discrimination statute being repealed.[138] The Supreme

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Secular Humanism as its religious and philosophical base, the result is '[e]ither complete hostile annexation of the Church or persecution of the Church by separation. Religion is then first removed from the marketplace and the school, [and] later from other domains of public life.' ") *quoting* E. VON KUEHNELT-LEDDHIN, LEFTISM: FROM DE SADE AND MARX TO HITLER AND MARCUSE 427 (1974).

133. *Cf. Wallace*, 472 U.S. at 70-71 (O'Connor, J., concurring) (discussing application of endorsement test to statute requiring a moment of silence before class at public schools during which students "shall meditate or voluntarily pray"). In analyzing the majority's decision, which held the statute unconstitutional, O'Connor concentrates on the language of the statute. She concurs in the result because, under the endorsement test, the option of "prayer" in the text of the statute endorses religion. *Id.* at 70-71. A similar statute without the word "prayer" in it would pass the endorsement test, just as the "secular commandments" have had God removed from them and would probably be constitutional. *Id.*

134. *See* Aguilar v. Felton, 473 U.S. 402, 421-25 (1985) (O'Connor, J., dissenting) (concluding that funding parochial schools was constitutional). Justice O'Connor argued that *Lemon*'s prohibition of "benign cooperation between church and state" was flawed. She stressed that the pivotal consideration in Establishment Clause cases should be whether the state endorses religion, rather than *Lemon*'s blanket prohibition of interaction between church and state. *Id.* Based on this reasoning, Justice O'Connor concluded that majority erred in holding a program using federal funds to pay parochial school teachers unconstitutional. *Id.*; *see also* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 399-400 (1985) (Justice O'Connor states that *Lemon* prohibition prong is unworkable); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 320 (1987) (demonstrating that endorsement test emphasizes intent to endorse religion rather than intent to aid it, and that statutes which aid religion without intent to endorse it pass endorsement test, but not *Lemon*).

135. *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

136. *See* Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967) (holding that change in law which seems to imply government endorsement of racial discrimination is unconstitutional). The Court reasoned that a shift from an "affirmative action law" to a neutral law would send a message of governmental endorsement of discrimination to the citizens. *Id.* at 376

137. 387 U.S. 369 (1967).

138. *Id.* at 373-74. Reitner refused to rent an apartment to the Mulkeys (Negroes) claiming that the repeal of statutes proscribing discrimination in renting on the basis of race made such discrimination legal. *Id.* at 372.

Court, per Justice White, held that for California to change its law from one explicitly prohibiting racial discrimination in the sale or rental of residential property, to one which was neutral on the issue would, in fact, be a shift away from neutrality and would send citizens a message endorsing discrimination.[139] The Court concluded that this shift, and the message it conveyed, would "involve the state in private racial discrimination to an unconstitutional degree."[140] Applying the same logic to the endorsement test, it seems that, if the endorsement test is more "religion-friendly" than *Lemon*, as the case law seems to indicate, then the message the Court will send by shifting from the *Lemon* test to an endorsement test will not be one of neutrality; rather, it will be perceived by the citizenry as favoring or endorsing religion since the shift will be to a standard more favorable to religion.[141] Yet, under both *Lemon* and the endorsement test, the government may not act in such a way as to "convey a message that religion . . . is favored or preferred."[142] Thus, a shift from the *Lemon* test to an endorsement test would probably fail the endorsement test as an unconstitutional establishment of religion.[143]

Probably the most telling criticism of the endorsement test is history itself. Many actions taken by the early legislatures, which were composed of the framers, would probably fail the endorsement test because they clearly endorse religion.[144] The declaration of a national day of Thanksgiving would

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139. *Id.* at 376. The shift from an anti-discrimination statute to a neutral statute could not, in context, be seen as a shift to a neutral position by the state. *Id.*

140. Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967); *see also* Stanley Applebaum, *Recent Decisions*, 19 S.C. L. REV. 888, 890 (1967) (the state is involved in discrimination if it encourages it). This problem is exacerbated when the logic from *Reitman* is applied to the endorsement test because both the old and new standards, *Lemon* and endorsement, do not allow for endorsement or encouragement of religion, whereas in *Reitman* California crippled itself by adopting the anti-discrimination statute. *See* Calvin R. Harvey, *Recent Decisions*, 36 GEO. WASH. L. REV. 240, 244-45 (1967) (result of the logic used in *Reitman* cripples states with anti-discrimination statutes from repealing them).

141. The logic in *Reitner* ran as follows: A shift from an anti-discriminatory position to a completely neutral position is a shift away from anti-discrimination, and, therefore, a shift towards discrimination. *Reitner*, 387 U.S. at 374-76. When applied to the endorsement test, the logic runs: *Lemon* is anti-establishment while the endorsement test is neutral (i.e. more friendly to religion). A shift from *Lemon* to the endorsement test, therefore, will be a shift toward religion. *Cf. id.* (applying same logic).

142. *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

143. *See* American Jewish Congress v. City of Chicago, 827 F.2d 120, 135 (1987) (Easterbrook, J., dissenting) (stating that if all endorsement of religion were prohibited, then legislation favoring religious freedom would be an unconstitutional establishment of religion).

144. *See Allegheny*, 492 U.S. at 660-61 (citing numerous religious practices sanctioned by government and found constitutional by Court); *Wallace*, 472 U.S. at 100 (acts of First Congress confirm that framers did not understand non-establishment to be synonymous with irreligion); *Lynch*, 465 U.S. at 681-82 (listing numerous actions by government which assist religion but are constitutional). Religion has been invoked throughout America's history to give legitimacy to governmental authority. *See* Robert Bellah, *Religion and the Legitimation*

now be unconstitutional under *Allegheny v. ACLU*.[145] The allocation of funds to missionaries for the conversion of Indians would probably fail the endorsement test if we apply *Aguilar v. Felton*.[146] Even the decision by the framers to begin each legislative session with a prayer, led by a chaplain paid with tax dollars, would probably be unconstitutional under endorsement analysis.[147] The Court in *Marsh* upheld similar legislation by the state of Rhode Island, basing its constitutionality on the history supporting the practice.[148] The framers' original decision to open with prayer, however, had no

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of the American Republic, *in* VARIETIES OF CIVIL RELIGION 3, 11 (Robert Bellah & Phillip Hammond, eds. 1980) (citing examples of religion used by government); Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L. J. 1237, 1251-52 (1986) (stating that religion is part of American society).

145. *See Allegheny*, 492 U.S. at 614 (applying endorsement test Court stated that "If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause"). Justice O'Connor's concurrence in *Lynch* applied the endorsement test and justified the celebration of Thanksgiving by emphasizing that it had cultural significance in addition to being a religious holiday. *Lynch*, 465 U.S. at 715. When the holiday of Thanksgiving was first proclaimed, however, there was no cultural tradition to look to in order to show a secular purpose; the purpose was clearly to endorse religion. *See* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 64 (James Ricahrdson, ed. 1897) (George Washington declaring Thanksgiving holiday as a national holiday "of public thanksgiving and prayer [to] Almighty God"). George Washington's proclamation was probably in violation of the endorsement test.

146. *See Aguilar*, 473 U.S. at 425 (applying endorsement test to a program providing aid to parochial schools). Justice O'Connor found that it was permissible for the state to aid parochial schools in teaching secular subjects, but that the state could not provide any aid which would endorse the religious tenets of the parochial school. *Id.* Under this analysis, the Treaty between the United States of America and the Kakaskia Tribe of Indians, 7 Stat. 78, 79 (Aug. 13, 1803), which provided $100 annually for a Catholic priest to carry out his religious duties and teach the Indians English, was probably unconstitutional.

147. *See* Act of Sept. 22, 1789, ch. 17, 1 Stat. 70-71 (1789) (authorizing payment of five-hundred dollars annually to the chaplains for the House and Senate). Application of the logic in *Marsh*, which rested primarily on the tradition of legislative prayer in America, would be useless in that there was no tradition of such prayer at the time that the framers passed legislation providing for it. *See Marsh*, 463 U.S. at 791 (holding legislative prayer constitutional by emphasizing its history).

148. *Marsh*, 463 U.S. at 791. The Court stated that history alone was not sufficient to prevent an Establishment Clause violation. *Id.* at 790. However, the history supporting the practice of prayer before legislative sessions indicated to the Court that the framers did not feel that such prayer was unconstitutional. *Id.* at 791. The district court in *Lee* addressed the question of prayer at public school commencement exercises, and held that the *Marsh* analysis did not apply because the practice was not sufficiently grounded in history to escape an Establishment violation. Weisman v. Lee, 728 F. Supp. 68, 73-74 (D.R.I. 1990). The Eleventh Circuit, in analyzing the same school prayer issue, stated that religious invocations convey the message that the school endorses religion, and therefore violate the Establishment Clause. Jager v. Douglas County Sch. Dist., 862 F.2d 824, 831 (11th Cir. 1989); *see also* James Dean, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U. L. REV. 1001, 1031 (1989) (stating that O'Connor's endorsement test would find prayer

such foundation—they were the first Congress under the Constitution.[149] If the endorsement test is in harmony with the Framers' intent, it appears that they violated it only days after enacting the Religion Clause.[150] This is illogical because the endorsement test is illogical.

B. *Non-coercion of Religion*

Probably the most rational Establishment Clause jurisprudence to come out of the Court thus far is the coercion test. The coercion test, would prohibit government from coercing

> anyone to support or participate in any religion or its exercise; and [it would prohibit government from], in the guise of avoiding hostility or callous indifference, giv[ing] direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so.[151]

Examples of coercion which have been held unconstitutional by the Court include compelling or coercing participation or attendance at a religious ac-

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at public school ceremonies unconstitutional). The validity of the holding in *Marsh* appears to rest on the fact that the practice has a long history, and was adopted by the framers.

149. *Cf. American Jewish Congress*, 827 F.2d at 136 (Easterbrook, J., dissenting) (under an endorsement analysis, Thomas Jefferson's bill for establishing Religious Freedom would be an Establishment Clause violation). The absence of a historical foundation for legislative prayer would be fatal under an endorsement analysis. *See Jager*, 862 F.2d at 828 (stating that prayer at public school commencement ceremony was not grounded in history and was, therefore, subject to *Lemon* analysis). The *Jager* Court's application of the "primary effects" prong of the *Lemon* test is very similar to an endorsement analysis. *See id.* at 831. The court found that prayer at a commencement exercise endorsed religion. *Id.* If such prayers were historically based, it seems that the court's conclusion would have been different. *See id.* at 828. *See also* James Dean, *Ceremonial Invocations at Public High School Events and the Establishment Clause*, 16 FLA. ST. U. L. REV. 1001, 1023-24 (1989) (*Jager* stretched the endorsement test by stating that even though there were several secular purposes underlying prayer at public school ceremonies, the prayer was unconstitutional because *one* purpose underlying it was religious).

150. *See Wallace*, 472 U.S. at 100-01 (implying that, under majority's reading of Establishment Clause, the framers violated the Establishment Clause days after adopting it); JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 132 (1987) (stating that within same month, September of 1789, First Congress both created committees to select chaplains, and adopted First Amendment which includes Establishment Clause).

151. *Allegheny*, 492 U.S. at 659; *see also* Mark Tushnet, *Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses*, 27 WM. & MARY L. REV. 997, 998 (1986) (stating that to show coercion one must show that practice at issue coerces—or compromises or influences religious beliefs in a way that endangers religious liberty—and that practice has a "religious purpose"). *See American Jewish Congress*, 827 F.2d at 137 (Easterbrook, J., dissenting) (calling for a change in Establishment Clause jurisprudence to a coercion test). Justice Kennedy's formulation of the coercion test seems to draw heavily from Judge Easterbrook's opinion. *See id.* at 135-40.

tivity,[152] requiring religious oaths to obtain government office or benefits,[153] and delegating governmental power to religious groups.[154] Under the coercion test, a moment of silence in the classroom would be constitutional in that it does not coerce students to pray, but accommodates those who wish to.[155]

This accommodation seems to be in line with early legislation enacted by the framers.[156] For example, a national day of Thanksgiving simply gives people the opportunity to give thanks, if they wish; it compels no one to do so.[157] A prayer opening a legislative session, even if it is called an endorsement of religion, forces no one to pray; it merely accommodates those who wish to, acknowledging that the majority of Americans believe in and worship God.[158] Most importantly, the coercion test explicitly prohibits state action directly benefitting religion to a degree that amounts to establishing a state religion, which is precisely the evil which the framers sought to

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152. *See* Engel v. Vitale, 370 U.S. 421, 436 (1962) (holding mandatory prayer at public schools unconstitutional); McGowan v. Maryland, 366 U.S. 420, 452 (1961) (stating that mandatory day of religious observation would be unconstitutional).

153. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding unconstitutional requirement of belief in God as prerequisite for holding public office).

154. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982) (holding statute allowing churches to prevent liquor sales within 500 feet of their premises unconstitutional).

155. *See Wallace*, 472 U.S. at 89 (Burger, J., dissenting) (stating that statute requiring moment of silence before class during which student's *may* pray in no way threatens religious liberty). The coercion test favors religious belief. *See Allegheny*, 492 U.S. at 660-62 (Kennedy, J., concurring in part and dissenting in part) (stating that absent coercion, risk of establishment of religion presented by accommodation is minimal and stating that prayer before a legislative session is non-coercive); *American Jewish Congress*, 827 F.2d at 137 (Easterbrook, J., dissenting) (opening sessions of court with "God save the United States and this honorable court," is an accommodation of religion which does not coerce).

156. *See Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting) (listing examples of early legislation which endorsed religion); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 630-32 (5th ed. 1891) (stating that general sentiment at time First Amendment was adopted was that Christianity should be encouraged to fullest extent that it could without interfering with rights of conscience of others); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986) (comparing recent Establishment Clause decisions with religious actions taken by framers).

157. *See Allegheny*, 492 U.S. at 660-62 (Kennedy, J., dissenting); Gallagher v. Crown Kosher Super Mkt. of Mars, 366 U.S. 617, 628 (1961) (legislative recognition of day of religious observance doe not force anyone to worship); American Jewish Congress v. City of Chicago, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting); *see also Zorach*, 343 U.S. at 313-14 (the state should accommodate and encourage religion); Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) (under coercion test government may pursue legitimate goals which aid the cause of religion).

158. *See Marsh*, 463 U.S. at 792 (stating that prayer before opening legislative session is merely a "tolerable acknowledgment of beliefs widely held among the people of this country"); Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3 (there is a gray area in which government may permissibly facilitate the exercise of religious liberty).

prevent.[159]

Additionally, the coercion test does not present any of the logical inconsistencies which exist under an endorsement analysis. The fact that every act of government necessarily endorses some belief system presents no problem, since the coercion test implicitly recognizes that government must endorse something, and allows this endorsement, as long as it abridges no one's freedom of conscience.[160] As to the problem of shifting toward a more "religion-friendly" standard posed by the logic of the *Reitner* Court, the coercion test does not pretend to be a religiously neutral, but allows governmental endorsement of religious belief in general.[161] A shift from *Lemon* to the more "religion-friendly" standard of non-coercion will send the message to citizens that the government favors religious belief, but will coerce no one to practice a religion or believe in any religion at all, which is consistent with the coercion test.[162] The coercion test appears to be closely in line with the history of the Establishment Clause, as Madison put it: "that Congress

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159. *Compare Allegheny*, 492 U.S. at 659 (Kennedy, J., dissenting & concurring) *quoting Schempp*, 374 U.S. at 206 (acts which tend to establish a state religion constitute coercion) *with* 1 ANNALS OF CONG. 730 (Joseph Gales, ed. 1789) (Madison suggested wording the Establishment Clause to prevent Congress' establishing a national religion).

160. *See Allegheny*, 492 U.S. at 662 (Kennedy, J., dissenting & concurring) (government may accommodate religion and even share in celebration of religious holidays); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249, 252 (1986) (paraphrasing Justice Black, "any governmental interference with religion necessarily would involve at least an implicit approval of establishment of other beliefs or practices considered acceptable"); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 287-88 (1987) (showing that religious beliefs will inevitably have some influence on government). Government may endorse religion in general. *See Zorach*, 343 U.S. at 313-14 ("[w]hen the state encourages religious instruction . . . it follows the best of our traditions"); *American Jewish Congress*, 827 F.2d at 135 (Easterbrook, J., dissenting) (in endorsing freedom of religion, Jefferson was endorsing religion).

161. *See Mergens*, __ U.S. at __, 110 S. Ct. at 2377-78, 110 L. Ed. 2d at 208 (government may endorse religion so long as endorsement does not rise to the level of coercion); *Allegheny*, 492 U.S. at 662 (government may accommodate religion and even share in celebration of religious holidays by making them public holidays, erecting religious displays, sponsoring parades, and giving government employees and school children holiday vacations). "[I]t is difficult to maintain the fiction that requiring government to avoid all assistance of religion can in fairness be viewed as serving the goal of neutrality." *Id.* at 657; *see also* Steven Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1015 (1989) (promoting institutional separation between church and state which would not necessitate symbolic separation).

162. Recalling the logic in *Reitner*, shifting from anti-discrimination to neutrality sent the massage that government endorsed discrimination. Reitner v. Mulkey, 387 U.S. 369, 375 (1967). When this logic is applied to the endorsement test, one finds that shifting from *Lemon* to a more "religion-friendly" standard sends the message that government endorses religion, thus violating the endorsement test. *Cf. Id.* (the logic used in *Reitner* is applied here). The coercion test does not suffer from this internal inconsistency because, although a shift to the

should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience."[163]

CONCLUSION

This Comment began with a quotation from the *Gospel of John* ending with Pilate asking, "What is truth?" Pilate, the secular authority, was concerned with the practical, with keeping the peace, and did what he felt necessary to attain that objective. In the pursuit of freedom, and in a well-intentioned effort to prevent religious persecution and oppression, the Supreme Court, with the tacit approval of the American people, has attempted to accommodate all religions with the result of accommodating none. The god of Establishment Clause jurisprudence has been devoutly worshiped, and sacrifices of pro-religious legislation have been offered on the altar of separation for over fifty years. However, the time has come to abandon the god of establishment and return to the true intent of the framers. The above analysis indicates that the coercion test is most in line with that intent, and should be adopted by the Court.

In reality, whether the Court chooses coercion, or endorsement, or leaves the Establishment Clause in the hands of *Lemon*, to continue drifting aimlessly about the jurisprudential sea, is irrelevant. What matters is that in applying whatever standard it chooses, the Court keeps in mind the intent of the framers—the spirit which gave, and still gives, the Constitution life. The Constitution, despite the many great things it has done for America, is only parchment. It is the principles underlying the Constitution which made America great. These principles were the product of religious people, many of whom left their homes, fleeing the reign of tyrants, in order to worship God according to the dictates of their consciences. It is the principles we venerate, not the parchment; it is God we worship, not the king. During the past fifty years, however, we have placed the parchment above the principles, and have pursued what we believed to be in the best interest of the king at God's expense.

Our national motto is "In God we trust." We should guard that motto well, and strive to be worthy of it, lest we be heard to say. . . .

> Had I but served God with half the zeal
> I serv'd my king, he would not in mine age
> Have left me naked to mine enemies.
>
> Henry the Eighth Act I, sc 2.

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coercion test will endorse religion, it will not coerce; and coercion is what the coercion test proscribes. *Cf. Id.* (applying logic from *Reitner* to implementation of the coercion test).

163. 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789) (emphasis added).