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A New Originalism: Adoption of a Grammatical Interpretive Approach to Establishment  
Clause Jurisprudence after *District of Columbia v. Heller*

A thesis submitted in partial fulfillment of the  
requirements for the degree of Master of Judicial Studies

by

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May, 2010

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THE GRADUATE SCHOOL

We recommend that the thesis  
prepared under our supervision by

**CHRISTOPHER A. BOYKO**

entitled

**A New Originalism: Adoption Of A Grammatical Interpretive Approach To  
Establishment Clause Jurisprudence After District Of Columbia V. Heller**

be accepted in partial fulfillment of the  
requirements for the degree of

**MASTER OF JUDICIAL STUDIES**

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## ABSTRACT

The debate governing the proper method of Constitutional interpretation has waged amongst judges, scholars, and advocates since the very founding of the document itself. A universally-accepted approach would seem impossible to achieve. However, a solid framework for interpretation must guide any system of proper Constitutional jurisprudence. This thesis proposes such a framework, as applied to the Establishment Clause of the First Amendment, a constitutional provision that has yet eluded consistent application. It examines the infirmities of current Establishment Clause jurisprudence occasioned by the judicial creation of surrogate constitutional principles that have improperly replaced and supplanted clear text. Because of this improper supplantation, Establishment Clause jurisprudence has devolved into a series of inchoate approaches that, by virtue of their surrogate status, defy clear and consistent application. The result has become the creation, by judicial fiat, of multiple “establishment clauses” with each approach existing both independently and yet interchangeably, the amalgamation of which produces jurisprudential chaos.

This framework adheres to the text of the Establishment Clause through interpretation of the Clause within the parameters of its textual language and grammatical structure. It achieves uniformity of application yet remains flexible therein, where such application operates within the confines of rules of grammar and usage that bind textual interpretation to those rules. It analyzes the weaknesses of the current approaches in light of this framework, and sets forth a standard that demands adherence to text as governed by rules of grammar and usage, thereby eliminating surrogate Constitutional terminology.

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A NEW ORIGINALISM: ADOPTION OF A GRAMMATICAL INTERPRETIVE  
APPROACH TO ESTABLISHMENT CLAUSE JURISPRUDENCE AFTER *DISTRICT  
OF COLUMBIA V. HELLER*

CHRISTOPHER A. BOYKO\*

- I. INTRODUCTION TO THE EXEGETICAL AND INTERPRETIVE RATIONALE
- II. HISTORICAL CONTEXT OF ESTABLISHMENT
- III. JUDICIAL CONCEPTS OF ESTABLISHMENT—SURROGATE TERMS AS SUPERTEXT
  - A. *The “Wall of Separation”*
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  - B. *Grammatical and Linguistic Modality—A New Originalism*
- V. CONCLUSION

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Where-ever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate[.]<sup>1</sup>

#### I. INTRODUCTION TO THE EXEGETICAL AND INTERPRETIVE RATIONALE

The Constitution is a legal document.<sup>2</sup> Its text was not composed in haphazard fashion, nor were its terms fortuitously chosen. Its drafters were sober men, of singular purpose, driven from the inception to construct a founding document designed both to eradicate the faults exposed in the British system and to protect against the ascendance of the caprice of tyranny over the rule of law.

The text of the Constitution is then bound unto itself, and the document derives its very authority from text whose meaning is etched into history; whose context, when apparent, dictates application; and whose application, when ambiguous, finds support in the objective meanings attributed to such text, with reference to the understandings of the drafters themselves, from the course of history, and from normative rules of grammar and usage.<sup>3</sup> This textual hermeneutic arises because the words of the Constitution are, by their very declaration, supreme law. In fact, to accept the supremacy of the Constitution (to which all legislative, executive, and judicial members swear an oath of support), one

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<sup>1</sup> JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 202 (Russell Kirk ed., 1955) (1689).

<sup>2</sup> Justice Antonin Scalia, Speech at the Annual Federalist Association, Charles Cuprill Chapter (Feb. 13, 2006) (as reported by Melissa McNamara, CBS News, *available at* [http://www.cbsnews.com/stories/2006/02/14/supremecourt/main1315619.shtml?source=RSS&attr=\\_1315619](http://www.cbsnews.com/stories/2006/02/14/supremecourt/main1315619.shtml?source=RSS&attr=_1315619) (last visited May 27, 2009)) (“The Constitution is not a living organism; it is a legal document. It says something and doesn’t say other things.”).

<sup>3</sup> Indeed, few terms in the Constitution are self-defining, and it is unquestionably the proper role of the judiciary to give meaning to these terms where ambiguity exists. However, construction of terms is a far cry from judicial addition, subtraction, and substitution of terms. *See infra* Part I.

must first accept the presupposition that the Constitution's text imbues the document with the very authority to grant its proclaimed supremacy.<sup>4</sup> Any other conclusion makes reference to the Constitution secondary, because it improperly, and unnecessarily, binds constitutional text (in the application) to some extrinsic body of law, the making of which thereby subordinates text to judicial agency; the language of Article VI not only contradicts such an outcome, but in fact proscribes it. Therefore, because the Constitution derives its authority from the words of the document itself—from its status as Constitution—and because Article VI mandates that no agency subordinate to the Constitution may violate its authority (even if such agency be entrusted with what we now call judicial review<sup>5</sup>), there can exist no legitimate constitutional law where such jurisprudence “evolves” from any method of interpretive review that subjugates such text, or creates “tests” or “standards” that supplant or substitute explicit text. If such be the constitutional modality, then the authoritative meaning of that text, which sets forth the very authority with which to invoke it, must not, and indeed cannot, suffer at the protean attitudes, understandings, or protocol of nine unelected men and women, or a majority or plurality of them.<sup>6</sup>

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<sup>4</sup> See Vasan Kesavan, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1129 (2003) (“To invoke the Constitution as authoritative requires that the Constitution be taken on its own terms. To reject the basis on which the Constitution purports to be authoritative and its own specification of what constitutes ‘this Constitution’ is to reject any basis for invoking the Constitution as authoritative.”).

<sup>5</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>6</sup> See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824-25 (1986) (“What does it mean to say that words in a document are law? One of the things it means is that the words constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens.”); see also Kesavan, *supra* note 4.

And yet, two hundred and twenty-three years post, the text of this document has indeed suffered at the hands of such men and women. Modern constitutional jurisprudence and political thought hails such development as proof of an “organic,” “evolving,” or “elastic” Constitution.<sup>7</sup> The most common method of imposing such elasticity occurs through the addition of words and phrases to the text of the Constitution, thereby infusing it with both a meaning and an authority foreign to itself.<sup>8</sup> Thus, Fifth

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<sup>7</sup> This is not to say that a constitution should not evolve over time to address changes that the passage of time inevitably brings and adapt to new developments in society or technology (e.g., pornography, “virtual” property rights, email and the internet, electronic surveillance, etc.), or changes in attitudes or morality. However, the Constitution as a legal document must evolve or expand by interpretation or construction within its own parameters. Any evolution undertaken by addition, subtraction, or substitution must occur by amendment—a designedly difficult process. As Judge Bork (often accused of unwavering adherence to notions of “judicial restraint” and “original understanding”) notes of the distinction between judicial construction of existing terminology and the judicial creation of extra-constitutional principles: any invalidation, on constitutional grounds, of an act of the “political branches” must happen “in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution.” Bork, *supra* note 6, at 826 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-2 (Harvard University Press 1980)). Bork further clarifies this idea:

The important thing, the ultimate consideration, is the constitutional freedom that is given into [judges’] keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty . . . is to ensure that the powers and freedoms the framers specified are made effective in today’s circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.

*Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

<sup>8</sup> In reality, the concept of an “evolving” Constitution is embodied within the document itself and is therefore self-executing under the amendment provisions of Article V. However, such a process is by design slow and difficult, and as a result does not serve as a convenient means with which to “elastify” the language of the Constitution under the exigencies of any particular case implicating its terms. This author posits one theory for this rationale, and an explanation for why such improper—and at times illegal—wielding of judicial power does not produce an outcry, or even a whimper, among the general populace, let alone the judiciary as a whole. Oftentimes, the outcome

Amendment “liberty” becomes infused with vague notions of “privacy,” and equal protection becomes divided into subparts of protected or “suspect” classes. Ultimately, then, there emerges the development of wholly novel concepts such as “substantive” due process and other extra-constitutional doctrines, concepts evolving not from the text of the document but as authoritative “extra-text,” thereby achieving an impossible dichotomy of being melded with the document and yet altogether absent from it.<sup>9</sup>

More insidious, however, and therefore more difficult to discern, is the opposite phenomenon: the disregard of explicit constitutional terminology, which being ignored, become orphaned; once orphaned, the text becomes meaningless as law, whereby, depending on a particular Justice or plurality of Justices, implicit terms become substitutes for explicit text. Over time, these implicit terms, by rote, derive their own explicit status, unquestioned, even unanalyzed; and so existing, thereby acquire a surrogate or “shadow” constitutional validity, bearing a more authoritative weight than the actual text itself.<sup>10</sup> These surrogates, possessing such illegitimate rote authority,

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of the case makes palatable the means by which such outcome was reached; therefore, in cases with reprehensible facts, the public reaches a collective recognition that, to use general parlance, “this cannot be right,” and therefore looks to the judiciary to make it right. The outcome, when the judiciary does endeavor to make it right, produces an accompanying collective consensus that justice has prevailed, the nature of which either (1) prevents the public from questioning, or even analyzing, whether such justice was reached in an improper manner; or (2) otherwise insulates the particular judge or judges from any criticism for having so reached “justice” in a constitutionally impermissible manner.

<sup>9</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31-32 (Free Press 1990).

<sup>10</sup> Bork calls this phenomenon law by judicial “fiat” and “not law in any acceptable sense of the word.” Michael W. McConnell, *The First Amendment Jurisprudence of Judge Robert H. Bork*, 9 *CARDOZO L. REV.* 63, 65 (1987), *quoted in* Robert Bork,

become imbedded within constitutional jurisprudence as super-constitutional inquiries that, like “ghoul[s] in . . . late night horror movies,” are killed, resurrected, and killed again, as would seem appropriate under the particulars of any given case.<sup>11</sup>

The consequence of this phenomenon is twofold. First, ambiguous terms in the Constitution, if they be ambiguous at all, become construed by extra-constitutional concepts that, adopted on an *ad hoc* basis, themselves become susceptible to equally ambiguous application, which application, in turn, supplants the text itself.<sup>12</sup> Second, once supplantation occurs, these concepts impregnate the Constitution as part of court-created inquiries, “standards,” or “tests” by which whole constitutional provisions are construed and interpreted, and thereby become surrogate text, or “supertext.”

Nowhere, in the opinion of this author, is this phenomenon more apparent, nowhere is its weakness more exposed, and nowhere is its effect more divisive, than in the

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*Forward* to G. MCDOWELL, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY*, at ix (Center for Judicial Studies 1985).

<sup>11</sup> *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

<sup>12</sup> See, e.g., Daniel L. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation”*, 39 J. CHURCH & ST. 455, 456 (1997) (“Occasionally a metaphor is thought to encapsulate so thoroughly an idea or concept that it passes into the vocabulary as the standard expression of that idea. Such is the case with the graphic phrase ‘wall of separation between Church & State,’ which in the twentieth century has profoundly influenced discourse and policy on church-state relations. Jefferson’s ‘wall’ is accepted by many Americans as a pithy description of the constitutionally-prescribed church-state arrangement.”); see also DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 3 (N.Y. Univ. Press 2002) (positing that the federal judiciary has found the wall metaphor “irresistible, adopting it not only as an organizing theme of church-state jurisprudence but also as a virtual rule of constitutional law,” and thereby supplanting actual First Amendment text).

Establishment Clause cases.<sup>13</sup> Just as Thomas Jefferson’s “wall of separation,” perhaps the best known or most revered surrogate,<sup>14</sup> is now imbedded in First Amendment jurisprudence in the sixty years following *Everson v. Board of Education of Ewing*,<sup>15</sup> also imbedded are concepts of entanglement, endorsement, coercion, and neutrality—all surrogates for “establishment.”<sup>16</sup> While the Court has never attempted to create a textual surrogate for “religion,” it has nevertheless recognized “symbolic” surrogates such as crosses, menorahs, or manger scenes; “invocation” surrogates, such as prayers and so-called moments of silence; “utilization” surrogates, such as sectarian use of public

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<sup>13</sup> Indeed, in the words of the late Chief Justice Rehnquist, “Many of our . . . Establishment Clause cases have been decided by bare 5-4 majorities.” *Wallace v. Jaffree*, 472 U.S. 38, 107 n.6 (1986) (Rehnquist, J., dissenting); see Marcia S. Alembik, Note, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1176 (2006); Jeremy Patrick-Justice, *Cutting-Edge Issues in Public Interest Lawyering: Strict Scrutiny for Denominational Preferences: Larson in Retrospect*, 8 N.Y. CITY L. REV. 53, 53 n.1 (2005), citing LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT*, at xviii (Univ. N.C. Press 1994).

<sup>14</sup> See, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE 1* (Harvard University Press 2002) (“Two centuries later, Jefferson’s phrase, ‘separation between church and state,’ provides the label with which vast numbers of Americans refer to their religious freedom. In the minds of many, his words have even displaced those of the U.S. Constitution, which, by contrast, seem neither so apt nor so clear.”). As will be discussed *infra*, such use of substitutionary surrogates for explicit textual provisions of the Establishment Clause has impeded clear textual analysis to the point of rendering such text meaningless, or at a minimum, subordinate to its surrogate.

<sup>15</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Beginning with Justice Black’s opinion in *Everson*, Jefferson’s wall of separation has become standard constitutional fare for layman, law student, and judge alike. In fact, as stated in *Board of Education v. Allen*, 392 U.S. 236, 242 (1968), “[t]he constitutional standard is the separation of Church and State.”

<sup>16</sup> As will be discussed *infra*, the “entanglement” aspect is most closely aligned to the surrogate concept of “separation,” and the concepts of “endorsement” and “coercion” at least minimally align themselves with the actual text, “establishment.” However, none of these concepts have been applied uniformly or consistently. Neutrality, by contrast, seems more of an indicia of endorsement/establishment rather than a test thereof.



facilities; or “funding” surrogates, such as printing allowances or school vouchers.<sup>17</sup> However, from the standpoint that “religion” is itself not an ambiguous concept, the Court has never attempted to limit or expand its import beyond what it already would seem to encompass by implication.<sup>18</sup>

Current Establishment Clause jurisprudence oscillates between no less than five approaches—*Lemon*,<sup>19</sup> endorsement, coercion, neutrality, and a “history and traditions” approach last seen in *Van Orden*<sup>20</sup> and *McCreary County*.<sup>21</sup> Unfortunately, the Court applies none of these approaches consistently, cannot decide which approach to utilize in any given situation, and even where it will use a test, does not apply it uniformly. Furthermore, when expedient, the Court appears to craft a hybrid of these approaches, e.g.: *Lemon*’s purpose and effect with endorsement and coercion; neutrality as indicative of endorsement or *Lemon*’s purpose; psychological coercion mixed with *Lemon*’s effect prong; and in its most current form, a hybrid combining a history and traditions approach with *Lemon*’s purpose/effects prongs, as indicative of neutrality. As this thesis posits, such an inconsistent state of Establishment Clause jurisprudence is not only unsurprising,

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<sup>17</sup> As will be discussed *infra*, such disparate use of surrogates lends itself to inconsistent outcomes, and the myriad tests that derive therefrom are themselves not uniformly applied, rendering Establishment Clause jurisprudence “inchoate if not incoherent.” EDWIN MEESE III, *THE HERITAGE GUIDE TO THE CONSTITUTION* 304 (Mathew Spalding & David Forte eds., Heritage Foundation 2005).

<sup>18</sup> For this reason, all Establishment Clause approaches analyze state action in terms of “religion” without ever attempting to define religion, or at least to conceptualize it in some fashion. Instead, such approaches merely presume its involvement. This begs the question, addressed *infra*, as to what constitutes “religion” for First Amendment purposes.

<sup>19</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>20</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>21</sup> *McCreary County v. ACLU*, 545 U.S. 844 (2005).

but is altogether expected, as these tests, often created *ad hoc*, cannot be applied uniformly, or exclusively it would seem. Even if they could, all present what can be termed as “super-constitutional” or “supertextual” principles.

The *Lemon* approach, when even applied, is so detached from “establishment of religion” that several Justices have labeled it unworkable and called for it to be overruled. The endorsement approach is the offspring of *Lemon*, and similarly lacks any consideration of “establishment” as that term would necessarily imply some affirmative stance taken by government carrying with it the force of law. The coercion approach coexists with the first two approaches, albeit independently; and while coercion appears to address the concept of legal compulsion, in practice, it has instead relied upon considerations of the subjective, “psychological” effect of a statute, policy, or practice on the complainant. History and traditions analysis, while relevant as to the founders’ understanding of the meaning of text, remains helplessly, and hopelessly, inconsistent, as it all too often leads to conflicting interpretations of the same text. Neutrality lacks any constitutional basis whatsoever, and therefore remains the most ambiguous of approaches.

This thesis proposes an approach to Establishment Clause jurisprudence (and one applicable to constitutional interpretation as a whole) that maintains fidelity to the Constitution by confining the application and interpretation of explicit text to the strictures of well-established norms of grammar and usage. It will begin by analyzing the disparities created through the addition or substitution of super-textual language to the clause through the use of surrogate concepts, and will demonstrate that any such method of constitutional adjudication becomes unworkable and incoherent once such tests utilize

surrogate concepts and terminology. Through grammatical exegesis will emerge the theory that the Religion “phrases”<sup>22</sup> do not afford competing protections, and adhering most closely to the structure and meaning of the Religion Clause as a whole, more specifically, with respect to the grammatical interplay of its two adjectival subparts, the present participle phrases “respecting an establishment of religion” and “prohibiting the free exercise thereof,” a new normative meaning, a modality, emerges, where the Establishment “phrase” becomes construed in its truest context, as an adjectival phrase modifying “law.” This “linguistic modality”<sup>23</sup> thus respects and maintains the integrity of the document as drafted, and ensures that the words and context employed by the Founders—to which indelible significance adhered at the moment of inscription—remain governed by normative rules of grammar and usage (e.g., “Standard Written English”); only in this way does the language of 1787/1791 become bound by the same semantic and linguistic norms as bind the language today. In other words, this approach places a type of “linguistic seal” upon the Constitution that allows judicial interpretation to achieve consistent application within the parameters of modern society. Since judges today are bound by the same rules of grammar and usage comprising standard written English that bound the framers at the Constitutional Convention, this linguistic approach seals the original structure of the text within the parameters of modern application.

Indeed, the Supreme Court has already demonstrated a willingness to employ such an approach vis-à-vis the language of the Second Amendment in *District of Columbia v.*

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<sup>22</sup> See discussion *infra* Part IV.

<sup>23</sup> Defined and discussed *infra* Part IV.

*Heller*,<sup>24</sup> wherein the Court analyzed the grammatical structure of the Amendment and identified the text as setting forth a “prefatory” clause and an “operative” clause, and then construed the former clause as giving meaning to the latter. The Court also focused on the meanings of the individual terms contained within each clause, i.e., “militia,” “right,” “people,” and “keep and bear Arms.” Thus, the Court has at least laid the groundwork for the adoption of a new approach to constitutional interpretation: one that utilizes the rules of grammar and usage, rather than concepts of original understanding that are often hard to discern, so as to reach decisions that adhere most closely to the text and meaning of the Constitution as written.

## II. HISTORICAL CONTEXT OF ESTABLISHMENT<sup>25</sup>

Even before the creation of the Federal Constitution or state constitutions, religious life in colonial America involved, to a large extent, ideas of “favored” or “recognized” religions versus religious minorities.<sup>26</sup> Adherents to disfavored religions became “dissenters” who were fearful that any dissent would unleash penalty or punishment from the state, or at least, exclusion from the benefits bestowed upon the “favored” believers.<sup>27</sup>

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<sup>24</sup> *Dist. of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>25</sup> The following is but a brief recitation of the history of religious establishment in the colonies and serves as both a description of the environment existing at the time the Constitution was drafted and ratified and as a backdrop for the language chosen in the First Amendment Establishment Clause. For a more detailed view of establishment in the colonies, see Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

<sup>26</sup> This concept has been recognized by the Court in its “endorsement” approach to Establishment Clause jurisprudence—an approach particularly espoused by Justice O’Connor discussed *infra* Part III.B.3.

<sup>27</sup> See HAMBURGER, *supra* note 14, at 9-10:

The dissenters were the adherents of minority denominations that refused to conform to the churches established by law. The established churches (Episcopal

The Founders were thus more concerned with securing religious liberty, as opposed to segregating government from religion,<sup>28</sup> and to this end, from the standpoint of dissent, affording protection against government reprisal—either direct (punishment) or indirect (exclusion).<sup>29</sup>

Any examination of this concept of “establishment” must occur within this context. In light of the colonial history, the drafters of the Constitution deliberately chose the word “establishment” over a more generic or even more comprehensive word; such choice was

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in the southern states and Congregationalist in most New England States) were established through state laws that, most notably, gave government salaries to ministers on account of their religion. Whereas the religious liberty demanded by most dissenters was a freedom from the laws that created these establishments, the separation of church and state was an old, anticlerical, and, increasingly, antiecclesiastical conception of the relationship between church and state. As might be expected, therefore, separation was not something desired by most religious dissenters or guaranteed by the First Amendment. Indeed, it was quite distinct from the religious liberty protected in any clause of an American Constitution, whether that of the federal government or that of any state.

<sup>28</sup> This religious liberty, of course, is also protected by the Free Exercise Clause; however, early concerns involved not so much the freedom to practice one’s religion as they did the notion of the social ostracism descended upon a disfavored sect and, to a lesser extent, the denial of privileges or status given to “established” religions.

<sup>29</sup> See HAMBURGER, *supra* note 14, at 89-107. The states with established religions originally imposed penalties on those holding dissenting viewpoints. These states ended sanctions but instead enacted specified privileges for their established denominations—notably, salaries for the established clergy. Against such establishments, dissenters sought not only a freedom from penalties (whether in terms of the “freedom of worship” or the “free exercise of religion”) but also guarantees against the unequal distribution of government salaries and other benefits on account of differences in religious beliefs. Some dissenters even demanded assurances that there would not be any civil law taking “cognizance” of religion. As a result, the colonial constitutions drafted to accommodate the antiestablishment demands of dissenters guaranteed religious liberty in terms of these limitations on government—specifically, limits on discrimination by civil laws. *Id.*

not accidental.<sup>30</sup> Furthermore, the founders understood the phrase “respecting an establishment of religion” to have particular import at drafting, one designed to protect against the establishment of a national religion, the likes of which the founders had experienced firsthand in Great Britain and the likes from which many citizens had escaped in other European countries.<sup>31</sup> Notwithstanding this, prior to the American Revolution the Anglican Church was officially established in the five southern colonies, and more often than not, Puritanism (i.e., Congregationalism)—out of favor in England—was the established church in most New England colonies, Rhode Island excepted.<sup>32</sup>

Of course, the Religion Clause of First Amendment itself clearly states, “Congress shall make no law respecting an Establishment of religion, or prohibiting the Free Exercise thereof . . . .”<sup>33</sup> The drafters employed this language, as generally understood at

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<sup>30</sup> Some delegates urged either stronger or weaker language; e.g., “Congress shall make no law touching religion” or taking “cognizance” of religion. HAMBURGER, *supra* note 14, at 106-07.

<sup>31</sup> Germany, Scandinavia, France, and Holland had established religions in one form or another. *See* McConnell, *supra* note 25, at 2107.

<sup>32</sup> *Id.* at 2115-16. With respect to usage as to the various religious denominations, Judge McConnell provides a concise explanation at footnote 54:

The term “Anglican” did not come into contemporaneous use until the eighteenth century, but I use it here as a shorthand for the Church of England prior to Independence. The term “Episcopalian” was sometimes used in reference to the Church of England prior to Independence, but I will reserve it to refer to the American successor to the Church of England after Independence. I will use the term “Puritan” to denote the congregational Reformed Protestantism of New England in the hundred or so years after settlement, and the term “Congregationalist” to denote the same church after the mid-1700s, when it had lost the theological and behavioral rigor that is associated with the term “Puritan.” I will use the term “Calvinist” or “Reformed” to encompass not only Puritans and Congregationalists, but also Presbyterians, Dutch Reformed, Independents, and other denominations whose theology derives from the thoughts of John Calvin.

*Id.* at 2115 n.54.

<sup>33</sup> U.S. CONST. amend. I.

the time, principally so as to afford a two-tiered protection: (1) against the establishment of a national religion on the one hand, and (2) against any concomitant disestablishment of existing state religions.<sup>34</sup> Prior to victory over Great Britain, nine of the thirteen colonies had established churches, and at the time the First Amendment was adopted, several states continued to recognize some form of religious establishment.<sup>35</sup>

Thus, the idea of “establishment”—both from the colonial standpoint and at the drafting of the federal Constitution—encompassed, and was understood to entail, much more than just official “recognition” of a particular church or sect. In particular, for the Southern colonies, religious establishments consisted of laws compelling religious observance, providing financial support for the ministry, controlling the selection of religious personnel, dictating the content of religious teaching and worship, vesting certain civil functions in church officials, and imposing sanctions for the public exercise of religion outside of the established church. This was the model throughout the South, although the systems in the Carolinas and Georgia allowed for greater toleration of dissention.<sup>36</sup>

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<sup>34</sup> A disestablishment of a state religion would be, in effect, an exercise of denominational or sectarian favoritism on the part of the federal government, whether in the form of aid, subsidy, or recognition. See Patrick-Justice, *supra* note 13, at 55 n.9 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1161 (2d ed. 1988) (“A growing body of evidence suggests that the Framers principally intended the establishment clause to perform two functions: to protect state religious establishments from national displacement, and to prevent the national government from aiding some but not all religions.”); see also McConnell, *supra* note 25, at 2109. See generally MEESE, *supra* note 17, at 303.

<sup>35</sup> McConnell, *supra* note 25, at 2107.

<sup>36</sup> *Id.* at 2119. It must be noted that the most extreme model of establishment, that which was found in Virginia, eventually broke down or dissipated by the time of the American Revolution; however, even such dissipation did not end the official church in

In New England, establishment resembled less the Anglican models in that its structure was based on locality, i.e., centered around the particular convictions of the townsfolk rather than a central church. This is significant only from the standpoint of the scope of establishment; in New England, there was local establishment, whereas in Virginia, state establishment.<sup>37</sup> New England also differed from the Southern colonies in that Congregationalism was the established faith; thus, members of the Church of England were considered the dissenters (the dissenters in the Southern colonies were the established faith in New England, and vice versa). Prior to the Revolution, New England engaged in the practice of punishing dissenters; however, because the dissenting Anglicans in New England still wielded political power back in England, this policy never quite reached the harshness of the policy in the South, particularly, Virginia.<sup>38</sup>

Whatever the nature and extent of establishments existing in the Colonies prior to the Constitution, all involved, by necessity, one common element: official promotion and recognition by the governmental authority. As stated by Judge McConnell: "An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views. During the period between initial settlement and

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Virginia until the state enacted the Bill for Establishing Religious Freedom in 1786. *Id.* at 2120.

<sup>37</sup> *Id.* at 2121.

<sup>38</sup> *Id.* at 2124-26.



ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant.”<sup>39</sup>

Establishment itself requires an object, i.e., the establishment of something or someone. Given the historical context in which the Founders viewed “religion,” it can best be described as what I will call religion in a “hard” sense, meaning: if a “church” or a “religion” were established (in the sense described by McConnell), then it perforce required that something, or some set of ideas, be not only set forth, but set forth definitively, with the full endorsement and backing of the state. If there be punishment of dissent, there must be something from which the dissent derives. If there be compulsory church attendance, there must be a church to which attendance is compelled. Or if there be political favoritism for members of an established religion, there must be something with which to determine membership therein, and who the favored are. All these factors, then, from the Founders’ perspective, and from the history of what was being established, would not only imply, but require, adherence to a defining creed, a hierarchy of authority, and a teaching of doctrine and orthodoxy, within the context of establishment.<sup>40</sup> And

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<sup>39</sup> *Id.* at 2131. Judge McConnell goes on to list six common characteristics of laws constituting establishment:

Although the laws . . . were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.’

*Id.*

<sup>40</sup> For example, in New York—originally a Dutch settlement—local congregations selected their own ministers, but the “Classis” assembly in Amsterdam retained control over clerical qualifications and enforced adherence to the doctrinal orthodoxy of the Reformed Church. *Id.* at 2129-30. When the English took control of the colony, notwithstanding the tolerance shown to the Dutch church, the Duke of York nevertheless established a Protestant church. *Id.* at 2130. New York continued to recognize the Dutch

while some colonies may have tolerated dissent more readily than others, the dissenters, if they be dissenters, become so by virtue of their refusal to adhere to certain doctrine, orthodoxy of faith, and recognition of proper church authority (e.g., Catholicism and the Pope, the Anglican Church and the monarch, etc.).<sup>41</sup>

### III. JUDICIAL CONCEPTS OF ESTABLISHMENT—SURROGATE TERMS AS SUPERTEXT

#### A. *The “Wall of Separation”*

Prior to the mid-twentieth century, the Supreme Court had little opportunity to address, let alone interpret, the Establishment Clause, and as such, generated little substantive case law on the topic.<sup>42</sup> While as early as 1879 the Supreme Court referenced, as a definitive phrase, Jefferson’s “wall of separation” metaphor in *Reynolds v. United States*,<sup>43</sup> it did not go so far as to adopt it as controlling, extra-textual language

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Reformed churches (derivatives of Calvinism), until eventually, the Governor of New York mandated that all four of New York’s counties “call[], induct[], and establish[], a good sufficient Protestant Minister.” *Id.* Thus, while establishment itself might change, each subsequent establishment requires adherence to a doctrinal orthodoxy of some sort. *See id.*

<sup>41</sup> The purpose of this paper is not to reach a determinative definition of “religion” as such, but rather to establish the proposition that “hard” religion may be the subject of establishment for Establishment Clause purposes while “soft” notions of religion may not. In fact, “soft” notions of religion are not religion at all with respect to the Establishment clause (discussed *infra*). This process is by no means some academic exercise; it is a governing principle derived from the text of the Constitution itself. For a more academic and detailed discussion of “religion,” see Lee J. Strang, *The Meaning of “Religion” in the First Amendment*, 40 DUQ. L. REV. 181 (2002).

<sup>42</sup> See Robert L. Cord, Book Note, *Separation of Church and State: Historical Fact and Current Fiction*, 97 HARV. L. REV. 1509 (1984); see also ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 108 (Lambeth Press 1982); Lee v. Weisman, 505 U.S. 577, 599 n.1 (1992) (discussing pre-*Everson* cases); Elizabeth A. Harvey, Case Note, *Freiler v. Tangipahoa Parish Board of Education: Squeeze the Lemon Test Out of Establishment Clause Jurisprudence*, 10 GEO. MASON L. REV. 299, 302 (2001).

<sup>43</sup> *Reynolds v. United States*, 98 U.S. (8 Otto.) 145, 164 (1879). This “wall of separation” was originally penned by Jefferson in a January 1, 1802 letter to the Danbury

until seven decades later, in *Everson v. Board of Education of Ewing*.<sup>44</sup> *Everson* involved, among other things, a constitutional challenge to a New Jersey statute that authorized local school districts to make “rules and contracts” for the transportation to and from school for those children living “remote” from a schoolhouse. The statute excluded schools operated for profit but did not exclude other private or parochial schools.

Acting pursuant to the statute, the Board of Education of Ewing promulgated a rule authorizing reimbursement to parents who had, at their own expense, arranged public bus transportation to school for their children. The Board authorized part of the money to be used to reimburse those parents who sent their children to Catholic schools. Plaintiff *Everson* brought suit in his capacity as a district taxpayer, challenging the statute on various constitutional grounds, both state and federal, including the Establishment Clause of the First Amendment. The Court, after a lengthy discussion of the history and rationale underlying the adoption of the Establishment Clause, and after determining that the Fourteenth Amendment made the First Amendment applicable to the States, held that the statute at issue did not constitute an establishment. The Court set forth its Establishment Clause analysis as requiring separation between church and state:

The “establishment of religion” clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion

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Baptist Association, some 11 years after the ratification of the First Amendment. *Dreisbach, supra* note 12, at 1. While, again, this paper does not undertake a discussion or analysis of either the text of the letter or the meaning Jefferson gave to such “wall,” the actual phrase may not have originally been Jefferson’s in the first place. *See HAMBURGER, supra* note 14, at 38-45; *Dreisbach, supra* note 12, at 71-72.

<sup>44</sup> *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947).

over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”<sup>45</sup>

In sum, the Court concluded that “[t]he First Amendment has erected a wall between church and state,” and “[t]hat wall must be kept high and impregnable.”<sup>46</sup> Therefore, the Court “could not approve the slightest breach.”<sup>47</sup>

The statute at issue did not violate the Establishment Clause.<sup>48</sup> While the Court was careful to strike a balance between state action that aided or supported a religious

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<sup>45</sup> *Everson*, 330 U.S. at 15-16. In *Everson*, the Court for the first time held that the Establishment Clause of the First Amendment applied to the States through the “incorporation” doctrine of the Fourteenth Amendment. *Id.* at 15. Not surprisingly, after *Everson*, Establishment Clause litigation mushroomed. However, despite citing Jefferson’s “wall” metaphor, and the additional language that such wall must remain “high and impregnable,” the Court nevertheless concluded that the New Jersey statute did not “breach” the wall. *Id.* at 18. In so doing, the Court recited at length the experiences of the American colonists of various religions and the underlying rationale behind the adaptation of the First Amendment. *Id.* at 8-13. It is interesting to note that the Court’s recitation described what can accurately be termed the “evils and dangers” of true “establishment,” and in that regard, *Everson* remained more faithful to the text of the First Amendment than has often since occurred. Equally noteworthy, the Court qualified or recognized the establishment of religion “by law,” which qualification has since been ignored or abandoned. *See id.* at 12 n.12.

<sup>46</sup> *Id.* at 18. The Court did not cite Jefferson’s wall as a starting point, or as law, but rather, as a descriptive metaphor; nor did the court create surrogate language to replace “establishment” or religion, in the sense of creating extra-constitutional principles; however, it did add to that metaphor, describing the wall as “high and impregnable.” *Id.* at 16, 18. In any case, as will be discussed *infra*, such judicial restraint has not remained in subsequent decisions.

<sup>47</sup> *Id.* at 18.

<sup>48</sup> *Id.* at 17.

institution on the one hand versus a denial of such aid that would in effect “hamper” citizens in the free exercise of their religion on the other, the Court nevertheless found an implied mandate of neutrality: “[the First Amendment] requires the state to be . . . neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”<sup>49</sup>

Apparently, the Court in *Everson* was persuaded that the New Jersey statute did not run afoul of the Establishment Clause given that the “aid” rendered to parents sending their children to parochial schools was equally rendered to parents of public school children. While New Jersey could provide transportation to public school children, it could not, in the name of protecting the citizenry from the specter of an “established” church, prohibit the extension of the general benefits of its laws to citizens on the basis of religion. Conversely, New Jersey could extend such benefits to the general public without regard for religious belief, so long as the aid rendered fell neutrally on all citizens. Concomitantly, the denial of a neutrally-applied aid to parochial schools, aid “so separate[ly] and so indisputably marked off from the religious function [of such schools],” would hamper the ability of those schools to function where they otherwise could exist under state law, an outcome “obviously not the purpose of the First Amendment.”<sup>50</sup>

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<sup>49</sup> *Id.* at 18. As will be discussed *infra*, the concept of neutrality has no place in Establishment Clause analysis.

<sup>50</sup> *Id.*

Despite its limited scope, *Everson* set the groundwork for today's Establishment Clause jurisprudence.<sup>51</sup> In so doing, it began a line of reasoning and constitutional jurisprudence that abandons concepts of establishment and religion and embraces the surrogate concepts of neutrality, entanglement, and endorsement, which are often confused and/or equated with the concept of "separation."<sup>52</sup> Unfortunately, the Court's treatment of "separation" has evolved from the neutrality expressed in *Everson* to the "aggressive separation" reached in later years.<sup>53</sup>

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<sup>51</sup> See, e.g., Daniel L. Dreisbach, *The Mythical "Wall of Separation": How a Misused Metaphor Changed Church-State Law, Policy and Discourse*, 6 FIRST PRINCIPLES, June, 23, 2006, <http://www.heritage.org/Research/PoliticalPhilosophy/fp6.cfm> ("In the half-century since this landmark ruling, the 'wall of separation' has become the *locus classicus* of the notion that the First Amendment separated religion and the civil state, thereby mandating a strictly secular polity. The trope's continuing influence can be seen in Justice John Paul Stevens's recent warning that our democracy is threatened '[w]hen we remove a brick from the wall that was designed to separate religion and government.'") (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting)).

<sup>52</sup> See *McCreary County v. ACLU*, 545 U.S. 844, 889 (2005) (Scalia, J., dissenting); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring); *Alembik*, *supra* note 13, at 1185; *Harvey*, *supra* note 42, at 307-08 (applied to cases with government aid to facilities including religious institutions, and *Rosenberger's* neutrality test); see also Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU*, 71 MO. L. REV. 317, 317, 337-38 (2006).

<sup>53</sup> "Aggressive separation" as the term is used here conveys the role undertaken by the Court as a sentry posed at Jefferson's wall, gun in hand, ready to repel any intruder upon the wall's keep. As such, the Court began to strike down both laws and government practices that it felt too closely aligned government with religious subjects, the result being the creation of extra-textual safeguards to accomplish this end, be they proscriptions against entanglement or endorsement or the mandate of complete neutrality. See *infra* Part III.

## B. Paradigms of Separation—Aggressive Separation

### 1. *Lemon v. Kurtzman*

The birth of this “aggressive separation” took place some fifteen years after *Everson*, in the landmark case of *Lemon v. Kurtzman*.<sup>54</sup> The Court, expanding on *Everson*, attempted for the first time to furnish a decisional “test” out of what it termed the “opaque” language of the Establishment Clause.<sup>55</sup> In so doing, the Court derived its test “with reference to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity,’” such ideals “gleaned” from criteria “developed by the Court over many years.”<sup>56</sup>

*Lemon* involved a constitutional challenge to two separate Pennsylvania and Rhode Island statutes that provided state aid to church-related elementary and secondary schools. Specifically, the Pennsylvania statute at issue provided financial support to nonpublic elementary and secondary schools in the form of reimbursement for the cost of

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<sup>54</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, even the *Lemon* Court acknowledged that “total separation” between church and state was not possible “in an absolute sense.” *Id.* at 614. Nonetheless, cases subsequent to *Lemon* have recognized that the *Lemon* test has been disproportionately used to reflect unwarranted hostility to religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 665 (1989) (Kennedy, J., concurring in part and dissenting in part).

<sup>55</sup> *Lemon*, 403 U.S. at 612. *See also* Harvey, *supra* note 42, at 303; Alembik, *supra* note 13, at 1177-78.

<sup>56</sup> *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)). Interestingly, in finding these “many years,” the Court cited (in addition to *Everson*) a mere two cases—both decided within three years—reciting the “cumulative criteria developed by the Court over many years” so as to craft its new test. *Id.* Furthermore, it is unclear where the Court found such development over many years, given, as stated *supra* note 45, the Court, prior to *Everson* in 1947, had little opportunity to address the Establishment Clause, and never, prior to *Everson*, applied it to state action. *See Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring).

teachers' salaries, textbooks, and instructional materials incurred by such schools in connection with specified secular subjects. The state reimbursement, funded by state taxation on cigarettes, applied only to those courses also "presented in the curricula of the public schools."<sup>57</sup>

Similar but not identical to the Pennsylvania statute, the Rhode Island statute authorized the state to directly subsidize, in the form of a salary supplement, "an amount not in excess of 15%" of the salaries of teachers of secular subjects<sup>58</sup> in nonpublic elementary schools. Such supplement was paid directly to the teachers. However, the Rhode Island statute also provided that, as supplemented, a nonpublic schoolteacher's salary could not exceed the maximum paid to public school teachers.<sup>59</sup> It was undisputed that under both statutory schemes, state aid had been given to "church-related" educational institutions.<sup>60</sup>

The Court struck down both statutes as unconstitutional establishments of religion. In so doing, the Court initially examined the actual text of the Establishment Clause, finding

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<sup>57</sup> *Lemon*, 403 U.S. at 610 (quoting PA. STAT. ANN. Tit. 24, §§ 5601-09 (West 1971) (repealed 1977)). The statute was passed to address a perceived "crisis" in Pennsylvania's nonpublic schools due to rising costs relating to "purely secular educational objectives." *Id.* at 609 (citation omitted). The Court found that, since the inception of the statute, some five million dollars had been expended annually to nonpublic schools, of which over 96% were "church-related," mostly Roman Catholic. *Id.* at 610.

<sup>58</sup> *Id.* at 607. Any teacher who taught a subject not offered in the Rhode Island public school system was not eligible for the supplement; furthermore, any teacher receiving the supplement was prohibited from teaching any religious subject. *Id.* at 608.

<sup>59</sup> *Id.* at 607. The Rhode Island statute was based on a legislative finding that "the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers." *Id.*

<sup>60</sup> *Id.* at 606.



it “at best opaque.”<sup>61</sup> The Court paid particular attention to the “respecting” aspect of establishment, and concluded that the Establishment Clause forbade those laws that constituted “a step that could lead to . . . establishment” even if such laws “[fell] short of [establishment’s] realization,”<sup>62</sup> thereby broadening the scope of the term “establishment” to encompass laws that might fall short of establishment and yet nevertheless respect an establishment.<sup>63</sup>

This being the case, the Court now had to develop criterion with which to determine such an outcome. Consisting of three parts, the Court adopted a test as a hybrid of two previous cases, *School District of Abington v. Schempp*<sup>64</sup> and *Walz v. Tax Commission*,<sup>65</sup> and mandated that:

- (1) the statute at issue must have a secular legislative purpose (the “purpose” prong);
- (2) the statute’s principal or primary effect must be one that neither advances nor inhibits religion; (the “effects” prong);
- (3) the statute must not foster an excessive government entanglement with religion (the “entanglement” prong).<sup>66</sup>

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<sup>61</sup> *Id.* at 612.

<sup>62</sup> *Id.* at 612.

<sup>63</sup> Other cases have referred to the “tendency” toward the establishment of religion. *See, e.g., Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring in part and dissenting in part).

<sup>64</sup> *School District of Abington v. Schempp*, 374 U.S. 203 (1963) (involving the reading of Bible passages in public schools).

<sup>65</sup> *Walz v. Tax Commission*, 397 U.S. 664, 664 (upholding a tax exemption for places of religious worship).

<sup>66</sup> *Lemon*, 403 U.S. at 612-13. These prongs exist as freestanding propositions, not conditionally precedent on the others nor in any way conjunctively construed—any one of which, if found to exist, would constitute establishment and invalidate the law at issue. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); Harvey, *supra* note 42, at 305.

Applying this test to the statutes at issue, the Court found that neither the Pennsylvania nor Rhode Island statutes violated the purpose prong.<sup>67</sup> With respect to the effects prong, the Court, while stating that the Pennsylvania and Rhode Island programs “approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses,” nevertheless declined to determine whether the principal or primary effects of the statutes infringed upon the proscribed advancement or inhibition of religion.<sup>68</sup> The “entanglement” prong, however, became the Court’s basis for striking down the laws at issue. In so doing, the Court held that the “cumulative impact of the entire relationship arising under the statutes in each State” involved the “excessive entanglement between government and religion.”<sup>69</sup>

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<sup>67</sup> *Lemon*, 403 U.S. at 613 (“Inquiry into the legislative purposes . . . affords no basis for a conclusion that the legislative intent was to advance religion.”).

<sup>68</sup> *Id.* at 613.

<sup>69</sup> *Id.* at 614. When examining a statute under the entanglement prong to determine if government entanglement is in fact “excessive,” the Court will consider “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” *Id.* at 615. The *Lemon* Court concluded there were, essentially, two forms of entanglement: (1) a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs; or (2) a state statute or program might have the potential to create a political atmosphere divided along religious lines. See *Marsh v. Chambers*, 463 U.S. 783, 798-99 (1983). It bears noting that, given the disjunctive nature of the three-part test, whether the Court even needed to craft the purpose and effect prongs, considering the foregone conclusion that if a statute at issue was found to violate these first two prongs, it would, perforce, violate the entanglement prong as well. Thus, the entanglement prong is not only a catchall prong but it also, in effect, engulfs and swallows and merges with the first two. As such, the entanglement prong stands alone and achieves the surrogate status of constitutional text.

## 2. *Lemon* Neglected, History Examined—*Marsh v. Chambers*

The Court began its selective retreat from the *Lemon* inquiry twelve years later in *Marsh v. Chambers*.<sup>70</sup> *Marsh* involved a constitutional challenge brought by several Nebraska legislators to the practice of their legislature opening each legislative session with prayers delivered by a state-paid Presbyterian chaplain. The district court found that the prayer itself did not violate the Establishment Clause but that the act of paying the chaplain with state funds did, and entered an injunction barring such expenditure of public money.<sup>71</sup> The Eighth Circuit Court of Appeals struck down the entire practice as violative of the Establishment Clause and enjoined both the prayer and the funding.<sup>72</sup> On certiorari, the Supreme Court limited its review to the constitutionality of opening legislative sessions with prayers led by state-employed clergy, and held that neither the act of having a clergyman open legislative sessions with prayer, nor the act of paying him to do so, violated the Establishment Clause.<sup>73</sup>

In reaching its decision, the majority did not reference *Lemon* or employ its three-pronged approach. Rather, the majority analyzed legislative prayer from the perspective of the historical and traditional practices of the Founding Fathers during the opening session of the First Congress, and at the outset noted that “[i]t can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for

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<sup>70</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>71</sup> *Id.* at 785. The district court also barred the collection and publication of such prayers at the state’s expense. *Id.* at 785 n.3. That part of the decision was not appealed. *Id.*

<sup>72</sup> *Id.* at 785-86.

<sup>73</sup> *Id.* at 793-95.

submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable,” and with respect to the Nebraska practice at issue, that “it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsman imposed on the Federal Government.”<sup>74</sup> While the majority acknowledged that “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees,” it nevertheless afforded great weight to the “unbroken practice” of both the federal and state legislatures in finding that the Nebraska practice was more a “tolerable acknowledgment of beliefs widely held among the people of this country” than an impending threat of establishment of religion.<sup>75</sup>

### 3. Contextual Neutrality and the Origins of Endorsement—*Lynch v. Donnelly*

The Court’s next phase of Establishment Clause jurisprudence, and the evolution of “separation” as interpretive doctrine, occurred in *Lynch v. Donnelly*.<sup>76</sup> *Lynch* involved a Christmas display owned and maintained by the City of Pawtucket, Rhode Island and situated in a park owned by a nonprofit organization and annually erected by the city. Apart from the usual Christmas fare, the display also contained a crèche, or Nativity scene, which had been part of the display for over forty years. The crèche itself consisted

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<sup>74</sup> *Id.* at 790-91.

<sup>75</sup> *Id.* at 790, 792. The majority also gave due consideration to the fact that legislative prayers involved adults rather than, say, schoolchildren susceptible to “religious indoctrination.” *Id.* at 792. In a lengthy dissent, Justice Brennan dismissed the history and tradition approach as “wrong” and chastised the majority for not deciding the case under *Lemon*. *Id.* at 796 (Brennan, J., dissenting). The dissent summarily rejected legislative prayer as unconstitutional, finding the “religious” purpose of legislative prayer to be “self-evident.” *Id.* at 797. Furthermore, the dissent found that the primary effect of legislative prayer is “clearly religious.” *See id.* at 797 n.4.

<sup>76</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

of traditional figures for such a display, including the infant Jesus, Mary, Joseph, shepherds, angels, kings, and animals, all ranging in height from five inches to five feet.<sup>77</sup>

Residents of Pawtucket and the Rhode Island affiliate of the ACLU brought suit in United States District Court challenging the inclusion of the crèche in the Christmas display. The district court held that inclusion of the crèche violated the Establishment Clause, and a divided panel of the First Circuit Court of Appeals affirmed.<sup>78</sup> The Supreme Court granted certiorari and reversed the court of appeals.<sup>79</sup> Chief Justice Burger, writing for the majority, recognized, while the First Amendment was designed to prevent the intrusion of either religion or government into the provinces of the other, “total separation” was not possible.<sup>80</sup> In so recognizing, the Court believed that the “wall of separation,” while a useful metaphor, was “not a[n] . . . accurate description of the practical aspects of the relationship that in fact exists between church and state.”<sup>81</sup> The Court also recognized that “the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any.”<sup>82</sup>

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<sup>77</sup> *Id.* at 671.

<sup>78</sup> *Id.* at 672.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (quoting *Lemon*, 403 U.S. at 614).

<sup>81</sup> *Id.* at 673.

<sup>82</sup> *Id.* (citing *Zorach v. Clauson*, 343 U.S. 306, 314, 315 (1952) and *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948)). This notion that accommodation bears any relevance to an Establishment Clause stems from the Court’s misperception as to the relationship between the Establishment phrase and the Free Exercise phrase. *See infra* Part III.D.

The Court also paid particular attention to the contemporaneous understanding of the framers as to the guarantees afforded by the Establishment Clause. The Court noted that the First Congress (whose members had been delegates to the Constitutional Convention), in the same week it approved the Establishment Clause as part of the Bill of Rights, enacted legislation providing for paid chaplains for the House and Senate.<sup>83</sup> The Court afforded the constitutional decisions of the First Congress the “greatest weight” as an interpretive mechanism.<sup>84</sup>

The Court went on to discuss the significance of religion in many of the nation’s holidays, namely, Thanksgiving and Christmas, and acknowledged that Congress had authorized the President to proclaim a national day of prayer each year, “on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.”<sup>85</sup> The Court also found historical accommodation of religion in Presidential proclamations commemorating Jewish Heritage Week and the Jewish High Holy Days.<sup>86</sup> The Court declined to take a “rigid, absolutist view of the Establishment Clause” in light of historical examples of accommodation, and limited its analysis “to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.”<sup>87</sup>

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<sup>83</sup> *Lynch*, 465 U.S. at 674.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 677 (quoting 36 U.S.C. § 169h (1994), amended by 36 U.S.C. § 119 (2000)).

<sup>86</sup> *Id.* (citing Proclamation No. 4844, 3 C.F.R. 30 (1982) and 17 WEEKLY COMP. PRES. DOC. 1058 (Sept. 29, 1981)).

<sup>87</sup> *Id.* at 678 (citing *Walz*, 397 U.S. at 671, 669).

Despite its refusal to adopt an “absolutist view,” the Court nevertheless seemed resigned to the conclusion that “no fixed, per se rule can be framed,” and that “the purpose of the Establishment Clause was to state an objective, not to write a statute.”<sup>88</sup> The Court thus refused to be confined to any single “test or criterion,” citing *Lemon* but declining to apply it to the facts before it.<sup>89</sup> Rather, the Court focused on the crèche wholly within the context of the Christmas season, and whether the state action had any secular purpose. After reviewing cases where the Court had invalidated state action on the grounds that a secular purpose was found lacking,<sup>90</sup> the Court turned to the crèche at issue and found that, while itself a religious symbol, when analyzed in the entire context of the Christmas display and the Christmas season generally, the city’s inclusion of the crèche in the display served an appropriate secular purpose, given the historical significance of the Christmas event in the context of the history and traditions of the country.<sup>91</sup>

The Court also declined to consider inclusion of the crèche as conferring a substantial and impermissible benefit upon religion in general, and the Christian faith in particular. The Court reasoned that the crèche conferred no more of a benefit upon religion than did

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<sup>88</sup> *Id.* (citing *Walz*, 397 U.S. at 668).

<sup>89</sup> *Id.* at 679.

<sup>90</sup> See *Stone v. Graham*, 449 U.S. 39 (1980) (holding a state statute requiring the posting of Ten Commandments on public classroom walls invalid for lack of secular purpose); *Abington*, 374 U.S. at 205 (holding invalid a state statute requiring daily Bible readings in public schools; Bible readings not part of a secular school curriculum but rather motivated wholly by religious considerations); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding daily invocation of God’s blessings mandated by city’s board of education and read aloud over public school address system are “wholly inconsistent” with the Establishment Clause notwithstanding students’ right not to participate).

<sup>91</sup> *Lynch*, 465 U.S. at 683-85.

state-supplied textbooks to church-sponsored schools,<sup>92</sup> expenditure of public money for transportation to ecclesiastical schools,<sup>93</sup> federal grants for college buildings of religious colleges combining religious and secular education,<sup>94</sup> noncategorical grants to church-sponsored colleges and universities,<sup>95</sup> tax exemptions for church properties,<sup>96</sup> and Sunday Closing Laws.<sup>97</sup> The Court concluded that any benefit to religion or Christianity bestowed by the presence of the crèche was “indirect, remote, and incidental.”<sup>98</sup> Given the minimal amount of money expended on maintenance of the crèche, the Court also found no administrative entanglement between religion and government.<sup>99</sup>

Most significant about the *Lynch* case was Justice O’Connor’s separate concurring opinion, wherein for the first time she espoused a “clarification” of the *Lemon* doctrine, often called the “endorsement” approach to Establishment Clause jurisprudence.<sup>100</sup> In particular, Justice O’Connor saw two principal ways that government action could “run afoul” of the First Amendment: (1) “excessive entanglement with religious institutions,” which (a) “may interfere with the independence of [such] institutions,” (b) afford such institutions “access to government or governmental powers not fully shared by nonadherents,” and (c) “foster the creation of political constituencies defined along

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<sup>92</sup> *Id.* at 681 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968)).

<sup>93</sup> *Id.* at 681-82 (citing *Everson*, 330 U.S. at 1).

<sup>94</sup> *Id.* (citing *Tilton v. Richardson*, 403 U.S. 672 (1971)).

<sup>95</sup> *Id.* (citing *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976)).

<sup>96</sup> *Id.* (citing *Walz*, 397 U.S. at 664).

<sup>97</sup> *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)).

<sup>98</sup> *Id.* at 683.

<sup>99</sup> *Id.* at 683-84.

<sup>100</sup> *Id.* at 687 (O’Connor, J., concurring).



religious lines”; and (2) “government endorsement or disapproval of religion,” which O’Connor saw as a “more direct” infringement on the First Amendment.<sup>101</sup> According to O’Connor, government endorsement of religion “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Government disapproval of religion, on the other hand, would send the opposite message.<sup>102</sup>

O’Connor proceeded to apply her proffered approach to *Lemon*’s three prongs. With respect to the entanglement prong, O’Connor expressly limited the analysis to “institutional entanglement.”<sup>103</sup> O’Connor refused to extend the idea of entanglement to any “political divisiveness” created by such religious displays, stating flatly that “political divisiveness along religious lines should not be an independent test of constitutionality,” and that the constitutional inquiry “should focus ultimately on the character of the government activity that might cause such divisiveness, not . . . the divisiveness itself.”<sup>104</sup> With respect to *Lemon*’s purpose and effect prongs, O’Connor’s inquiry focused on the notion of endorsement, specifically, (1) what the city of Pawtucket “intended to communicate” by inclusion of the crèche (purpose), and (2) irrespective of intent, what message the city’s inclusion of the crèche actually conveyed to observers thereof, based

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<sup>101</sup> *Id.* at 687-88.

<sup>102</sup> *Id.* at 688.

<sup>103</sup> *Id.* at 689.

<sup>104</sup> *Id.*

both upon the objective message sent and the subjective meaning attributed by recipients of such message.<sup>105</sup>

In “clarifying” *Lemon*, O’Connor stated that under the purpose prong, the analysis should focus not on whether the state action at issue possessed some secular purpose, but rather, whether the state, by virtue of the activity, intends to convey a general message of “endorsement or disapproval of religion.”<sup>106</sup> O’Connor found no intent to convey or promote a religious message with respect to inclusion of the crèche, but only intent to “celebrat[e] . . . the public holiday through [use of] traditional symbols.”<sup>107</sup> O’Connor rejected the notion that a determination of intent could be made independent of a consideration of the overall purpose of the display at issue. O’Connor found that the celebration of public holidays has cultural significance even if it also has religious significance; for this reason, she found inclusion of traditional symbols to be within the parameters of a legitimate secular purpose.<sup>108</sup>

Turning to the “effect” aspect of the endorsement analysis, O’Connor similarly rejected the notion that the effect prong of *Lemon* required invalidation of government action merely because such action in fact causes, even as a primary effect, advancement or inhibition of religion.<sup>109</sup> Instead, O’Connor looked to whether the state action at issue had the effect of conveying a message of official endorsement or disapproval of religion to the extent that the state action makes religion relevant, in reality or in public

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<sup>105</sup> *Id.* at 690.

<sup>106</sup> *Id.* at 691-92.

<sup>107</sup> *Id.* at 691.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 691-92.

perception, to status in the political community.<sup>110</sup> O'Connor found the display at issue did not communicate a message of governmental endorsement of Christianity.<sup>111</sup> O'Connor reasoned that the overall holiday setting of the display, while not of itself sufficing to neutralize the religious significance of the crèche, nevertheless "changes" what viewers of the crèche would fairly understand to be the purpose of the crèche, i.e., to celebrate a traditional holiday using traditional symbols of that holiday, and not an endorsement of the religion from which the holiday originates.<sup>112</sup>

The dissent, while acknowledging that the Religion Clauses of the Constitution had "proved difficult to apply," nevertheless looked to the *Lemon* test for guidance in "assessing whether a . . . governmental practice involves an impermissible step toward the establishment of religion."<sup>113</sup> The dissent chided the majority for its "less-than-vigorous" application of *Lemon*, and opined that the familiar traditions of the Christmas holiday could not justify departure from the precedent set by *Lemon*.<sup>114</sup> Applying *Lemon*, the dissent found both a religious purpose to the crèche as well as a primary effect of (1) advancing the government's "imprimatur of approval," and (2) conferring the "prestige of government" on Christian beliefs associated with the crèche.<sup>115</sup> Finally, the dissent found that inclusion of the crèche in the Christmas display fostered an excessive entanglement between government and religion in that other religious groups would invariably begin to

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 692.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 694 (Brennan, J., dissenting).

<sup>114</sup> *Id.* at 696.

<sup>115</sup> *Id.* at 701 (citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982)).

petition Pawtucket for inclusion of their religious symbols in the display, such requests the city would then be compelled to accommodate.<sup>116</sup>

*C. The Wall Reinforced—Lemon’s “Fourth Prong”*

1. Endorsement Supplants *Lemon*—*Wallace v. Jaffree*

In *Wallace v. Jaffree*,<sup>117</sup> the Court addressed three Alabama state statutes: the first authorized a one-minute period of silence in all public schools “for meditation”;<sup>118</sup> the second authorized a one-minute period of silence in all public schools “for meditation or voluntary prayer”;<sup>119</sup> and the third authorized teachers to lead “willing students” in prescribed prayer to the “Almighty God” as “Creator and Supreme Judge of the world.”<sup>120</sup>

A parent of three schoolchildren challenged the constitutionality of the statutes and sought to enjoin their operation. The district court found no constitutional infirmity with the first statute but concluded that the latter two were “an effort on the part of the state of Alabama to encourage a religious activity.”<sup>121</sup> Nevertheless, the district court refused to

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<sup>116</sup> *Id.* at 702.

<sup>117</sup> *Wallace v. Jaffrey*, 472 U.S. 38, 40 (1985).

<sup>118</sup> *Id.* (citing ALA. CODE § 16-1-20 (1984)).

<sup>119</sup> *Id.* (citing ALA. CODE § 16-1-20.1 (1984)).

<sup>120</sup> *Id.* (citing ALA. CODE § 16-1-20.2 (1984)). The text of 16-1-20.2 also contained a declaration that “the Lord God is one”; the actual text of the prescribed prayer therein contained the following supplication:

Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

*Id.*

<sup>121</sup> *Wallace*, 472 U.S. at 41 n.5 (citing *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982)).

find them unconstitutional, holding that the state of Alabama had the power to establish a state religion if it so chose.<sup>122</sup> The Eleventh Circuit Court of Appeals reversed the decision of the district court, holding the second and third statutes unconstitutional.<sup>123</sup> The Supreme Court granted certiorari with respect to the constitutionality of the second statute, section 16-1-20.1, which authorized a one-minute period of silence for “prayer and meditation.”<sup>124</sup>

At the outset, the Court flatly rejected any notion that the state of Alabama could constitutionally establish any religion.<sup>125</sup> With respect to section 16-1-20.1, the majority of the Court examined what it once again termed “criteria developed over many years” and cited the three-pronged approach of *Lemon* and found that section 16-1-20.1 violated the purpose prong.<sup>126</sup> However, in applying the purpose prong, the Court enmeshed the analysis with O’Connor’s endorsement analysis first set forth in *Lynch*, stating that “[i]n applying the purpose test, it is appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’”<sup>127</sup> Under the revised standard, the Court determined that ample evidence existed in the record to support a conclusion that section

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<sup>122</sup> *Id.* at 41 n.6 (citing *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983)).

<sup>123</sup> *Id.* at 41 n.7 (citing *Jaffree v. Wallace*, 705 F.2d 1526, 1535-39 (11th Cir. 1983)).

<sup>124</sup> *Id.* at 45 (citing ALA. CODE § 16-1-20.1 (Supp. 1982)). The Court had previously unanimously affirmed the finding by the court of appeals as to the unconstitutionality of the third statute at issue, ALA. CODE § 16-1-20.2 (1984) (invocation of “Almighty God” as “Creator and Supreme Judge of the world”). See *Wallace v. Jaffree*, 466 U.S. 924, 925 (1984) (Stevens, J., concurring).

<sup>125</sup> *Wallace*, 472 U.S. at 48.

<sup>126</sup> *Id.* at 56.

<sup>127</sup> *Id.* (citing *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring)).

16-1-20.1 lacked any secular purpose whatsoever.<sup>128</sup> In particular, the Court found the addition of the words “voluntary prayer,” the legislative history, as well as trial testimony from state legislators, indicative of but one purpose, i.e., to “return voluntary prayer to the public schools.”<sup>129</sup> Most significantly, while the majority cited *Lemon* and purported to apply its three-pronged approach, the majority nevertheless focused the analysis on whether the Alabama statute amounted to an unconstitutional endorsement of religion.<sup>130</sup>

Citing Justice O’Connor’s concurring opinion in *Lynch v. Donnelly*, the Court held:

For whenever the State itself speaks on a religious subject, one of the questions that we must ask is “whether the government intends to convey a message of endorsement or disapproval of religion.” The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16-1-20.1 was intended to convey a message of state approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words “or voluntary prayer” to the statute. Keeping in mind, as we must, “both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded, we conclude that § 16-1-20.1 violates the First Amendment.”<sup>131</sup>

After a separate concurring opinion by Justice Powell wherein he argued for continued adherence to *Lemon*, Justice O’Connor again reaffirmed her call to clarify or rework *Lemon*, as first set forth in her concurring opinion in *Lynch*.<sup>132</sup> O’Connor reiterated previous statements by the Court that “it is far easier to agree on the purpose that underlies the First Amendment’s Establishment and Free Exercise Clauses than to obtain

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 57-60.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 60-61 (citing *Lynch*, 465 U.S. at 690-91, 694 (O’Connor, J., concurring) (footnotes omitted).

<sup>132</sup> *Id.* at 67.

agreement on the standards that should govern their application.”<sup>133</sup> She also noted that, while she was “not ready to abandon all aspects of the *Lemon* test,” she nevertheless opined that application of the *Lemon* test had proven “problematic,” and strove to accomplish more than to merely “erect a constitutional ‘signpost’ to be followed or ignored in a particular case as our predilections may dictate.”<sup>134</sup> Rather, she sought to craft a standard for constitutional adjudication “that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.”<sup>135</sup>

In O’Connor’s view, the endorsement/disapproval approach encompassed the first two prongs of *Lemon* in that it “requires courts to examine whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.”<sup>136</sup> As such, endorsement analysis did not preclude the state from acknowledging religion or from taking religion into account when making law and public policy; it did, however, preclude government from conveying or attempting to convey a message that religion, or a particular religious belief, is favored or preferred by the state. The latter would place the “power, prestige and financial support of government . . . behind a particular religious belief,” thereby creating an indirect but nonetheless “coercive pressure” on religious minorities to conform to the prevailing religious

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<sup>133</sup> *Id.* at 68 (quoting *Walz*, 397 U.S. at 694).

<sup>134</sup> *Id.* at 68-69.

<sup>135</sup> *Id.* at 69 (quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963)).

<sup>136</sup> *Id.*

sentiment.<sup>137</sup> O'Connor stressed that under the endorsement analysis, legislatively mandated moments of silence, without more, would not likely violate the Establishment Clause; however, O'Connor was careful to point out that moment of silence legislation, either as drafted or as implemented, could theoretically favor a child who prays over a child who does not, especially where a teacher might exhort the schoolchildren to use the allotted moment of silence for prayer.<sup>138</sup>

Chief Justice Burger wrote the dissenting opinion. He termed the majority's holding "curious," and criticized the analysis under both the *Lemon* and endorsement approaches.<sup>139</sup> With respect to endorsement, Burger argued that to make an Establishment Clause distinction between legislation allowing a moment of silence and legislation allowing a moment of silence during which a student may engage in prayer "manifests not neutrality but hostility toward religion."<sup>140</sup>

Justice Rehnquist offered a more vigorous dissent. Rehnquist cited *Everson*<sup>141</sup> and what he termed the "exegesis" of Establishment Clause doctrine and the "wall of

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<sup>137</sup> *Id.* at 70 (quoting *Engel*, 370 U.S. at 431).

<sup>138</sup> *Id.* at 73-74. O'Connor rejected the argument made by the State of Alabama that allowing for moments of silence and voluntary prayer amounted to nothing more than an adjustment to the school schedule to meet sectarian needs, and that it was permissible under *Zorach*, 343 U.S. at 313-14. O'Connor felt that while allowing for moments of silence might constitute such an "adjustment," moments of silence coupled with encouragement to pray by the State "converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise." *Wallace*, 472 U.S. at 74 n.2 (citing *Abington*, 374 U.S. at 226).

<sup>139</sup> *Id.* at 85.

<sup>140</sup> *Id.*

<sup>141</sup> *Everson*, 330 U.S. at 16.



separation” metaphor as first quoted in *Reynolds v. United States*.<sup>142</sup> Rehnquist flatly asserted, “[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”<sup>143</sup> After a lengthy review of the drafting of the Establishment Clause, the history of the Constitutional Convention, and the ratification process, Rehnquist concluded the Establishment Clause forbade only government preference among religious sects or denominations and did not require absolute neutrality on matters religious.<sup>144</sup>

From his recitation of the history of the Establishment Clause, Rehnquist flatly rejected the continued viability of separation as a constitutional touchstone, declaring it “all but useless” as a guiding principle of Establishment Clause jurisprudence, and that its “greatest injury” was “its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights.”<sup>145</sup> To Rehnquist, the “wall” metaphor was historically inaccurate, based on “bad history,” “useless as a guide to judging,” and should be “explicitly abandoned.”<sup>146</sup> Rehnquist next characterized *Lemon*’s three part test as adding “mortar” to *Everson*’s wall, thereby implying that *Lemon* compounded the

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<sup>142</sup> *Reynolds*, 98 U.S. at 164.

<sup>143</sup> *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

<sup>144</sup> *Id.* at 106.

<sup>145</sup> *Id.* at 107.

<sup>146</sup> *Id.* Of course, while Rehnquist cast doubt on the wall metaphor, his explication of the history of the Establishment Clause did not lead him to the conclusion that, as a textual matter, any use of the wall metaphor amounted to the creation of extra-constitutional language. *Id.*

mistake made in *Everson*.<sup>147</sup> Rehnquist faulted the *Lemon* test as historically unsound, continued adherence to which would inevitably cause fractures within the Court and produce “unworkable plurality opinions.”<sup>148</sup> In the end, Rehnquist discarded *Lemon* and with it “the mists of an unnecessary metaphor.”<sup>149</sup>

## 2. Endorsement, Fracture, and the Birth of Coercion—*County of Allegheny v. ACLU*

Rehnquist’s predicted “fracture” of the Court proved true in the watershed case of *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,<sup>150</sup> where O’Connor’s endorsement approach finally garnered a plurality of the Court. *Allegheny* involved a challenge brought by the American Civil Liberties Union and several individual residents of Pittsburgh, Pennsylvania, seeking (1) to permanently enjoin the County of Allegheny’s display of a crèche containing a banner reading “*Gloria in Excelsis Deo*” within the confines of the county courthouse, and (2) to enjoin the City of Pittsburgh from displaying a Chanukah menorah located outside the City-County Building alongside the city’s forty-five foot decorated Christmas tree and a sign bearing the mayor’s name and entitled “Salute to Liberty.”<sup>151</sup> The district court, relying on *Lynch v. Donnelly*, denied

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<sup>147</sup> *Id.* at 108.

<sup>148</sup> *Id.* at 110.

<sup>149</sup> *Id.* at 112. In this passage, Rehnquist indicated that he would not follow the “neutrality” approach to the Establishment Clause that would eventually arise in the Court. See *Rosenberger*, 515 U.S. 819; *McCreary County*, 545 U.S. 844; *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>150</sup> *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

<sup>151</sup> *Id.* at 581-82, 588-89. Beneath the title of the sign read: “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom.” *Id.* at 582.

the injunction and entered judgment for the county and the city.<sup>152</sup> The Third Circuit Court of Appeals reversed, distinguishing *Lynch v. Donnelly* and holding that both displays constituted an impermissible governmental endorsement of Christianity and Judaism under *Lemon v. Kurtzman*.<sup>153</sup> The Supreme Court granted certiorari and affirmed in part and reversed in part the decision of the court of appeals.

In a jaggedly divided decision, consisting of seven parts each joined by different Justices, the Court held that the crèche at issue violated the Establishment Clause but that the menorah did not. The majority's exact approach is difficult to ascertain as to a decisional rule of law; nevertheless, the Court adopted O'Connor's endorsement analysis, at least as a starting point, seemingly replacing the analysis under *Lemon's* effects prong.<sup>154</sup> While the majority found the *Lynch* decision useless as a matter of guiding precedent, it found O'Connor's concurrence had set forth a "sound analytical framework for evaluating governmental use of religious symbols."<sup>155</sup> The *Allegheny* majority thus found two constitutional principles emerging from O'Connor's concurrence in *Lynch*: first, a flat rejection of any notion that the Court would tolerate even minimal endorsement of religion;<sup>156</sup> second, a "sound" method for determining whether the government's use of an object or symbol with religious meaning, whether standing alone

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<sup>152</sup> *Id.* at 588.

<sup>153</sup> *Id.* at 588-89.

<sup>154</sup> *Id.* at 590. The Court has stated that "[t]here is no need here to review the applications in *Lynch* of the 'purpose' and 'entanglement' elements of the *Lemon* inquiry, since in the present action the Court of Appeals did not consider these issues." *Id.* at 594 n.45. O'Connor in fact proposed combining *Lemon's* purpose and effects prongs into her endorsement approach. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

<sup>155</sup> *Allegheny*, 492 U.S. at 595.

<sup>156</sup> *Id.*

or as part of a larger display, would constitute or otherwise convey the endorsement of religion.<sup>157</sup> Implicit in this analysis would be what effect the religious object would have on the ordinary observer thereof, or stated alternatively, the subjective message the state's use of the object fairly sends to the ordinary observer.<sup>158</sup> This question would turn, then, on the overall setting in which such object appears, be it in a museum gallery, a Christmas display, a classroom decoration, etc. As a result, the analysis would become one applied on a case-by-case basis such that each challenged use of a religious object would be "judged in its unique circumstances to determine whether it [endorses] religion."<sup>159</sup> In a lengthy footnote, the Court explained the differences between the approach taken by the majority in *Lynch* and the approach taken in O'Connor's concurrence, stressing that O'Connor's approach would allow government acknowledgment of religion only so far as such recognition would serve as a means to "solemniz[e] public occasions" or recognize "what is worthy of appreciation in society," and not amount to government approval of a particular belief.<sup>160</sup>

The majority then turned its analysis to the crèche display within the County Courthouse. At the outset, the Court rejected the arguments of the county and the city that religious symbols must be shown to be coercive before they would run afoul of the

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)).

<sup>160</sup> *Id.* at 595 n.46. The Court has never adopted any method by which to make such a distinction; nevertheless, terms such as "approval" are so far removed from textual language, and so much broader in scope, as to become impossible guideposts for anything other than naked judicial power to strike down any particular state action.

Establishment Clause.<sup>161</sup> Rather, the Court found sufficient the purely passive display of religious symbology, a more or less “silent” endorsement.<sup>162</sup> Of particular concern to the Court was the display’s lack of neutralizing elements, such as were found in *Lynch*.<sup>163</sup> The Court refused to find the presence of neutralizing displays of Santa Claus and other secular decorations displayed in other parts of the courthouse convincing; apparently, for the Court, the proximity of religious elements with secular elements became a deciding factor.<sup>164</sup> Equally relevant under the Court’s analysis was the placement of the crèche itself—the Court concluded that given the crèche’s display at the Grand Staircase of the courthouse, “[n]o viewer could reasonably think that it occupies this location without the support and approval of the government.”<sup>165</sup> The Court found government endorsement notwithstanding the presence of a placard indicating that a Roman Catholic organization, and not the city or the county, owned the crèche.<sup>166</sup> Finally, it rejected arguments that the crèche was a permissible symbol of Christmas as a national holiday, stating that the government may not celebrate Christmas in such a way that “endorses Christian doctrine.”<sup>167</sup>

Justice Kennedy, with whom Chief Justice Rehnquist and Justices White and Scalia joined, dissented with respect to the crèche display, concluding that it did not violate the

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<sup>161</sup> *Id.* at 597 n.47.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 598.

<sup>164</sup> *Id.* at 598 n.48.

<sup>165</sup> *Id.* at 599-600 n.50.

<sup>166</sup> *Id.* at 600-01.

<sup>167</sup> *Id.* at 601.

Establishment Clause.<sup>168</sup> The dissent noted the Court's previous rulings that demanded state neutrality towards religion, lest any government recognition of religion confer an "imprimatur of state approval," to a point requiring a "relentless extirpation of all contact between government and religion."<sup>169</sup> The dissent felt that the majority's endorsement approach, which depended heavily upon context and perception, would unduly and in fact uncharacteristically require the government "in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious."<sup>170</sup>

Kennedy's dissent examined previous decisions and gleaned from them "two limiting principles" that guided Establishment Clause cases.<sup>171</sup> Guided by these principles, the dissent fashioned a rule that stood in stark contrast to the majority's open-ended endorsement approach:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.<sup>172</sup>

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<sup>168</sup> *Id.* at 655.

<sup>169</sup> *Id.* at 657.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 659.

<sup>172</sup> *Id.* at 659-60 (citations omitted).

The dissent viewed the endorsement approach as a “novel theory,” and the Court’s growing reliance on it as becoming “a permanent accretion to the law.”<sup>173</sup> As such, the dissent endeavored to demonstrate that the endorsement approach was both “flawed in its fundamentals and unworkable in practice.”<sup>174</sup> The dissent stressed that the meaning of the Establishment Clause must derive not from the impressions occasioned upon the “reasonable observer” but rather determined by reference to historical practices and understandings.<sup>175</sup> The dissent saw the First Amendment as “a rule, not a digest or compendium,” and its application not to be premised on the objective feelings of some fictional “reasonable observer,” and whether he or she might be made to feel “like an outsider” to the body politic that is government.<sup>176</sup> As the dissent pointedly stated, “[i]f the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer [or exhortations to prayer made by the President] cannot escape invalidation” under the endorsement test.<sup>177</sup>

Apart from its history and traditions criticism, the *Allegheny* dissent further criticized the “endorsement-in-context” approach to government use of religious symbolism as creating a “jurisprudence of minutiae”:

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<sup>173</sup> *Id.* at 669.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 670. Reference to historical practices must relate to “those conducted by government units . . . subject to the constraints of the Establishment Clause. Acts of ‘official discrimination against non-Christians’ perpetrated in the 18th and 19th centuries by States and municipalities” become “irrelevant” to this inquiry, but the practices of past Congresses and Presidents are “highly informative.” *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 673.

A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as “a center of attention separate from the [religious symbol].” After determining whether these centers of attention are sufficiently “separate” that each “had their specific visual story to tell,” the court must then measure their proximity to the [religious symbol] . . . [as well as] the prominence of the setting in which the [religious] display is placed . . . . Deciding cases on the basis of such an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitutional adjudication.<sup>178</sup>

The dissent then concluded by stating that the majority’s approach transformed the Court into a “national theology board,” such that the application of a “strict separationist view” of prohibiting any acknowledgment of religion would produce a consistency of application preferable to the endorsement approach.<sup>179</sup> In any event, decisions regarding the inclusion of religious symbols in holiday displays would best be left to local legislative officials; if such inclusion offends the body politic, then the proper remedy for such offense lies at the ballot box, and not through the hammer of constitutional promulgation.

### 3. Coercion Unbound—*Lee v. Weisman*

Kennedy’s coercion model controlled the outcome in *Lee v. Weisman*.<sup>180</sup> *Weisman* involved a constitutional challenge to the practice of including prayers and benedictions during school graduation ceremonies. Specifically, school principals in the City of Providence, Rhode Island invited members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle school and high school students. Such practice was permitted by the Providence School Committee and the Superintendent of Schools, and many principals elected to have clergy deliver the

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<sup>178</sup> *Id.* at 674-76.

<sup>179</sup> *Id.* at 678.

<sup>180</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).



prayers during the graduation events. As part of this custom, Providence school officials supplied the clergy with a pamphlet entitled “Guidelines for Civic Occasions.”<sup>181</sup> This pamphlet recommended that prayers delivered at nonsectarian civic ceremonies be done with “inclusiveness and sensitivity,” but also admonished that “prayer of any kind may be inappropriate on some civic occasions.”<sup>182</sup>

In June 1989, Nathan Bishop Middle School’s principal, Robert E. Lee, invited Rabbi Leslie Gutterman to deliver prayers at the graduation exercises.<sup>183</sup> Rabbi Gutterman received the instruction pamphlet and was advised by Lee that his prayers should remain nonsectarian.<sup>184</sup> Rabbi Gutterman delivered an invocation and a benediction, addressing “God” and thanking God for various blessings bestowed upon America in general and the graduating students in particular, and asking God’s guidance for the students in their future endeavors.<sup>185</sup> At no time in his prayer did Rabbi Gutterman invoke any sectarian reference either to Yahweh, Jehovah, or Adonai, to the Jewish faith or to the Lord or Jesus Christ of the Christian faith.<sup>186</sup>

Deborah Weisman was one of the students graduating from Nathan Bishop. Four days before the graduation ceremony, her father, Daniel Weisman brought suit in United States District Court as a Providence taxpayer and as next friend of Deborah, seeking to enjoin

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<sup>181</sup> *Id.* at 581.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 581-82.

<sup>186</sup> *Id.*

the reading of the prayers at the ceremony.<sup>187</sup> The district court denied a temporary restraining order, and the graduation ceremony went forward as planned, with Deborah in attendance.<sup>188</sup> Following the ceremony, Daniel Weisman filed an amended complaint seeking a permanent injunction barring officials from Providence public schools from inviting clergy to deliver invocations and benedictions at future graduations.<sup>189</sup> On stipulated facts, the district court, applying *Lemon*, granted a permanent injunction, ruling that Providence's practice of including invocations and benedictions in public school graduations violated the Establishment Clause, and specifically, that such prayers, even if nonsectarian, created "an identification of governmental power with religious practice," thereby effectively endorsing religion.<sup>190</sup> The First Circuit Court of Appeals affirmed,<sup>191</sup> and the Supreme Court granted certiorari.<sup>192</sup>

The Court began its analysis with the proclamation that "it is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"<sup>193</sup> However, the Court expanded the concept of coercion to include "subtle coercive pressure," most pronounced in the confines of public education, wherein such coercion occurs simply because the student

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<sup>187</sup> *Id.* at 584.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 585.

<sup>191</sup> *Id.*

<sup>192</sup> *Lee v. Weisman*, 499 U.S. 918, 918 (1991).

<sup>193</sup> *Weisman*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678).

partaking in such graduation exercise, itself not mandatory, lacks any “real alternative which would have allowed [him or] her to avoid the fact or appearance of participation.”<sup>194</sup> The Court also found that while the clergy recited a prayer of his or her own choosing, the principal of the school in fact directed and controlled the content of the prayers through the issuance of the guidelines pamphlet and through the instruction that the prayers remain “non-sectarian.”<sup>195</sup>

The Court then clarified what it believed the impetus behind the Establishment Clause to be:

The explanation [the Establishment Clause’s prohibition on forms of state intervention in religious affairs] lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.<sup>196</sup>

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<sup>194</sup> *Id.* at 588. This conclusion might acquire greater validity in the context of activity occurring within the overall student-school relationship, where a dissenting student may reasonably fear some form of academic reprisal for voicing dissent. However, in the context of a graduation ceremony, where the student-school relationship has already ceased, such fear becomes less compelling.

<sup>195</sup> Although the Court acknowledged that the clergy had no obligation to follow these guidelines or instructions, it nevertheless found, without any apparent factual support in the record, that “no religious representative who valued his or her continued reputation and effectiveness in the community would incur the state’s displeasure” by ignoring the principal’s instructions. *Id.* It could be equally assumed that no clergy would compromise religious or ecclesiastical sanctity for concerns over political expediency. In any event, not only did the Court conclude that the students were coerced to participate, but that the rabbi was equally coerced to follow state-sponsored religious doctrine. *See id.*

<sup>196</sup> *Id.* at 591-92. The majority appears more concerned with the quality of faith that might be compromised by any type of state coercion, as opposed to the imposition of creed and orthodoxy through the machinations of government, where the Church, as an institution, possesses political power, such as the Roman papacy that emerged under Constantine.

The Court proceeded to examine the subtle coercion that it found to exist within the graduation ceremony itself:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion [to participate] . . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.<sup>197</sup>

The majority placed great emphasis on the circumstances of the case, from the standpoint that the target audience, school-age children, “are often more susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”<sup>198</sup> The Court thus found the implied “choice” of students whether to participate or not an illusory one, and reasoned that “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”<sup>199</sup> As such, the injury experienced by the students would be one occasioned by their required participation, under the aegis of the State, in a religious exercise. The Court rejected the notion that inclusion of the prayer, however brief, constituted but a *de minimus* intrusion, opining that to hold such prayer as *de minimus* would be an “affront” to the rabbi who offered them and to the students who held them sacred.<sup>200</sup>

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<sup>197</sup> *Id.* at 593.

<sup>198</sup> *Id.* at 593-94 (citations omitted).

<sup>199</sup> *Id.* at 594.

<sup>200</sup> *Id.* This conclusion of course now places the analysis equally on the audience and on the purveyor of the religious message, but again begs the question as to whether any religious message, if it be religious at all, could even conceivably be devoid of profound

In a concurring opinion, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated Jefferson's oft-cited "wall of separation," and the reasoning in *Everson*.<sup>201</sup> The concurrence also cited existing Court precedent<sup>202</sup> as support for the proposition that any religious reference in the public school setting, even if denominationally neutral and voluntary, nonetheless violated the Establishment Clause as *de facto* state sponsorship of religious activities. The concurrence then concluded that the majority's finding of coercion, subtle or not, although not necessary to show an Establishment Clause violation, would suffice to show endorsement: "[g]overnment pressure to participate in religious activity is an obvious indication that the government is endorsing or promoting religion."<sup>203</sup>

Justice Souter's separate concurrence addressed two interrelated issues: (1) whether the Establishment Clause proscribes state practices that show no preference to any religion or denomination, and (2) whether state coercion, above and beyond any state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation.<sup>204</sup> In answering the first question in the affirmative, Souter concluded

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meaning upon its adherents. It is in fact doubtful whether any religious expression could have any meaning at all absent such a defining characteristic; in fact, any contrary conclusion would invite the absurd possibility of the promotion of a religious message nonetheless devoid of religious content, thereby ceasing to be religious at all.

<sup>201</sup> *Id.* at 600-01 (Blackmun, J., concurring).

<sup>202</sup> See *Engel*, 370 U.S. at 422 (prayer selected by state authority to be read aloud by students); *Abington*, 374 U.S. at 206-07 (Bible reading or recitation of the Lord's prayer over school address system); *Epperson*, 393 U.S. at 98 (law preventing the teaching of evolution).

<sup>203</sup> *Weisman*, 505 U.S. at 604 (Blackmun, J., concurring).

<sup>204</sup> *Id.* at 609.

that the Establishment Clause forbids any state sponsored prayers, whether theistic or sectarian.<sup>205</sup> Souter termed this “settled law.”<sup>206</sup>

Souter next turned to the element of coercion. While acknowledging the “force” of the coercion arguments, Souter nevertheless declined to adopt a coercion analysis, an adoption he felt the Court could not undertake “without abandoning our settled law.”<sup>207</sup>

As Souter reasoned:

Like the provisions about ‘due’ process and ‘unreasonable’ searches and seizures, the constitutional language forbidding laws ‘respecting an establishment of religion’ is not pellucid. But virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion through, among other means, comprehensive schemes of taxation . . . . This much follows from the Framers’ explicit rejection of simpler provisions prohibiting either the establishment of a religion or laws ‘establishing religion’ in favor of the broader ban on laws ‘respecting an establishment of religion.’<sup>208</sup>

Justice Scalia authored a scathing dissent. Scalia posited a “history and traditions” approach to the Establishment Clause, citing Justice Kennedy’s concurrence in *Allegheny*. Scalia accused the majority of implementing a “bulldozer of its social engineering” through its invention of a “boundless, and boundlessly manipulable, test of psychological coercion,” through which it “lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more

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<sup>205</sup> *Id.* at 610.

<sup>206</sup> Souter’s “settled law” speaks only in generalities, of imprecise and at times divergent concepts of “religious purpose,” religious message, of “preferential support,” of “symbolic union of church and state.” *Id.* at 612-19.

<sup>207</sup> *Id.* at 618. Souter does not identify any precise rule gleaned from the “settled law,” other than oblique references to vague, subjective prohibitions against government sponsorship or approval of certain religions over others or of religion over nonreligion. *See id.* at 610-31. Strangely, the only settled test adopted by the Court to date—*Lemon*—Souter neglected to apply. *See id.*

<sup>208</sup> *Id.* at 620.

longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”<sup>209</sup> To Scalia, interpretation of the Establishment Clause should “comport with what history reveals was the contemporaneous understanding of its guarantees,” where such evidence “sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied’ to contemporaneous practices.”<sup>210</sup> After discussing the history of the nation with respect to the inclusion of prayer in governmental ceremonies and proclamations, Scalia labeled the majority’s approach as “psychology practiced by amateurs,” and its conclusion that state officials coerced students to participate in the graduation invocation and benediction as “incoherent.”<sup>211</sup>

#### 4. *Lemon’s Interment—Kiryas Joel*

*Board of Education of Kiryas Joel Village School District v. Grumet*<sup>212</sup> presented a highly unusual, and altogether unique, factual setting. The Village of Kiryas Joel, in Orange County, New York, consisted entirely of members and practitioners of Satmar Hasidim, a sect of Judaism and strict adherents to the Torah, a practice that required its members, among other things, to segregate the sexes outside the home, to speak Yiddish as its primary language, to dress in distinctive garb, and to eschew most aspects of modern society, such as television, radio, and English-language print publications. Following World War II, surviving members of the sect moved from Europe and relocated to the Williamsburg section of Brooklyn, New York. Thereafter, in 1974, the

<sup>209</sup> *Id.* at 632 (Scalia, J., dissenting).

<sup>210</sup> *Id.* (quoting *Lynch*, 465 U.S. at 673 and *Marsh*, 463 U.S. at 790).

<sup>211</sup> *Id.* at 636 (Scalia, J., dissenting).

<sup>212</sup> *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

Satmars purchased an approved but undeveloped subdivision in the town of Monroe, and assembled a community that eventually became the Village of Kiryas Joel.<sup>213</sup>

Because of their separationist lifestyle, the Satmars formed their private religious schools outside the auspices of the Monroe-Woodbury school district, namely, the United Talmudic Academy for males and the Bais Rochel for females. These schools, however, offered no special services for handicapped children, who, statewide, were entitled to special education services regardless of whether they were otherwise enrolled in private schools. Although the Monroe-Woodbury school district provided such special education for the schoolchildren of Kiryas Joel at an annex at the Bais Rochel location, the district discontinued this practice in 1985.<sup>214</sup> As a result, the Kiryas Joel children who needed special education were forced to receive such services at the Monroe-Woodbury public schools. However, most of these children, already burdened by various physical, mental, or emotional disorders, suffered severe trauma through their exposure to the outside environment.<sup>215</sup>

Eventually, the school district sought a declaratory judgment in state court as to whether state law barred it from providing special education services outside the district's regular public schools. The New York Court of Appeals concluded that state law

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<sup>213</sup> *Id.* at 690-91.

<sup>214</sup> *Id.* at 691-92. Specifically, the district discontinued this practice in response to two Supreme Court Establishment Clause decisions, *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *Aguilar* held unconstitutional New York City's practice of paying the salaries of public school teachers who provided remedial services in parochial school settings. *Aguilar*, 473 U.S. at 404, 414. *Ball* invalidated Grand Rapid's practice of utilizing nonpublic school facilities, at public expense, to provide instruction by teachers who were paid wholly or partly out of public funds. *Ball*, 473 U.S. at 375, 398.

<sup>215</sup> *Kiryas Joel*, 512 U.S. at 692.



permitted Monroe to establish a separate public school within the Village, but that Free Exercise considerations did not require such separate school. In response, the New York State Assembly enacted enabling legislation that established the Village of Kiryas Joel as a separate school district, with “all the powers and duties of a union free school district.”<sup>216</sup> The statute also “empowered a locally elected board of education to take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operations.”<sup>217</sup> The legislation thus addressed the “‘unique problem’ associated with providing special education services to handicapped children in the village.”<sup>218</sup>

Eventually, various groups challenged the Kiryas Joel school district under the New York and Federal Constitutions as an unconstitutional establishment of religion. The state trial court found the enabling statute unconstitutional under all three prongs of *Lemon v. Kurtzman*.<sup>219</sup> A divided state appeals court affirmed, holding that the statute at issue had the primary effect of advancing religion, in violation of *Lemon*’s second prong. The New York Court of Appeals affirmed on the federal question, holding that the statute “created a ‘symbolic union of church and State’ that was ‘likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval’ of their own,” thereby vesting the statute with the primary effect of advancing religious belief.<sup>220</sup>

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<sup>216</sup> *Id.* at 693 (citing 1989 N.Y. Laws ch. 748).

<sup>217</sup> *Id.* (citing N.Y. Educ. Law § 1709 (McKinney 1988)).

<sup>218</sup> *Id.* (quoting then New York Governor Mario Cuomo).

<sup>219</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>220</sup> *Kiryas Joel*, 512 U.S. at 695 (citing 81 N.Y.2d 518, 529).

On certiorari, the Supreme Court, in another highly fractured opinion, held the statute at issue violated the Establishment Clause. Specifically, the majority, authored by Justice Souter, concluded that the statute creating the Kiryas Joel School District delegated the state's discretionary authority over public schools "to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally."<sup>221</sup> As such, the majority concluded that the statute at issue transgressed the Establishment Clause, which "compels the State to pursue a course of 'neutrality' toward religion,"<sup>222</sup> favoring neither one religion over another, nor collectively favoring religious adherents over nonadherents.

The Court characterized the law as "an unusual and special legislative Act," and acknowledged that the statute itself did not delegate power based on religious belief or religious practice, nor did it delegate power to be used in accordance with religious beliefs, but rather, delegated power to establish a school district to a village that happened to be populated entirely by members of the Satmar Hasidic sect.<sup>223</sup> Because of this circumstance, the majority concluded that the statute "effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly."<sup>224</sup> The Court then found this circumstance to constitute forbidden "fusion of government and religious functions."<sup>225</sup>

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<sup>221</sup> *Id.* at 696.

<sup>222</sup> *Id.* at 696 (citing *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973), and *Epperson*, 393 U.S. at 104).

<sup>223</sup> *Id.* at 699.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 702. While the majority went to great lengths to characterize the formation of the village of Kiryas Joel as a religious endeavor, its analysis overlooks one crucial

Justice O'Connor's concurring opinion discussed at length the competing concepts of neutrality, accommodation, and equal protection that the case presented. O'Connor's recitation of the myriad of tests developed by the Court, not just for Establishment Clause cases, but for Free Speech cases and Equal Protection cases, bears note. She recognized that "setting forth a unitary test for a broad set of cases may sometimes do more harm than good," and "shoehorning new problems into a test that does not reflect the special concerns raised" by any particular case "tends to deform the language of the test."<sup>226</sup>

Justice Scalia authored the dissent in which Chief Justice Rehnquist and Justice Thomas joined. Scalia began his dissent with his usual vigor:

[T]he Founding Fathers would be astonished to find that the Establishment Clause—which they designed 'to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,'—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural particularities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.<sup>227</sup>

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point—the state action at issue was designedly narrow to suit the needs of one small sect, and not to “establish” a state religion. *See id.* at 691. In fact, the statute did quite the opposite—rather than establish a state religion, it allowed one established religion to govern itself. *See id.* Any “delegation” of political authority to the sect was a delegation to be used by that sect and applicable only to that sect, thus taking the analysis completely out of the establishment realm. *See id.* at 691-92. The law at issue was not of general applicability, nor did it authorize members of one religion to exercise any type of authority over nonmembers nor encumber nonadherents; it did not make them political outsiders, nor did it occasion any coercion, psychological or otherwise, upon any dissenting group, Christian, atheist, or Jew alike. *See id.*

<sup>226</sup> *Id.* at 718-19.

<sup>227</sup> *Id.* at 732 (Scalia, J., dissenting) (citation omitted).

Scalia accused the majority of “steamrolling” and “collapsing” the special circumstances present in the case, and characterized the majority’s holding as “breathtaking.”<sup>228</sup> To Scalia, the majority’s position amounted to the “novel proposition” that political power, appropriately vested in any group of citizens, could somehow become divested under the Establishment Clause where such group of citizens, by design or happenstance, shared the same, or even similar, religious beliefs.<sup>229</sup> Scalia likened this approach to a wholesale disfavoring of religion as religion, through the divestment of political power in a group purely on account of religious beliefs, “positively antagonistic to the purposes of the Religion Clauses.”<sup>230</sup> Scalia predicted that the majority would have “lauded” the legislation had it delegated the power to create a special school district on account of cultural differences occasioned by the parents of the schoolchildren being “nonreligious commune dwellers, or American Indians, or gypsies”; Scalia refused to see any contrary result mandated by cultural differences occasioned by religious belief.<sup>231</sup> In this respect, Scalia concluded that the law was facially neutral, and not religiously motivated.

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<sup>228</sup> *Id.* at 735, 737.

<sup>229</sup> *Id.* at 736. Scalia concluded that the majority’s approach would likely render the states of Utah and New Mexico unconstitutional at the time of their admission into the union, as residents of these states were predominantly Mormon and Roman Catholic, respectively. *Id.*

<sup>230</sup> *Id.* Scalia did not accuse the majority of disfavoring the Satmar religion; however, he did accuse the majority of failing to recognize that invalidation of vested political power—solely because such political power becomes vested in people sharing the same religious belief, and not on account of the belief but on account of the lifestyle accompanying such belief—is tantamount to disallowing political power in any group of citizens who happen to share common religious beliefs: “I see no reason why it is any less pernicious to deprive a group rather than an individual of its rights simply because of its religious beliefs.” *Id.* at 737.

<sup>231</sup> *Id.* at 741.

#### *D. The Wall Razed?*

##### 1. The Merging of the Disparate—*Rosenberger* and Neutrality

In *Rosenberger v. Rector & Visitors of the University of Virginia*<sup>232</sup> the Court once again abandoned coercion and apparently merged all Establishment Clause analyses with the concept of neutrality. *Rosenberger* involved a University of Virginia policy that permitted the payment of printing costs of various student publications. Specifically, as part of its program to support extracurricular student activities on campus, the University allowed student groups to organize as “Contracted Independent Organizations,” (“CIOs”). All CIOs enjoyed access to University facilities, including meeting rooms and computer terminals, but remained otherwise unaffiliated with the University.<sup>233</sup>

While all CIOs attained recognition by the University, selected CIOs were also eligible to apply for financial support from the Student Activities Fund (“SAF”). The SAF existed to support a broad range of extracurricular activities “related to the educational purpose of the University,” and the University Guidelines required that it operate “in a manner consistent with the educational purpose of the University as well as with state and federal law.”<sup>234</sup> The SAF received its funding via a mandatory \$14.00 fee assessed to each full-time student of the University.

University rules limited eligibility for SAF funds to eleven categories of student groups, among them being “student news, information, opinion, entertainment, or academic communications media groups.”<sup>235</sup> University guidelines also excluded the

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<sup>232</sup> *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

<sup>233</sup> *Id.* at 823.

<sup>234</sup> *Id.* at 824 (citations omitted).

<sup>235</sup> *Id.* (citations omitted).

reimbursement of costs related to certain CIO activities that would otherwise be eligible for SAF funds. Thus, an otherwise eligible CIO could not seek reimbursement for the costs of engaging in “religious activities, philanthropic contributions and activities, political activities, activities that would jeopardize the University’s tax-exempt status, those which involve payment of honoraria or similar fees, or social entertainment or related expenses.”<sup>236</sup> Whereas a “political activity” comprised only those activities involving “electioneering and lobbying,” a “religious activity” was not so limited, but rather comprised “any activity that ‘primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.’”<sup>237</sup>

Petitioners’ organization, Wide Awake Productions (“WAP”), published a newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*.<sup>238</sup> The impetus of this newspaper, and in fact the underlying reason for WAP’s existence, was to publish and disseminate a magazine that expressed philosophical and religious viewpoints from a Christian perspective, to foster an atmosphere of “sensitivity to and tolerance of Christian viewpoints” and to “provide a unifying focus for Christians of multicultural backgrounds.”<sup>239</sup> From the inaugural issue, WAP’s newspaper expressed manifestly Christian viewpoints, among them being its mission to “offer[] a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia,” and “to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal

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<sup>236</sup> *Id.* at 825.

<sup>237</sup> *Id.* (citation omitted).

<sup>238</sup> *Id.* at 825-26.

<sup>239</sup> *Id.* at 826 (citation omitted).

relationship with Jesus Christ means.”<sup>240</sup> The inaugural issue also included articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis’ ideas about evil and free will, and reviews of religious music. Subsequent issues featured articles about homosexuality, missionary work, and eating disorders, as well as more music reviews and interviews with professors. An accompanying cross marked the end of each article.<sup>241</sup>

An otherwise eligible CIO,<sup>242</sup> WAP applied for SAF funds with respect to the costs associated with printing its newspaper. The Appropriations Committee of the Student Council denied the request on the grounds that *Wide Awake* constituted a “religious activity” as defined under the Guidelines. WAP appealed the decision to the full student Counsel, contending that it met all applicable Guidelines for SAF support and that denial of such support violated the Constitution. The Student Council denied the appeal without comment, and WAP appealed to the Student Activities Committee. In a letter signed by the Dean of Students, the Committee upheld the denial of funding.<sup>243</sup>

Following the ruling of the Committee—the highest level of appeal within the University structure—WAP, among other parties, filed suit in United States District Court, alleging that the denial of SAF funding, based entirely on the viewpoint expressed in its newspaper, violated WAP’s rights to freedom of speech and the press, to the free

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<sup>240</sup> *Id.* (citations omitted).

<sup>241</sup> *Id.*

<sup>242</sup> Despite its asserted Christian perspective, WAP attained CIO status soon after its formation. *Id.* The University did not contend that WAP qualified as a “religious organization” under University Guidelines. *Id.*

<sup>243</sup> *Id.* at 827.

exercise of religion, and to equal protection of the law.<sup>244</sup> The district court ultimately granted summary judgment in favor of the University, ruling that denial of SAF support did not constitute impermissible content or viewpoint discrimination against WAP’s speech, and that the University’s concomitant Establishment Clause concern over SAF funding for WAP’s “religious activities” justified the denial of payment for printing costs to third-party contractors.<sup>245</sup> The Court of Appeals for the Fourth Circuit disagreed and concluded that the Guidelines did discriminate on the basis of content, but nevertheless upheld the district court, finding that the refusal to permit SAF funding served a “compelling interest in maintaining strict separation of church and state,” and therefore necessary to avoid an Establishment Clause violation.<sup>246</sup> The Supreme Court granted certiorari on both issues.

Justice Kennedy delivered the opinion of the Court. After concluding that the Guideline barring SAF funding for “religious activities” amounted to viewpoint discrimination, both on its face and as applied,<sup>247</sup> the Court turned to the question of whether allowing SAF-funded reimbursement to WAP printing contractors would violate

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<sup>244</sup> The parties brought their claims pursuant to 42 U.S.C. § 1983. *Id.* Petitioners also brought several claims under Virginia law, but did not pursue those claims on appeal. *Id.* at 827.

<sup>245</sup> *Id.* at 827-28.

<sup>246</sup> *Id.* at 828.

<sup>247</sup> *Id.* at 831-37. While the Court acknowledged that in a general sense, religious material as such would comprise a distinct body of thought or subject matter, to which the prohibition of content discrimination (barring all religious discussion) would apply, the Court concluded that to bar religious discussion, or discussion from a religious perspective, of subjects that themselves encompass general topics—such as reproduction, abortion, homosexuality, or death (subjects capable of discussion from a perhaps infinite number of philosophical or religious standpoints, be they Christian, Muslim, Hegelian, Kierkegaardian, Marxist, etc.)—constitutes viewpoint discrimination, and therefore “an egregious form of content discrimination.” *Id.* at 829.



the Establishment Clause.<sup>248</sup> At the outset, the Court treated the case as a typical “government benefits to religion” case, where the establishment scrutiny would focus on whether the criteria determining the receipt of such benefits, and the receipt of the benefits themselves, flowed from neutral policies and fell upon groups whose ideologies and viewpoints remained broad and diverse, even though some benefits might aid religious groups.

The Court found the University’s SAF funding program to be neutral, in that it provided funding for any CIO constituting a “student news, information, opinion, entertainment, or academic communications media group[,]” of which WAP belonged,<sup>249</sup> notwithstanding proscription on funding expenses incurred in “religious activities.” The Court concluded that WAP sought SAF funding as a student news and opinion journal rather than on account of its Christian viewpoint. News and opinion from a Christian standpoint is still news and opinion, of which the Guidelines permitted funding. Likewise, the student fees imposed to support the SAF went to fund expenditures, in furtherance of the goal of disseminating a wide variety of ideas, insofar as “student expression is an integral part of the University’s educational mission.”<sup>250</sup> SAF funds

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<sup>248</sup> The University actually abandoned this argument before the Supreme Court; nonetheless, the Court ruled upon the issue inasmuch as the court of appeals had based its decision on Establishment Clause grounds. *Id.* at 837.

<sup>249</sup> *Id.* at 840.

<sup>250</sup> *Id.* The Court noted that the fee imposed was not designed to support the government, but to support academic and education-related activities of students. *Id.* In this respect, the Court refused to conclude that the student fee was a “tax” exacted by the government for the support of religion, or was a direct money payment to an institution engaged in religious activities to support those activities. *Id.* at 840-41. Nor did the Court rule that the fee qualified as public money. *Id.* at 841. In this vein, the Court also declined to address the issue of whether a dissenting student who opposes particular

were not used to support religion, but rather to support the dissemination of news and opinion from a Christian perspective, much as the SAF would be available to any other CIO that disseminated news and opinion from any other perspective.

Justice Thomas' concurrence chastised the dissent for its mischaracterization of the original meaning of Establishment Clause and its "misleading application of history [that] yields a principle . . . inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs."<sup>251</sup> Thomas interpreted James Madison's Memorial and Remonstrance Against Religious Assessments<sup>252</sup> not as evidence that government must not prefer religion over irreligion (thus barring all forms of monetary assessments that might happen to benefit religious entities), but rather, as Madison's view that government may not bestow favor upon certain religious sects to the exclusion of others, wherein "intolerance, bigotry, unenlightenment and persecution" generally result.<sup>253</sup> For Thomas, the Establishment Clause simply did not proscribe state programs directly aiding religious activity when such aid is a part of a neutral program available to a wide variety of participants,<sup>254</sup> true

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speech funded by the \$14.00 fee would have a First Amendment right to seek a pro-rata return of that portion of his or her exacted fee expended for the speech to which he or she objects. *Id.*

<sup>251</sup> *Id.* at 852-53.

<sup>252</sup> For an informative discussion, see generally Justice Thomas's concurring opinion and works cited therein. *Id.* at 852-63.

<sup>253</sup> *Id.* at 856.

<sup>254</sup> *Id.* at 857-58. Here, Thomas falls prey to imprecision, much like the dissent, by substituting "religious" for "religion" and in equating "religious activity" with religion. *Id.* While direct government aid to religious activity that has sectarian overtones might implicate the Establishment Clause where such aid is pervasive and funded by government mandate, "religious activity" that might receive some governmental benefit

whether such benefit came in the form of governmentally-funded facilities or in the form of government funds themselves.<sup>255</sup>

Justice Souter, writing for the dissent, placed particular scrutiny upon the overall nature of WAP's newspaper, which he characterized as both a newspaper disseminating informative articles and opinion from a Christian perspective, and also a device of proselytization, a publication that at its core spread a message of Christian orthodoxy, exhorting sinners to repentance and to the salvation made available through the death and resurrection of Jesus Christ.<sup>256</sup> Based upon this conclusion, Souter categorically rejected the notion of any state-sponsored or state-funded subsidization of such a publication as absolutely forbidden under the Establishment Clause. The dissent, like Thomas, cited Madison's Remonstrance, but reached a different conclusion therefrom: that the Establishment Clause, as indicated by history, disallowed all forms of governmental support for religion.<sup>257</sup> With this conclusion, the dissent stated that "evenhandedness" in the doling out of government benefits could not of itself suffice to permit the direct

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cannot, as a matter of law, constitute an Establishment of religion because it is not religion and is not establishment. *See infra* Part IV.B.

<sup>255</sup> Such aid might come in the form of various tax exemptions or credits for religious institutions, being tantamount to a tax-funded government subsidy. *Id.* at 859-61.

<sup>256</sup> *Id.* at 865-66. In reaching this conclusion, the dissent gave particular significance to the doctrinal statements contained throughout the newspaper, even to its masthead, which bore Paul's exhortation in his Epistle to the Romans for believers to awake from their slumber "because our salvation is nearer now than when we first believed." *Id.* at 865.

<sup>257</sup> *Id.* at 869 n.1.

financial support for religious *proselytization*, even where such benefits are made available on a neutral basis and subject to neutral criteria.<sup>258</sup>

## 2. The Incoherent and Inchoate Mass of Approaches—*Santa Fe*

In *Santa Fe Independent School District v. Doe*,<sup>259</sup> the Court examined the practice of the Santa Fe Independent School District that permitted Santa Fe High School to deliver a prayer over the public address system before every varsity football game, a prayer recited by an elected student council chaplain. Two sets of students—one Catholic and one Mormon—challenged this practice in district court. During the pendency of the proceedings, the District amended its prayer policy to allow that such prayer would be voluntary from the standpoint that (1) the student council, under the advice and direction of the high school principal, would conduct an initial election process whereby the entire student body would vote by secret ballot as to whether a pre-game invocation<sup>260</sup> would occur before all varsity football games, and (2) if the student body voted that such an invocation would occur, the student body would then elect a student from a list of student volunteers who would deliver such invocation.<sup>261</sup> The content of the invocation itself

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<sup>258</sup> *Id.* at 881-83. The “central analysis” became not the neutrality of the evenhandedness of the funding itself, but rather upon whether the funding, if general, went to secular functions that could be separated from the overall sectarian nature of the institution such as “sufficiently to ensure that aid would flow to the secular alone.” *Id.* at 884.

<sup>259</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>260</sup> *Id.* at 294-98. The Court’s opinion indicates that the word “prayer” was removed from the policy and replaced with references to “messages,” “statements,” and/or “invocations,” although it is not clear from the opinion the context in which these words appeared. *Id.* at 298.

<sup>261</sup> *Id.* at 298 n.6. The policy as amended contained a failsafe option of sorts, where, if a court enjoined application of the re-written policy, the policy would revert to a

was left to the discretion of the student delivering the invocation, “consistent with the goals and purposes” of the amended policy.<sup>262</sup>

The district court eventually enjoined application of the rewritten policy, finding that the rewritten policy, on its face, effectively coerced student participation in a religious event, i.e., a sectarian prayer over the public address system at varsity football games.<sup>263</sup> Both the School District and the Doe parties appealed this decision, the School District arguing that the enjoined portion of the rewritten policy was permissible, and the Does contending that both the rewritten and the original policies violated the Establishment Clause. A majority of the court of appeals agreed with the Does, striking down both versions of the policy as applied to high school sporting events.<sup>264</sup> The Supreme Court granted the School District’s petition for certiorari on the following question: “‘Whether petitioner’s policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.’”<sup>265</sup>

Justice Stevens, writing for a majority of the Court, upheld the ruling of the court of appeals. Stevens cited *Lee v. Weisman* for the general proposition that government may not coerce support or participation in religion, or the exercise thereof, “or otherwise act in which ‘establishes a [state] religion or religious faith, or tends to do so.’”<sup>266</sup> Stevens then

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previously-existing policy that provided essentially the same terms except that the content of any invocation was to be “nonsectarian and nonproselytizing.” *Id.* at 297.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 299. Apparently, the policy at issue also applied to varsity baseball games as well. *Id.*

<sup>264</sup> *Id.* at 299-300.

<sup>265</sup> *Id.* at 301.

<sup>266</sup> *Id.* at 302.

rejected the School District's argument that the invocations in question would constitute "private" speech by the students, and therefore not attributable to the government under an Establishment Clause analysis, but additionally protected under the Free Speech and Free Exercise provisions of the First Amendment. In so rejecting, the Court refused to qualify the type of speech involved as that occurring in *Rosenberger*, i.e., individual/private speech within a governmentally-established limited public forum, but rather, as governmentally-sponsored speech within a forum controlled by the school district, allowing access thereto to only one student, who would perform the invocations under guidelines established by the school system and specifically created for that very speech.<sup>267</sup>

In dissent, Chief Justice Rehnquist accused the majority of distorting existing precedent and further demonstrating an overall "hostility to all things religious in public life."<sup>268</sup> Rehnquist also expressed disagreement with what he perceived as the majority's cutting with too wide a swath in its facial invalidation, stating that "[w]hile there is an exception to this principle [of the general refusal to render wholly invalid a policy based

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<sup>267</sup> *Id.* at 303-04. The Court acknowledged that these factors, standing alone, were not of themselves determinative of whether the speech involved was private speech or government speech; however, the Court concluded that, such factors taken together, and when coupled with the fact that the speech at issue would be determined by majority vote, created a mechanism of choosing speech—a mechanism set forth in the district's policy—that by definition silenced any dissenting or minority opinions, thereby creating not a limited public forum but, rather, a forum where only preferred speech would occur—thereby making the invocation government-sponsored speech. *Id.* at 304.

<sup>268</sup> *Id.* at 318.

on hypothetical or future contingencies] in the First Amendment overbreadth context . . . no similar justification [exists] for Establishment Clause cases.”<sup>269</sup>

### 3. A Beast with Two Heads—*Van Orden* and *McCreary County*

In 2005, the Supreme Court issued two simultaneous rulings, *Van Orden v. Perry*<sup>270</sup> and *McCreary County v. American Civil Liberties Union of Kentucky*<sup>271</sup>. Collectively, these rulings represent the continuing division existing within the Court, its most recent fracturing, and its most extreme display of the tensions existing between the neutrality model and the history and traditions model of Establishment Clause jurisprudence.<sup>272</sup> *Van Orden* involved an Establishment Clause challenge brought by residents of the State of Texas seeking to enjoin the display of the Ten Commandments on the grounds of the Texas State Capitol. The challenged display stood as a monolithic structure, six feet high and three and a half feet wide. In 1961, the State accepted the monument as a donation by the Fraternal Order of Eagles of Texas, a national social, civic, and patriotic organization. While the State selected the location of the monument, the Eagles of Texas paid the cost of erecting the structure, the dedication of which was presided over by two state legislators.<sup>273</sup> In 2001, Petitioner Thomas Van Orden, an erstwhile attorney, sued the state under 42 U.S.C. 1983, seeking both declarative and injunctive relief, namely, a

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<sup>269</sup> *Id.*

<sup>270</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>271</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

<sup>272</sup> Since these cases were decided, three members of the Court were replaced: Chief Justice Rehnquist passed away and was replaced by current Chief Justice John Roberts; Justice Sandra Day O’Connor retired and was replaced by Justice Samuel Alito; and Justice David Souter retired and was replaced by Justice Sonia Sotomayor.

<sup>273</sup> *Van Orden*, 545 U.S. at 681-82.

declaration that the maintenance of the monument violated the Establishment Clause and an injunction requiring its removal. Following a bench trial, the district court held that the monument did not constitute an establishment of religion. Specifically, the district court found (1) that Texas had a valid secular purpose in erecting the statue (as recognition and commendation of the Eagles for their efforts in reducing juvenile delinquency), and (2) that a reasonable observer, mindful of the history, purpose, and context of the monument, would not conclude that the monument, passive in nature and design, conveyed a message that the State was attempting to endorse religion. The court of appeals affirmed with respect to both the purpose and effect analysis. The Supreme Court granted certiorari and affirmed.<sup>274</sup>

In affirming, the majority described its Establishment Clause jurisprudence as “Januslike,” one face examining the history and traditions of the country, the other affixing its gaze upon the dangers to religious freedom posed by that government intervention in religious matters.<sup>275</sup> To the majority, Establishment Clause analysis necessitated consideration of both faces to the extent that “[o]ur institutions presuppose a

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<sup>274</sup> *Id.* at 682-83. While not evident from the Court’s opinion, the rationale applied by the court of appeals amounted to some conjunctively disjunctive form of *Lemon*, where endorsement and neutrality became sub-divisions of the purpose and effect prong of *Lemon*. See *Van Orden v. Perry*, 351 F.3d 173, 177-78 (5th Cir. 2003).

<sup>275</sup> *Van Orden*, 545 U.S. at 683. Again, threats to religious freedom find defense in the Free Exercise Clause. As posited herein, the threats to free exercise must always be present where establishment is called into question. The protections afforded by Free Exercise are greater, not lesser, than the protection afforded by Establishment, to the extent that Free Exercise protections are broader reaching and will afford protection even where no establishment exists; however, as posited, there can be no establishment without an accompanying, and in fact preceding or conjoining, free exercise infringement. Where no free exercise threat exists, ipso facto, no establishment can exist.



Supreme Being, yet . . . must not press religious observances upon their citizens.”<sup>276</sup> Achieving a reconciliation of the two “requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.”<sup>277</sup>

While not rejecting *Lemon*, the majority declared it “not useful” with respect to the “passive” monument erected on Capitol grounds.<sup>278</sup> Instead, the majority’s analysis was driven by the overall nature of the monument itself as well as the history and traditions of the nation.<sup>279</sup> The majority viewed the monument as an acknowledgment of the role the Ten Commandments has played in the Nation’s heritage; the majority found similar longstanding monuments not only to the Ten Commandments, but to the acknowledgment of God and other religious themes in general, interspersed throughout Washington, D.C. itself.<sup>280</sup> Furthermore, the majority reviewed the historical recognition the Decalogue played in all branches of government, such displays and recognitions “bespeak[ing] the rich American tradition of religious acknowledgments.”<sup>281</sup>

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 683-84. Rehnquist’s opinion rejected the Court’s primary assumption, stemming from *Everson*, that the Establishment Clause forbids any governmental preference to religion over irreligion, given the Court’s longstanding principles of acknowledgement, preferences, or accommodations of religion. *Id.* at 687-88. Here, then, is where any government hostility toward religion would require a Free Exercise examination of whether the hostility rose to the level of a law prohibiting the free exercise.

<sup>278</sup> *Id.* at 686.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 688-89.

<sup>281</sup> *Id.* at 690.

The majority then turned to the nature of the monument itself, recognizing that the Ten Commandments, as a religious matter, imbued the monument with religious significance. However, the nature of the Ten Commandments, as contained within the Mosaic law, also bore historical and social significance, apart from its status as embodiment of religious principles;<sup>282</sup> to the majority, the mere imbuing of a symbol with religious content, or its accompanying capability of conveying or promoting some message consistent with religious doctrine, would not of itself strip it of any overall non-religious meaning, and would not run afoul of the Establishment Clause.<sup>283</sup> Notwithstanding this general principle, the majority also recognized limits implicitly placed upon the government's use or acknowledgment of religious symbols, such as laws mandating their placement in a public school setting where such law evinces a "plainly religious purpose."<sup>284</sup> Thus, given the setting in which a religious symbol would be placed<sup>285</sup>—in elementary schools versus legislative chambers—such symbol may in fact

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<sup>282</sup> *Id.* Similar monuments, be they statues, plaques, inscriptions on buildings, or some other form, all might in some sense, at least with the Ten Commandments, or Decalogue, acknowledge the religious item as a symbol for a more general idea or concept. "Conceptual symbolism" it could be called, whereby we use either the Ten Commandments or an image of the Greek Goddess Themis to represent a nonreligious ideal, be it justice, or mercy, or judgment.

<sup>283</sup> *Id.* at 690.

<sup>284</sup> *Id.* The Court recognized its particular vigilance over Establishment Clause concerns occurring within the confines of elementary and secondary schools. *Id.* at 691.

<sup>285</sup> Conditioning the meaning behind the use of religious symbols, or other religious acknowledgments, might prove expedient, but it is equally unsound; a symbol as such cannot have meaning apart from that ascribed to it by society. If society chooses a symbol to stand for a concept or principle, then that symbol must remain so regardless of its surroundings. The Ten Commandments on the Courthouse walls mean the same as in school buildings.

serve as a passive tool of proselytization.<sup>286</sup> The Court therefore concluded that displaying the Ten Commandments, having both religious and nonreligious connotations, and given its placement, served as a passive symbol, falling far short thereby of violating the Establishment Clause.<sup>287</sup>

Scalia's concurrence reiterated his often-stated position that the Court adopt a consistent Establishment Clause jurisprudence "in accord with our Nation's past and present practices," the salient feature of which being "that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments."<sup>288</sup> Justice Thomas concurred in full but stressed his jurisprudential theory of original meaning, in terms of establishment as necessarily displaying "actual legal coercion" such as "mandatory observance or mandatory payment of taxes to support ministers," or some other method of compulsory observance of religious doctrine.<sup>289</sup> For Thomas, the Court's Establishment clause approach "elevates the trivial to the proverbial 'federal case,' by making benign signs and postings subject to challenge," and provides "no principled way" to determine the existence of religious significance at all, or by which to measure the line separating acknowledgment from establishment.<sup>290</sup> In this

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<sup>286</sup> It seems doubtful, for Establishment Clause purposes, that any proselytization can be passive; likewise, no Establishment can be passive. It cannot arise by circumstance, but by will. It is imposed, not occasioned.

<sup>287</sup> *Id.* at 691-92.

<sup>288</sup> *Id.* at 692.

<sup>289</sup> *Id.* at 693-94. Justice Thomas also espoused a position that the Establishment Clause's text and history "'resis[t] incorporation' against the States" via the Fourteenth Amendment. *Id.* at 693.

<sup>290</sup> *Id.* at 694.

way, the “incoherence of the Court’s decisions in this area renders the Establishment Clause impenetrable and incapable of consistent application.”<sup>291</sup>

Justice Breyer’s separate concurrence noted at the outset that the clarity sought by Thomas could not be achieved by application of a “precise” formula, and that resort must be made to the overall purposes of the Religion Clauses, those being assurance of the “fullest possible scope of religious liberty” and avoidance of “that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.”<sup>292</sup> In furtherance of these ends, “government must ‘neither engage in nor compel religious practices,’” nor must it “‘effect . . . favoritism among sects or between religion and nonreligion,’” nor must it “‘work deterrence of [any] religious belief.’”<sup>293</sup> While Breyer seemed to consider neutrality alone as an “insufficient” touchstone, he also concluded that the Court’s other tests could not “readily explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings . . .”;<sup>294</sup> he nevertheless acknowledged that where “the relation between government and religion is

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<sup>291</sup> *Id.* at 694-95. The Court has never even attempted to formulate any “principled approach” to the determination of “religion” as embodied by the Establishment Clause. While Justice Thomas seeks a principled way to separate the religious from the nonreligious significance with respect to “benign signs and postings,” or between the acknowledgment versus the establishment of religion, he misses the mark entirely in terms of clear constitutional text. What is required is a principled approach with which to determine and differentiate “religion” (and a violation if established) with “religious,” which even if “established” under current precedent, nonetheless presents no Establishment Clause problem. *See infra* Part IV.

<sup>292</sup> *Id.* at 698.

<sup>293</sup> *Id.* (citations omitted).

<sup>294</sup> *Id.* at 698-99 (citations omitted). What the Court’s test may not explain, the clear text of the Establishment Clause out of which these tests arose does: Legislative prayer is by no means “religion” in a hard sense, nor is it “establishment” by force of law.

one of separation, but not of mutual hostility and suspicion, one will inevitably [encounter] borderline cases.”<sup>295</sup>

A companion case, *McCreary County v. ACLU of Kentucky*<sup>296</sup> likewise involved the posting of the Ten Commandments on government property, albeit in two Kentucky County Courthouses, one located in McCreary County and one in Pulaski County, Kentucky. Unlike *Van Orden*, however, and with almost a mirror opposite of voting blocks, the Court concluded that the posting of the Ten Commandments violated the Establishment Clause.

Each County displayed the Commandments in large gold-framed wall hangings: McCreary County hung the display pursuant to an actual order by the County legislature to do so, while Pulaski County ceremonially hung the display in the presence of, and at the apparent behest of, the County Judge-Executive, accompanied by his church pastor. Both Counties’ displays contained an abridged rendition of the Ten Commandments as found in the King James version of the Holy Bible, including a citation to Exodus 20:3-17, and were readily visible by any person conducting business at the respective courthouses.<sup>297</sup> Eventually, the American Civil Liberties Union of Kentucky, among others, challenged both displays in federal district court.

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<sup>295</sup> *Id.* at 700. While no “test” can abate all possibility of borderline cases (those cases requiring fact-intensive analysis), a test that adheres to, rather than merely explicates or enhances, the text of the Constitution as primary, without supplantation, displacement, and substitution or addition, remains the only viable and consistent option in deciding these borderline cases.

<sup>296</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

<sup>297</sup> *Id.* at 851-52.

During the pendency of that lawsuit, both Counties passed resolutions authorizing a second, more expansive display. Each County resolution declared the Ten Commandments to be “the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded,’ . . . that ‘the Ten Commandments are codified in Kentucky’s civil and criminal laws,’” and various other statements evincing the importance of the Ten Commandments in Kentucky’s past.<sup>298</sup> The expanded displays, along with the Ten Commandments, contained a second display of eight other documents in smaller frames, each having some form of an historical or government declaration recognizing God, prayer, or the Bible.<sup>299</sup>

Following the assembly of the expanded displays, the district court issued a preliminary injunction against both displays, ordering their immediate removal. In doing so, the district court applied *Lemon*’s three part test, finding that the displays lacked any secular purpose. Both Counties filed notices of appeal from the injunction, but dismissed the appeals after acquiring new legal counsel. Thereafter, both Counties enacted new displays, entitled “The Foundations of American Law and Government Display,” containing an expanded version of the Ten Commandments, alongside other legal documents such as the Magna Carta, the Bill of Rights, and the Kentucky Constitution, as well as a picture of Lady Justice. A statement describing the historical and legal significance accompanied each document.<sup>300</sup> The ACLU moved to supplement the previous injunction to include the third display, and the Counties responded with renewed

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<sup>298</sup> *Id.* at 853.

<sup>299</sup> *Id.* at 853-54.

<sup>300</sup> *Id.* at 855-57.

arguments that the displays had a valid educational purpose. The district court disagreed and broadened the injunction to include the third displays. Both Counties appealed, and a divided panel of the circuit court upheld the district court, holding that despite the inclusion of other secular documents alongside the Ten Commandments, their ““lack of a demonstrated analytical or historical connection”” to the Ten Commandments, evinced an impermissible religious purpose behind the display.<sup>301</sup> The Supreme Court granted certiorari and affirmed.

Justice Souter, writing for a five-member majority, relied primarily on the Court’s *per curiam* decision in *Stone v. Graham*<sup>302</sup> in holding that the counties’ display of the Ten Commandments violated the Establishment Clause. *Stone* involved a Kentucky state law that required the posting of the Ten Commandments in all public school classrooms. The *Stone* Court labeled the Ten Commandments an “instrument of religion” and concluded that their presence in public school classrooms, devoid of any accompanying secular theme, lacked a secular educational purpose, thereby constituting an advance of religion.<sup>303</sup> Souter recognized that *Stone* did not stand for a per se proscription of any governmental display of the Commandments, necessitating a consideration of the overall context in which such a display occurs. Souter found two overarching similarities between the displays at issue and the display in *Stone*: (1) both displays set out the actual

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<sup>301</sup> *Id.* at 856-58. Only one judge of the majority also found that the display violated the effects prong in that “a reasonable observer would find that the display had the effect of endorsing religion given the lack of analytical connection between the Commandments and the other documents in the display, the courthouse location of the display, and the history of the displays.” *Id.* at 858 n.8.

<sup>302</sup> *Stone v. Graham*, 449 U.S. 39 (1980).

<sup>303</sup> *McCreary County*, 545 U.S. at 867 (citing *Stone*, 449 U.S. at 41 n.3).

text of the Decalogue, as opposed to some symbolic representation thereof,<sup>304</sup> and (2) each stood alone rather than as a component of a larger secular display.<sup>305</sup> In sum, any display of the actual text of the Ten Commandments, standing alone or absent “sequiturious” or “logically connected” secular “buffers” interspersed throughout, became thereby “an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government [endeavors] to place this statement alone in public view, a religious object is unmistakable.”<sup>306</sup>

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<sup>304</sup> *Id.* at 868. Such symbolic representation might depict “10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith.” *Id.* This suggestion transforms the Court into a national art critic; moreover, it suggests the ridiculous, as the very force of the Ten Commandments as a symbol of law exists and arises within and from the text of the Commandments themselves. Such an “alternative” representation would be akin to suggesting that the government could denude or buffer the Christian imagery inherent in Michelangelo’s *Pieta* only by substituting stick figures for Mary and the Christ. Furthermore, this conclusion directly contradicts the “reasonable observer” approach to the effects/endorsement analysis, as certainly any reasonable observer of an image of stone tablets containing roman numerals I through X would understand that image to represent the Ten Commandments, an impermissible “instrument of religion” under *Stone*.

<sup>305</sup> *Id.* The Court’s conclusion is troubling given that both courthouse displays included additional images; however, the Court reasoned that despite the presence of additional images, the placing of the Ten Commandments as central negated any presumption that the inclusion of secular images sufficed to integrate the Commandments into an overall secular display. *Id.* It is difficult to imagine any scenario where the Ten Commandments would be so integrated into other disjointed secular imagery that the religiously moral purpose for its inclusion would be lost upon the viewer.

<sup>306</sup> *Id.* at 869. If “morality subject to religious sanction” is one factor determinative of “religion” within the meaning of the Establishment Clause, then the Court would do well to include the concept of “sanction” as determinative of any “establishment” thereof. Furthermore, it would be hard to imagine any display of the Ten Commandments having any symbolic significance bereft of these essential elements; and so bereft, the symbol becomes stripped of the very concept it represents, rendering it meaningless and neutered.

Also, the presence of an “unmistakable religious object” begs the question as to whether such “religious” object constitutes religion. It does not. Furthermore, any statements made by the object are statements not of the government, but those imbedded in history, statements that have in fact occurred millennia ago.



The majority then turned to the post-suit but pre-judgment alterations/modifications made to the displays at issue. Because the government made these modifications during already pending legal proceedings, the Court deemed them insincere attempts to vest the displays with newfound historical, educational, and civic significance through the inclusion of countervailing secular material. The Court determined these efforts disingenuous on their face, and substantively insufficient under the Establishment Clause.<sup>307</sup>

The dissent, authored by Justice Scalia, concluded otherwise. First, it argued against the majority's conclusion that the Establishment Clause required complete government neutrality as to religion; second, it argued that the scope of the neutrality had been extended beyond any of the decisions reached in prior cases; and third, it argued that even where the principle of neutrality correctly considered as required under the Establishment Clause, the decision that the displays at issue violated the Establishment Clause was incorrect.<sup>308</sup>

#### IV. GRAMMAR AND USAGE/LINGUISTIC MODALITY—A HERMENEUTICAL LODESTAR

##### *A. Problems Inherent in Supertextual Approaches*

As discussed *supra*, the problems inherent in ignoring constitutional text manifest themselves through the creation, and sustainment, of surrogate standards that through continued use become surrogate “supertext” to the Constitution's clear language and, therefore, supplant it. When this results, the text itself becomes secondary, and in fact meaningless. We have seen, as outlined above, the most extreme example of this

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<sup>307</sup> *Id.* at 869-70.

<sup>308</sup> *Id.* at 885 (Scalia, J., dissenting).

supplantation in modern constitutional jurisprudence through the Court's disjointed treatment of the Establishment Clause. The "wall of separation" has so confounded the analysis because it has created the ultimate supertextual standard—that of separation. The word "separation," of course, occurs nowhere within the First Amendment. Furthermore, and more importantly, the surrogate concept of separation has forced the Court to craft and re-craft multiple, disjointed tests so as to accomplish its surrogate mandate of separation.<sup>309</sup>

O'Connor's separate concurring opinion in *Kiryas Joel*<sup>310</sup> perfectly illustrates the problems inherent in super-constitutional "tests," which tempt judicial proclivity to abandon clear constitutional text and to craft surrogate tests as definitive law rather than as a rule with which to construe that text. Two problems arise: first, no Justice, or lower judge, would dream to declare that any given problem is being "shoehorned" into the language of the Constitution; second, and equally important, is that the language of tests often transcends the constitutional text and subordinates the meaning of that text to judicially-created law that by its very nature "acquire[s] more and more complicated definitions which stray ever further from their literal meaning."<sup>311</sup> If such is the necessary and unfortunate result of any particular test, then the complications and straying inherent in their creation render subordinate the actual language of the Constitution from which they, presumably, derive.

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<sup>309</sup> See *Marsh v. Chambers*, 463 U.S. 783, 803-13 (1983).

<sup>310</sup> *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

<sup>311</sup> *Id.* at 719 (O'Connor, J., concurring).

Equally disturbing is the judicial rationale for justifying the need to develop multiple tests on the same subject, driven by some false judicial conviction that clauses such as the Establishment Clause “cannot easily be reduced to a single test.”<sup>312</sup> This conclusion is anathema to the very nature underlying any constitution, or any statute—that the language of the law drives the meaning of the law, and is not merely some ornamental and symbolic springboard from which to develop abstract tests that are mere shadows of the law, and thereby supplant the law through application. At some point, the test, however well-intentioned, transcends the law such that the analysis begins and ends with the language of the test, not the law. When this happens, the law itself becomes transformed, or in the case of the Establishment Clause, supplanted by multiple and disparate tests; O’Connor’s admonishment then rings true, that courts, “[r]ather than taking the opportunity to derive narrower, more precise tests from the case law, . . . tend to continually try to patch up the broad test, making it more and more amorphous and distorted.”<sup>313</sup>

It strains credulity to accept as a notion of constitutional interpretation that disparate tests can be derived from the same source, or that different tests can govern a singularly stated proscription. There is, however, one rationale that may explain such a proclivity: the usurpation of judicial power so as to accomplish an outcome that satisfies the Court’s quest for a just result. Thus, where the text of the Establishment Clause does not fit neatly into the desired result, it is ignored, broadened, substituted, supplanted, so as to

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<sup>312</sup> *Id.* at 720.

<sup>313</sup> *Id.*

achieve such result; and because the desired result—that of separation—is equally super-textual, the language of the law can never lead to the desired outcome.

### 1. *Lemon*/Endorsement Model

In *Lemon*, the Court posited that the proscription against an establishment included any “step towards” establishment, apparently construing the meaning of the term “respecting” as “nearing” or “approaching,” thereby broadening by substitution the prohibition against laws respecting establishment.<sup>314</sup> Moreover, the Court treated the term “respecting” as modifying “establishment of religion” rather than “law,” the result of which mandated a separation of government from religion as opposed to the proscription of laws respecting establishment.<sup>315</sup> In this analysis, the explicit requirement of “law” dilutes to the point of inconsequentiality, and “religion” expands into the realm of anything remotely “religious.”

The methodology cannot sustain itself nor can it remain cohesive. A law may respect religion but not establish religion, and yet under *Lemon*, government conduct respecting a religious topic would perforce constitute a law approaching an establishment of religion and a violation. Under this methodology, establishment becomes engulfed by all judicial notions of what “approaches” it. In other words, because the *Lemon* test expands the ambit of the term “respecting,” it thereby expands both the noun it modifies, “law,” and its object, “establishment of religion.”

Furthermore, *Lemon*’s three sub-classes of ways a law can “respect” religion—purpose, effect, and entanglement—essentially eliminate the distinction between

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<sup>314</sup> *Lemon*, 403 U.S. at 613.

<sup>315</sup> *Id.* at 612.

“religious” and “religion.”<sup>316</sup> So as can be applied to any given case, the government may pass a law (or undertake a policy) with a clear religious effect, such as the erection of a cross on government grounds. Because a cross is a religious symbol, the policy would have the effect of appearing to advance the Christian religion, and fall squarely within the prohibitions of *Lemon*. However, the act of erecting the cross, whether by law or policy, is by no means a law respecting an establishment. The detachment from text, however, allows for the analysis to stray into the “step toward” establishment realm, and also allows “religious” symbols to achieve a type of “conceptual symbolism” where the symbol becomes the concept, where the religious becomes the religion. Therefore, because the act of erecting a cross on public property undoubtedly involves the creation of the conceptual symbolism of Christianity, the act itself becomes a “step towards” not only the erection of the symbol, but the creation, or establishment if you will, of the concept. So, for the purposes of *Lemon*, the construction of a cross on government property would necessarily serve as a step toward Christianity, which would then become an act respecting Christianity. While the erection of a cross does not establish Christianity, it is a conceptual symbol of the religion, and consequently, tantamount to the religion itself. So under *Lemon*, the cross would violate the Establishment Clause while meeting neither of the operative words of the clause, i.e., it would be neither an establishment nor a religion.

The advancement portion of *Lemon*’s “effects” prong has since become melded with the notion of “endorsement.”<sup>317</sup> Whereas the concept of endorsement can occur both

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<sup>316</sup> *Id.* at 612-13.

<sup>317</sup> See *Allegheny*, 492 U.S. at 592-93.

actively and passively, the concept of advancement, in a strict semantic sense, cannot classify as a passive activity. As the Court itself has acknowledged, the term endorsement “is not self-defining,” hence the need to utilize even broader analysis that perforce acquires even greater disconnection from constitutional text.<sup>318</sup> This disconnectedness displays most clearly when the Court, as in *Allegheny*, stated that “[w]hether the key word is ‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same.”<sup>319</sup> From a textual standpoint, this conclusion is ludicrous. The “key word” and “essential principle” in any constitutional analysis must be words and principles chosen by the drafters and included therein; and for Establishment Clause analysis, the key word must remain “establishment,” and the essential principle, “establishment of religion.”

A law “fostering” an “excessive entanglement” with religion likewise constitutes a law respecting an establishment of religion, even if it has a secular purpose and neither advances or inhibits religion. Again, this test imposes super-constitutional implicature serving as a surrogate for explicit text: “fostering” replaces “respecting,” and “entanglement” replaces “establishment.” Equally disturbing is the Court’s substitution of ambiguous terms without attempting to establish any set of criteria with which to determine them; if the Court cannot fashion a definitive rule with which to determine establishment, how much less can it fashion a test with which to determine entanglement so excessive as to constitute an establishment? *Lemon*’s continued existence, however, remains most troubling in that the Court has since developed additional “tests” that exist

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<sup>318</sup> *Id.* at 593.

<sup>319</sup> *Id.*

along some unsound continuum with *Lemon*.<sup>320</sup> The obvious implication becomes, then, that the existence of multitudinous tests creates multiple, and disparate, Establishment Clauses. No sound system of legal thought can ever support such a result.

In *Marsh v. Chambers*, for example, Justice Brennan's dissenting analysis reached beyond *Lemon*'s prongs and emphasized the principles of "separation" and "neutrality" that he found "implicit" in the Establishment Clause.<sup>321</sup> Emerging from these "implicit" principles were still deeper implicit principles, "relevant" and yet that much further removed from actual text. The first of such principles (which the dissent termed "purposes") was what the dissent described as "to guarantee the individual right to conscience," implicated not only when "the government engages in direct or indirect coercion" but also when "the government requires individuals to support the practices of a faith with which they do not agree."<sup>322</sup> A second such principle was "to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues or by unduly involving itself in the supervision of religious institutions or officials."<sup>323</sup> A third such principle was "to prevent the

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<sup>320</sup> See Kristen M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 PAC L.J. 121, 126, 144-45 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (Scalia, J., concurring); Kenneth M. Cox, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1198-1203 (1984).

<sup>321</sup> *Marsh*, 463 U.S. at 803-13 (1983). Again, we see the process of substitution and the subsequent elevation of "implicit" terms over "explicit" ones, where implicit ideas achieve surrogate status as supertext of the Constitution.

<sup>322</sup> *Id.* at 803. Of course, "coercion" has since become a second "test" by which the Court has addressed Establishment Clause issues, discussed *infra* Part IV.A.2.

<sup>323</sup> *Id.* at 803-04 (footnote omitted). Certainly, a state often takes upon itself the decision to interfere with other "autonomies," such as in the financial or economic realm (through compulsory taxation and regulation) or in the realm of the family. Of course,

trivialization and degradation of religion by too close an attachment to the organs of government.”<sup>324</sup> A fourth such principle was to “help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.”<sup>325</sup>

The *Marsh* dissent then went a step further, however. Not only did it establish these nascent principles, but it then imbued them with an even further reaching arch, not only applying them “to the relationship of government to religious institutions or denominations” as a whole, but extending them “to the relationship of government to religious beliefs and practices,”<sup>326</sup> all doing so with assurances that “this view of the Establishment Clause is [not] a recent concoction of an overreaching judiciary.”<sup>327</sup>

However, even *Lemon* does not mandate that the law at issue be devoid of religious undertones or connotations, but rather, proscribes laws whose primary effect neither advances nor inhibits religion. There is a tremendous difference, both as a matter of normative meaning and usage, between “religious” and “religion.” These are not synonymous terms, nor can they be used interchangeably within the context of the Establishment Clause.<sup>328</sup> However, this difference has never been explicitly recognized

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such intrusion does not necessarily implicate anything contained in the Constitution guaranteeing such autonomy, except where the Court has engaged in the aforementioned addition of language, and the rights created thereby, i.e., “privacy” or “substantive due process.”

<sup>324</sup> *Id.* at 804.

<sup>325</sup> *Id.* at 805.

<sup>326</sup> *Id.* at 806.

<sup>327</sup> *Id.*

<sup>328</sup> Even the most cursory review of many Establishment Clause opinions reveals that the Court itself often uses these two terms interchangeably.



or adequately addressed by the Court since the adoption of the *Lemon* test. That is precisely because *Lemon*, being an ambiguous and disjointed test, lends itself to such substitution of implicit terms for explicit ones, “religious” for “religion.” A cross is religious; a menorah is religious; however, a cross is not part and parcel with Christianity, nor is a Menorah part and parcel with Judaism.<sup>329</sup>

Endorsement as a constitutional principle, established in *Allegheny*, instructs that the government’s use of a religious symbol constitutes an unconstitutional step toward establishment if it has the effect of endorsing religious belief; and that such an effect is to be determined by the context in which such religious symbol appears. The *Allegheny* Court deemed these principles “sound.”<sup>330</sup> Thus, the majority in *Allegheny*, at first blush, appeared to discard, or at least distance itself from, the *Lemon* standard, using not *Lemon*’s three pronged inquiry to evaluate state action but rather setting forth an examination as to the effect of the state action at issue, i.e., “whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their

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<sup>329</sup> Indeed, even the Christian cross itself takes many forms, depending on the particular branch of Christianity using it. The orthodox cross is markedly different than, say, the Latin cross (the traditional cross used by Western Christianity), or even the Roman Catholic crucifix, which, by definition, has affixed to it the corpus of Christ to denote his suffering.

<sup>330</sup> *Allegheny*, 492 U.S. at 597, 668. The Court thus shifts a focus not to government action—an “active” establishment—but to the general perception created by that action, where the reasonable observer could in effect create a “passive” establishment because he or she merely perceived an establishment. Or, in the case of judicially created and extra-constitutional tests that supplant text, the reasonable observer could declare an endorsement (“passive endorsement”) where no such endorsement was undertaken (“active endorsement”). See *id.* at 620. The dissent termed this shift in focus a “most unwelcome[] addition to our tangled Establishment Clause jurisprudence.” *Id.* at 668.

individual religious choices.”<sup>331</sup> This new endorsement approach, amazingly, both supplanted and supplemented *Lemon* from the standpoint that “endorsement” becomes both a stand-alone proposition and a surrogate for *Lemon*’s “effects” prong.<sup>332</sup> Of course, since *Lemon* itself supplanted explicit text, endorsement analysis remains twice removed from that text.

Furthermore, endorsement analysis, like *Lemon*, not only ignores the explicit requirement of “law” within the Establishment Clause, it in fact eliminates it. Even the concept of “ceremonial deism”<sup>333</sup> recognized as valid in such instances as “In God We Trust” on currency, “God save the United States and this Honorable Court,” or “under God” in the Pledge of Allegiance, misses the mark set by the text of the First Amendment. References to God on government property—however generic—carry with them no force of law. Presidential messages invoking the Almighty or imploring prayer in times of crisis may offend agnostic or atheistic sensibilities, but they in no way establish religion in the sense that they mandate adherence under penalty of law to a particular creed or orthodoxy. Under endorsement, the focus shifts to the result of the government action, and not the action itself; therefore, a crèche erected on city property might be deemed an endorsement even in the absence of a “law” requiring such display.

Furthermore, the “jurisprudence of minutiae” that results from the subjective context required by endorsement analysis “demands the Court to draw exquisite distinctions from

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<sup>331</sup> *Id.* at 597 (quoting *Ball*, 473 U.S. at 390). It should be noted here that the Court eventually overturned *Ball* in *Agostini v. Felton*, 521 U.S. 203, 203 (1997).

<sup>332</sup> *Allegheny*, 492 U.S. at 595-97.

<sup>333</sup> *Id.* at 603.

fine detail in a wide range of cases.”<sup>334</sup> Moreover, the examination as to whether the government’s use of a religious symbol in a holiday display, as in *Allegheny*, is permissible given the lack of “reasonable alternatives that are less religious in nature” inherently fails because “it requires not only that the Court engage in the unfamiliar task of deciding whether a particular alternative symbol is more or less religious, but also whether the alternative would ‘look out of place.’”<sup>335</sup> The very essence of the endorsement test, “with its emphasis on the feelings of the objective observer, easily lends itself” to the type of inquiry” into the social prominence enjoyed by any particular strand of religion receiving government acknowledgment, which depending on the degree of prominence, would determine whether such acknowledgment rises to the level of endorsement.<sup>336</sup> This type of inquiry produces the unintended result that “[t]hose religions enjoying the largest following must be [relegated] to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions.”<sup>337</sup> The Court becomes, in this respect, an arbiter not of law, but of social sensitivity.

## 2. Coercion Model

Coercion analysis also proves problematic. *Allegheny*’s dissent recognized the coercive aspects inherent, and in fact necessary, for government action to constitute “law,” but nevertheless distinguished between direct coercion—for example, compelling observance of the Sabbath, imposing special taxes to support religious institutions, or requiring public officials to declare allegiance to the Pope in order to hold public office—

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<sup>334</sup> *Id.* at 676 (Kennedy, J., concurring in judgment & dissenting in part).

<sup>335</sup> *Id.* at 676-77 (internal citations omitted).

<sup>336</sup> *Id.* at 677.

<sup>337</sup> *Id.*

and indirect, symbolic, or “passive” recognition of religion: the former would amount to a per se violation of the Establishment Clause, while the latter, save for extreme cases,<sup>338</sup> would at most bestow some “intangible” benefit to religion that is either “ensconced in the safety of national tradition” or “unlikely” to pose a realistic risk of establishment.<sup>339</sup>

Thus, the two guiding principles emerging from the *Allegheny* dissent appear to be: (1) government may not directly coerce any participation or nonparticipation in religion; and (2) government may not, through adoption or recognition of religious symbols, concepts, or traditions, place its aegis upon selected religions or faiths, or religion in general to the exclusion of nonreligion so as to amount to an indirect coercion by proselytization.<sup>340</sup> Indirect proselytization would occur in instances where the government recognition or assistance confers an undue benefit on religion. Such undue benefit does not occur in the context of legislative chaplains (*Marsh*), public sponsorship of religious displays at Christmas (*Lynch*), provision of school transportation to parochial schools (*Everson*), or tax exemptions for religious organizations (*Walz*).<sup>341</sup>

The analysis undertaken in *Lee v. Weisman* examined activity occasioned at the invitation of public officials and, as it occurred within the context of public school

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<sup>338</sup> The Court cited as an example of such an extreme case a city that permitted the permanent erection of a Latin cross on the roof of city hall, not as a per se violation but rather one that would “place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.” *Id.* at 607.

<sup>339</sup> *Id.* at 661-62 (Kennedy, J., concurring in part & dissenting in part).

<sup>340</sup> *Id.* at 659-63.

<sup>341</sup> *Id.* at 662-63.

graduation, cloaked with an “obligatory” or mandatory component.<sup>342</sup> The Court made clear that the practice of including clergy-lead prayers at these graduations did not implicate, or require, Free Exercise accommodation analysis under *Lemon*, and stated that: “[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”<sup>343</sup> The Court found the state action at issue constituted “pervasive,” and impermissible, government involvement in religious activity,<sup>344</sup> “to the point of creating a state-sponsored and state-directed religious exercise in a public school,” which circumstance the Court deemed determinative of the issue before it, without resort to *Lemon*, or endorsement.<sup>345</sup>

The *Weisman* Court, while reciting coercion, also made the error of equating religious with religion, and nonsectarian prayer with Establishment. Just as matters of conscience,

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<sup>342</sup> *Weisman*, 505 U.S. at 586. The majority reached this conclusion notwithstanding its acknowledgement that the school district did not require attendance at graduation as a condition for receipt of a diploma. *See id.*

<sup>343</sup> *Id.* at 587. As discussed *infra*, Free Exercise accommodation, without more, could never supercede Establishment Clause limitations.

<sup>344</sup> Again, the Court examines “religious activity,” as opposed to religion, thereby skirting explicit constitutional text and cloaking such text with superceding extra-constitutional doctrine. *See id.* at 586. The Court also equated the State methods for including such prayer—the choice by the principal—to a State statute mandating that such prayers take place. *See id.* at 587. The expansion of constitutional text in this respect cannot be reconciled with the traditional concept of “law” as compulsory state action.

<sup>345</sup> *Id.* at 587. Here Justice Kennedy attempts to delve into the consciousness or the mental state of the hypothetical attendee, thereby making the subjective perception of a single observer determinative of an Establishment of Religion; what makes this mode of analysis most disturbing is the fact that Kennedy himself rejected such subjective touchstone in his *Allegheny* dissent. Furthermore, Justice Kennedy’s subjective approach in *Weisman* betrays what he identified in *Allegheny* as the “imperative of applying neutral principles in constitutional adjudication.” *Allegheny*, 492 U.S. at 676.

morality, and faith—perhaps inextricably tied to religion in a general sense—do not by their relation thereto transform or overtake their object, supplications for divine guidance do not become proclamations of the divine, and what the divine is, to whom the divine reveals, or for whom the divine intercedes. While *Weisman* recognized the inherent tension between the Establishment Clause and the Free Exercise Clause, it mistook the display or exercise of the trappings of religion for religion itself.<sup>346</sup> The Madisonian system and its dichotomy of majority-based laws and constitutionally-protected rights invite a tyranny of the majority through legislative fiat and a tyranny of the minority through judicial largesse. Madison himself, cited by the majority, was concerned not so much with the trappings of religion, or the religious, as with the “ecclesiastical establishments” that ultimately defile, and not preserve, “the purity and efficacy of Religion.”<sup>347</sup> Nevertheless, the *Weisman* Court apparently declined to differentiate things “religious” from the overall concept of “religion.”<sup>348</sup>

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<sup>346</sup> See *Weisman*, 505 U.S. at 592 (“What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”). The “inherent tension” between Free Exercise and Establishment exists as a result of Court-created tests, not from the language of the First Amendment.

<sup>347</sup> *Id.* at 590 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in 8 PAPERS OF JAMES MADISON 301 (W. Rachal, R. Rutland, B. Ripel, & F. Teute eds. 1973)).

<sup>348</sup> The Court drew a distinction between sectarian notions of religion and what it termed a “civic” religion, or in other words, expressions of faith that do not rise to the level of sectarianism or creeds, be they invocations of a generic or unidentified divinity, or higher power, or otherwise non-offensive universal notions of “God.” *Weisman*, 505 U.S. at 589. The Court nevertheless struck down civic religion as violative of the Establishment Clause, where the mere absence of a specific creed could not neutralize the idea of God from its religious origins. See *id.* Of course, such distinction begs the question of whether any expression of religious content, be it prayer, or

The Court also distinguished its decision in *Marsh* given the “[i]nherent differences between the public school system and a session of a state legislature,” where the latter involves adults who are “free to enter and leave with little comment and for any number of reasons,” who are, unlike the former, not confronted with the choice to remain and comply or to boycott and thereby bypass “the one school event most important for the student to attend,” a ceremony where family and friends come together “to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.”<sup>349</sup>

Justice Souter’s logic in his concurrence in *Weisman* yields an interesting result in terms of his analysis between the Free Exercise Clause and the Establishment Clause, where he states that if coercion should be the test for Establishment Clause cases, such a standard would effectively eviscerate the Free Exercise Clause, in that “laws that coerce nonadherents to ‘support or participate in any religion or its exercise’ . . . would virtually by definition violate their right to religious free exercise.”<sup>350</sup> Thus, Souter concludes that

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acknowledgement of a religious holiday, is (1) a law; (2) a law respecting establishment; or (3) a law respecting an establishment of religion, civic or otherwise. In this respect, the notion of a generic reference to a religious holiday such as Christmas, with both religious and non-religious criteria, as permissible (as found in *Allegheny*) cannot be reconciled with the generic notions of God in a commencement ceremony, both of which involve non-establishment.

<sup>349</sup> *Id.* at 595-97. The majority’s reasoning here might be more germane to the traditional negligence approach to the law, where age and maturity often determine the duty and requisite standard of care governed thereby; however, as matter of constitutional adjudication, where the Establishment stands as an absolute, and not a relative, prohibition, such an approach creates tiers or levels of scrutiny that again are themselves both foreign to and antagonistic towards the clear text.

<sup>350</sup> *Id.* at 621 (citations omitted).

coercion, as an implied element of the Free Exercise Clause, need not be a predicate upon which an Establishment Clause violation would be based. Justice Souter rejected the notion that requiring absolute governmental neutrality in matters of religion was irreconcilable with the accommodation required by the Free Exercise Clause. While government accommodation “must lift a discernable burden on the free exercise of religion,”<sup>351</sup> any act of government that purported to accommodate religion by acting in an area not otherwise burdened would amount to endorsement and thus a violation.

Justice Souter’s analysis is incorrect. All establishments, if they be establishments, must infringe upon free exercise; there can be no establishment violation without an accompanying free exercise violation. Requiring coercion for an establishment analysis in no way eviscerates the protections afforded by free exercise; it clarifies them. As discussed *infra*, the placement of the participial phrases indicate the first as the most extreme, and the second as less extreme, such that government could infringe on free exercise without an accompanying establishment, but never the reverse. Using coercion as a touchstone does not delimit Free Exercise analysis, which must afford more expansive protections such that the reach of its protections extends beyond establishment concerns. Coercion then serves more as a model by which to determine whether a law respecting an establishment exists, and not merely whether an establishment is threatened.

### 3. Neutrality/History and Traditions Model

Neutrality as a decisional test for Establishment Clause violations does not take into account the inherent characteristic that neutrality, with respect to religion, requires

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<sup>351</sup> *Id.* at 629.



government passivity, while the only situations subject to Establishment Clause scrutiny necessarily involve government action. Neutrality as an Establishment Clause determinative not only proves too much, but is most often a self-executing analysis. Any law is government action; any law passed has some function; any practice involving anything remotely “religious” must perforce be motivated in some way upon the religious. Too often, neutrality acts not as a constitutional standard, but some surreal examination driven by any number of extrinsic circumstances, *ad infinitum*, from the typeface of a sign posted on government property to the proximity of a monument to a government building. Far from grounded in text, the standard becomes altogether separated from text, and governed more by personal aesthetics than linguistics.

Souter’s concurring analysis in *Weisman* set forth his neutrality approach to the Establishment Clause, and displayed an “all or nothing” rationale, where the inclusion of any message or symbol with religious meaning, no matter how denominationally neutral, would necessarily constitute government approval of religion over non-religion, or even religion over agnosticism; deism over atheism; belief over nonbelief.<sup>352</sup> Souter also

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<sup>352</sup> Of course, the Establishment Clause speaks of law, and speaks of establishment, and not in terms of preferences, or inclusion, or acknowledgment. Furthermore, proscriptions within the Constitution must be self-executing from the standpoint of being absolute: the Establishment Clause either bars State action in a certain area or it doesn’t. Thus, given the rationale found in the Court’s precedent, and Souter’s interpretation of it, no exception can be made, such as in the motto “in God we trust,” or “under God,” no matter how ceremonial or perfunctory the invocation of such phrases might be.

However, as neither practice is, in the proper sense, law, such practices are nevertheless not barred. But the concept that any state action, pursued as a matter of tradition or ceremony and not law (as in the case of *Weisman*), involving recognition of religion, or the religious, somehow constitutes law as the framers understood the word “law” to mean, cannot be reconciled with the approach taken by either the majority or the concurring opinions in *Weisman*.

criticized what he identified as “‘nonpreferential’ state promotion of religion.”<sup>353</sup> Nonpreferential promotion is an oxymoron, if not a contradiction in terms. Promotion must involve advancement, to advocate one idea to the exclusion of others. A nonpreferential promotion as such is not a promotion at all. So something is either a promotion or it is not; if not a promotion, it must be nonpreferential. If the aggressive separation requires the absence of any religious idea, that becomes tantamount to promotion of irreligion, which betrays neutrality. Amazingly, while Souter affirms that the “text of the Clause” would not “readily permit” the adoption of a coercion test, he proceeds to declare that “[n]or does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in our existing precedent that we should fundamentally reconsider our course.”<sup>354</sup> To Souter, while the “settled” precedent did not always establish “perfectly straight lines,” such precedent “cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.”<sup>355</sup>

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<sup>353</sup> *Id.* at 612.

<sup>354</sup> *Id.* at 618. Apart from failing to identify this inherent textual premise, the supposition by Souter that “existing precedent” adhered to the clear text is, at best, unsustainable. The precedent identified by Souter spoke of non-existent “walls of separation,” “entanglement,” “endorsement,” subtle or indirect coercion, “symbolic union of church and state,” terms not only “extratextual,” but supertextual, meaning, terms having replaced the text as the judicial touchstone of decision. *Id.* at 609-31.

Furthermore, no precedent identified by Souter, or any of the majority in *Weisman*, identified any textual premise, inherent or otherwise, with respect to what constitutes “religion” for Establishment Clause purposes. In fact, all precedent and subsequent decisions have presupposed religion by the existence of any trapping thereof, be it reference to an “Almighty” or Divine providence, or a manger scene.

<sup>355</sup> *Id.* at 619.

Justice Souter's analysis of the "extratextual evidence of original intent" results in a conclusion not supported even by his own examination of that evidence. Justice Souter argues the changes made to the subject of the Establishment Clause evince the Framers' intent to make such proscription as broad as possible, to wit: changes in the phraseology, from "establishment of a religion" or "establishing religion" to "respecting an establishment of religion" required the Court to give the clause its broadest prohibitive effect. However, while Justice Souter observes that earlier versions of the clause employed even more imprecise terms than "respecting," such as "no laws touching religion," he neglects to carry this logic forward to his conclusion; if "respecting" is deemed a more precise term than "touching," then *ipso facto*, the framers meant just that, respecting. Respecting is itself a present participle, meaning "on the subject of," or "regarding." Any clear reading of the participial phrase "respecting an establishment of religion" would not include what Justice Souter identifies as the "features and incidents of establishment."<sup>356</sup>

In *Kiryas Joel*, the majority expanded the neutrality rationale and identified *any* perceived threat to government neutrality as one occurring not by virtue of the use made of such benefit, but by the very according of the benefit, or as the majority termed, the threat "at an antecedent stage."<sup>357</sup> This conclusion lacks any constitutional guidance. The Establishment Clause speaks nothing as to future contingencies, or possibilities of future or contingent violations; nor has the Court ever invalidated a law based on some future unknown act by a legislative authority, one that may or may not adhere to the same

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<sup>356</sup> *Id.* at 622.

<sup>357</sup> *Kiryas Joel*, 512 U.S. at 702-03.

standard of neutrality.<sup>358</sup> In other words, the Court's neutrality analysis, and the linchpin of any Establishment Clause violation based upon such analysis, hinges upon proving a negative, i.e., that the legislature would in fact not act consistently to carve out special legislation when faced with a comparable situation, be it a religious community or otherwise.<sup>359</sup>

Because the majority determined that the benefit bestowed upon the village "flow[ed] only to a single sect," it felt constrained to conclude that the statute violated the Establishment Clause.<sup>360</sup> In doing so, the majority was careful to reiterate that the Constitution permitted, and even mandated, accommodation of religion where the challenged law imposed special burdens upon the free exercise of that religion. Despite

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<sup>358</sup> This concern, if it be a concern at all, would perhaps more properly present an Equal Protection argument, as it would also present, in such a form as stated by the majority, a ripeness problem. However, see the dissent:

Making law (and making exceptions) one case at a time, whether through adjudication or through highly particularized rulemaking or legislation, violates, *ex ante*, no principle of fairness, equal protection, or neutrality simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of. If it did, the manner of proceeding of this Court itself would be unconstitutional. It is presumptuous for this Court to impose—*out of nowhere*—an unheard-of prohibition against proceeding in this manner upon the Legislature of New York State. I have never heard of such a principle, nor has anyone else, nor will it ever be heard of again.

*Id.* at 748 (Scalia, J., dissenting).

<sup>359</sup> *See id.* at 703-04. The proviso that government must act in a religiously neutral way, as a constitutional touchstone, would not necessarily implicate the Establishment Clause at all if the "future" community seeking special legislative treatment did so based on purely secular considerations. For example, a community of environmentalists, existing as a municipal subdivision, might be delegated powers such that it could operate schools powered entirely by solar energy.

<sup>360</sup> *Id.* at 705. Justice Blackmun noted as much in his brief concurrence, where he wrote separately to express his "disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon*." *Id.* at 710 (Blackmun, J., concurring).

recognizing the propriety of such accommodation in certain instances, the Court also reiterated that an “unconstitutional delegation of political power could [not] be saved as a religious accommodation.”<sup>361</sup> The fatal infirmity of the New York statute lied in the fact that it singled out a particular sect for special treatment, therefore violating the requirement of neutrality.<sup>362</sup>

*Kiryas Joel*, perhaps better than any other case, highlights the dangers of adopting super-textual approaches, and the always-accompanying specter of a result driven by application of such to unusual fact patterns. For example, Justice Kennedy’s main criticism of the state action arose from New York’s creation of the school district by drawing political boundaries on the basis of religion. Kennedy’s concern would appear to have greater weight if and when nonadherents would decide to relocate within the Village of Kiryas Joel, where imposition of such legislation against nonadherents would in fact meet all criteria of the Establishment Clause: a law, an establishment, and a religion.<sup>363</sup> However, the thrust of Kennedy’s opinion concentrates more on the concept of religious accommodation than it does on establishment; his criticism of the state action

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<sup>361</sup> *Id.* at 706.

<sup>362</sup> *Id.* at 706-07. The majority hinted that its holding did not foreclose other “alternatives” for providing bilingual and bicultural special education to Satmar children that adhered to neutral principles. This statement further demonstrates the Court’s rudderless approach to Establishment Clause jurisprudence, where it appears to impose a “strict scrutiny”/“narrowly tailored” standard, as it would for violations of equal protection, or for content-based speech restrictions.

<sup>363</sup> Such a conclusion is difficult to ascertain in a vacuum, however, especially given the concept of establishment mandated by law, where adherence is enforced or nonadherence punished under penalty of law. *Id.* at 722 (Kennedy, J., concurring).

at issue involved the use of religion as a criterion with which to draw political or electoral boundaries, and not the establishment of the Satmar religion itself.<sup>364</sup>

In *Rosenberger*, the Court applied neutrality to a “government benefits to religion” case, where Establishment Clause scrutiny has traditionally fallen upon any government program that benefits a religious group, or religion in general, or where religion or religious views are “implicated [to] some degree.”<sup>365</sup> In such cases, the Court is mindful that in enforcing the Establishment Clause, it does not foreclose the government from extending the same benefits to religious groups that are made generally available to the public, without regard to religious belief. To this end, the Court has required that such extension of benefits be based upon neutral principles or criteria, and remain generally available based on such neutral principles notwithstanding the fact that they aid or benefit religious groups or individuals.<sup>366</sup> However, in these types of cases, the Court has also

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<sup>364</sup> Kennedy’s analysis focused on similarity of future action with respect to neutrality; however, it makes no mention that the electoral boundaries drawn by the statute affected only the very religion targeted by the statute. *See id.* at 722-32. Thus, no coercion can exist where there is no dissenting class to coerce—where all citizens of the challenged law are adherents, no endorsement or coercion can, by definition, occur, and nor does that danger exist unless and until nonadherents become subject to the law. The infirmity of the law at issue, then, lies in its prospective application under as yet unascertained, and in large part unascertainable, scenarios.

<sup>365</sup> *Rosenberger*, 515 U.S. at 839.

<sup>366</sup> *Id.* This method of constitutional adjudication appears nearly incomprehensible when measured against the actual text of the Establishment Clause. While extending financial or other government benefits to one religion to the exclusion of others may necessarily precede an establishment by law, or might be an aggregate indicia of such establishment, or must occur in conjunction with an establishment, such availability, even if not neutrally applied, cannot of itself constitute a law respecting an establishment because there is no accompanying free exercise problem. All establishment problems must carry with them a concomitant free exercise problem.

If neutrality, as an Establishment Clause requirement, prohibits government from taking any action implicating anything religious, the Establishment Clause as written

recognized a “conflicting” principle—that the extension of government benefits might conceptually reach such a pervasive level or extent as to amount to an establishment of religion.

Resolution of these conflicting principles requires a line-drawing based on particular facts; however, such line drawing must occur with reference to a fixed point, that being the text of the Constitution. O’Connor’s concurrence in *Rosenberger* surmised that such line drawing (which she equated to “careful judgment”) is required when “two principles [(Free Exercise and Establishment)], of equal historical and jurisprudential pedigree, come into unavoidable conflict.”<sup>367</sup> O’Connor’s “unavoidable conflict” comes not from the language of the First Amendment, but from the multiple and inconsistent tests created to give them effect.

This being the case, the Court’s decision in *Santa Fe* represents the most muddled and inconsistent Establishment Clause analysis the Court has ever undertaken, in large part because the Court seemed to apply all of its crafted approaches, none to the exclusion of

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ceases to exist as law. While an establishment perforce requires a government preference for religion or for a particular religious belief (which, of course, would lack any neutrality at law), the reverse does not, as a matter of logic, follow. Government preference on matters of religion, especially in the realm of conceptual representations of larger ideals such as justice, equality, or morality (be it government preference to have such ideal ethics, depicted in religious rather than secular terms—be it displays of the Ten Commandments, the Beatitudes, or the writings of Augustine over secular displays depicting the Greek goddess Themis, the writings of Aristotle, Justinian, or Blackstone, or the text of The Laws of Solon, the Roman Twelve Tables, Hadrian’s Law, or any other secular source of law or morality), or in the realm of recognition of religion’s cultural or historical significance to the people of our nation (be it a government preference for Christmas displays including religious themes of the nativity, or a Menorah, or with themes relating to Kwanzaa, over the secular, commercialized Christmas displays of Santa Clause) cannot of itself determine establishment because such preferences interfere with no aspect of one’s private right to believe or disbelieve.

<sup>367</sup> *Id.* at 849.

the other. While at the outset of its opinion the Court cited *Weisman* and its coercion approach, it proceeded to examine the school district's policy of student-led invocation as one "endorsing" religion; it also cited the district's "entanglement" with what it categorized as the "religious message" necessarily involved in any "invocation." The Court then reverted back to an endorsement analysis, inquiring as to whether anyone present at the pre-game invocation (and acquainted with the text of the policy, its history, and its implementation) would perceive the student-led invocation as a school-approved prayer.<sup>368</sup> Concluding its jurisprudential vacillation, the majority undertook the coercion analysis with which it began its opinion, concluding that the policy at issue had instigated an electoral process where minority opinion on a religious issue—invocation—would necessarily become subjugated to the majority will, thereby inviting coercion. The coercion thus descended upon any minority present at such invocation occurred by virtue of the natural desires and perceived social pressure to further school spirit, such as attending football games, as well as the presence of students who may have no choice but to be there—cheerleaders, band members, or the football players themselves.<sup>369</sup> Notwithstanding this, the majority nevertheless concluded that a psychological coercive effect would descend on anyone actually present during the invocation, even where their attendance was wholly voluntary.

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<sup>368</sup> *Santa Fe*, 530 U.S. at 308. The majority rejected the district's argument that the invocation was simply a means to "solemnize" the sporting event, reasoning that the district itself prescribed an "invocation" to occur, the nature of which would necessarily encompass a prayer. *Id.* at 309.

<sup>369</sup> *Id.* at 310-12. This analysis begs the question of whether any minority student would feel psychological coercion occasioned by the state when deciding whether to join the football team, cheerleading squad, or school marching band.



The battle between history-and-traditions and neutrality that took place in *Van Orden* and *McCreary County* demonstrates that neither test can accomplish uniformity of application in the context of the Establishment Clause. Both *Van Orden* and *McCreary* involved displays of religious symbology, i.e., the Ten Commandments, on government property. Yet the Court reached diametrically opposite results in each case. In *Van Orden*, the majority applied history and traditions and found the display of the Ten Commandments permissible.<sup>370</sup> In *McCreary*, the majority applied neutrality and invalidated the display.<sup>371</sup> The only decisional significance emerging from these two cases appears to be that history-and-traditions would allow displays of the Ten Commandments, and neutrality would not. However, the extent to which either test should, or would, be utilized in a similar case remains elusive at best.

For example, *Van Orden*'s dissent, authored by Justice Stevens, reached a determination that any preservation of "Jefferson's metaphorical 'wall of separation between church and state,'" or of the similar concept of "wholesome neutrality," "create[s] a strong presumption against the display of religious symbols on public property," and with respect to the Texas monument, mandated invalidation.<sup>372</sup> In particular, the dissent felt that display of religious symbols on government property creates an impermissible risk of offending nonadherents and adherents alike, thereby

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<sup>370</sup> *Van Orden*, 545 U.S. at 681.

<sup>371</sup> *McCreary County*, 545 U.S. at 850-51.

<sup>372</sup> *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting). Here, the dissent effectively elevates metaphor over text.

encroaching the obligation to avoid divisiveness and exclusion in the religious sphere, as compelled by the Free Exercise and Establishment Clauses.<sup>373</sup>

Stevens thus indicated that the neutrality approach will pay scant deference to history and tradition, other than to acknowledge its “strong role” in American culture; in this respect, while delimiting the scope of the metaphorical wall would not require governments to “hide works of art or historic memorabilia from public view just because they also have religious significance,” the dissent categorized its deference to tradition as of “marginal relevance” to a monument that served as “official state endorsement of the message that there is one, and only one, God.”<sup>374</sup> Chiefly, Stevens found an overriding religious message from the fact that the Decalogue constitutes the actual word of God, who demands worship of Him alone, supreme above all other deities.<sup>375</sup> Stevens found equally disturbing the actual version of the Ten Commandments used, which Stevens noted were not merely semantic differences, but differences (such as for example, the Sixth Commandment’s directive “thou shall not murder” versus “thou shall not kill”)

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<sup>373</sup> *Id.* at 709-10 (Stevens, J., dissenting). This approach presupposes a neutrality implicit within the Free Exercise and Establishment Clauses; however, as stated *supra* Part IV.A.3, any textual reading of the Clauses reveals neutrality implicit if the Free Exercise Clause prohibits any favoring of religion over irreligion, whereas the specific violation of Establishment necessarily requires something more, the preference between particular religions, or specific sects of a particular religion.

<sup>374</sup> *Id.* at 711-12. One would wonder whether Texas’s posting of a replica of Michelangelo’s “David” or da Vinci’s “Last Supper” would constitute “official state endorsement” of Yahweh’s anointing on David as King, or of Jesus’ propitiatory atonement as Messiah.

<sup>375</sup> *Id.* at 716-17. Such declaration of supremacy and any perceived endorsement of monotheism in general would be rejected not only by atheists, but presumably, by Hindus, Buddhists, or adherents to ancient Greek mythology for that matter.

upon which different sects of Judaism or Christianity might vigorously disagree.<sup>376</sup> Display of such sectarian text—a step beyond display of a religious symbol—on government property invokes not only a powerful presumption of invalidity, but in fact “enhances the religious content of its message” as somehow the official message of the State.<sup>377</sup>

Stevens also discounted various expressions recognizing a divine being made by the Founding Fathers as constituting transient statements of each speaker’s individual beliefs not necessarily imbued with government endorsement, whereas “permanent placement of a textual religious display on state property . . . amalgamates otherwise discordant individual views into a collective statement of government approval [that] never ceases to transmit itself to objecting viewers whose only choices are to accept the message or to ignore the offense by averting their gaze.”<sup>378</sup> Moreover, these views, even if indicative of the Nation’s tradition as a “religious people,” were nevertheless absent from the Constitution’s text, and if taken selectively, “paint a misleading picture” as to the traditional role of religion in public life.<sup>379</sup>

In the companion case of *McCreary County*, the majority, of which comprised the dissent in *Van Orden*, applied neutrality to invalidate the display of the Ten Commandments. The majority described its neutrality imperative as follows:

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<sup>376</sup> *Id.* at 717-18 n.16.

<sup>377</sup> *Id.* at 721. The monument is, of course, a passive and silent monolith; its message is static in nature in that it says the same thing as existed millennia ago.

<sup>378</sup> *Id.* at 723.

<sup>379</sup> *Id.* at 724. Stevens proceeded to identify “nonconforming sentiments” with respect to the early colonists’s viewpoints regarding religious uniformity. *See id.* at 724-25 n.23-26.

The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions. In these varied settings, issues of interpreting inexact Establishment Clause language, like difficult interpretive issues generally, arise from the tension of competing values, each constitutionally respectable, but none open to realization to the logical limit.<sup>380</sup>

Apparently, the majority in *McCreary* settled upon neutrality as a reconciling interpretive tool because “tradeoffs are inevitable, and an elegant interpretive rule to draw the line in all the multifarious situations is not to be had.”<sup>381</sup> Thus, to the majority, only the principle of neutrality remedied the “variety of interpretive problems” of the concepts of Free Exercise and Establishment, and as such, “has been helpful simply because it responds to one of the major concerns that prompted adoption of the Religion Clauses.”<sup>382</sup> The majority conceded that neutrality would not provide precise guidance in all cases, could not resolve all marginal cases, nor remove from doubt all the dubious trappings on infringement, but nevertheless embraced neutrality as a “prudent way of keeping sight of something the Framers . . . thought important.”<sup>383</sup> It also dismissed the

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<sup>380</sup> *McCreary County*, 545 U.S. at 875. This characterization borders on indecipherable. It is also unclear which part of the Establishment Clause—all twelve words of it—is inexact.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 875-76. One may safely assume that the Framers were well aware of these “major concerns” when they drafted the First Amendment. As well-educated men, and deliberate drafters, they certainly would have included neutrality in the Amendment if neutrality were the overriding goal—a sentence such as “Congress shall remain neutral in all matters involving religion, and shall make no law preferring any religion over other religions, or preferring religion over the absence of religion.” Indeed, had this been the text of the Religion sentence, the Court’s multifarious tests might be more fitting a response to such language; and actually, the tests adopted would support the proposition that such alternative and “inexact” drafting had in fact occurred.

<sup>383</sup> *Id.* at 876. Presumably, the Framers would have judges “keep in sight” the actual language employed in the First Amendment as paramount and determinative. Furthermore, the citation from James Madison employed by the majority spoke of the “line of separation between the rights of religion and the Civil authority with such

dissent's reliance on historical evidence as to the Framers' understanding as inconclusive at best: the majority discussed evidence for both arguments: (1) that the principle of neutrality in Establishment concerns perhaps exceed the Framers' understanding of the clause, and (2) that neutrality in fact comports with the Founders' intent such as would invalidate even government acknowledgment of religion.<sup>384</sup>

With respect to the first argument, the dissent cited numerous instances in which the Founders specifically referenced matters of religion, acknowledgement of a deity, affirmation in the belief of a divine being, or assent to the reference to such divinity ancillary to the conduct of government affairs/business.<sup>385</sup> Given the case history cited

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distinctness as to avoid collisions & doubts on unessential points," when read in context of the entire letter, indicates Madison's concerns—as apparently spoken in the Rev. Adams's sermon—as to monetary support of religion by government. *Id.* See Letter from James Madison to Rev. Jasper Adams (1832), reprinted in JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM THE PAST THREE CENTURIES 75-77 (Westview Press 3d ed. 2003) (1965). Given Madison's apparent concern with the intermingling of religion and public money, one is left to wonder whether Madison, in the context of this letter, would have considered the posting of the Ten Commandments on the walls of courthouses as just such an "unessential point." Nevertheless, the impetus of Madison's letter to the Rev. Adams concerned the government's direct monetary support of religion and not its passive recognition thereof.

<sup>384</sup> *McCreary County*, 545 U.S. at 877-78. The imperative of neutrality certainly provides no self-explicating guidance, nor is it apparent on its face, but requires still further deviation and separation from the textual requirement of establishment. Further, the neutrality imposed requires, if nothing more, merely the inclusion of sufficient buffers within any display of religiously-significant imagery, which merely dilutes all messages. An externally and artificially created neutrality is not neutrality at all, but dilution. The majority acknowledged this by its concession that the Constitution contained no textual definition of Establishment; however, not only does neutrality cut a wider swath, it would be used to supplant explicit text with something not implicit within it. See *supra* Part IV.A.3. As for the majority's assertion that "[n]o one contends that the prohibition of establishment stops at the designation of a national [or a state] church" see *McCreary County*, at 875, 885-912 (Scalia, J., dissenting).

<sup>385</sup> *Id.* at 886-89.

by the dissent, in which government extended or bestowed benefits specifically to religion or only thereto—e.g., property tax exemptions (*Walz*), or permitting students to leave public school for the purpose of receiving religious instruction (*Zorach*)—the dissent concluded that any premise of absolute neutrality, that government cannot favor religion over irreligion, as “demonstrably false.”<sup>386</sup> As concerns government acknowledgment of religious belief in general, “it is entirely clear from our Nation’s historical practices that the Establishment Clause permits the disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists”<sup>387</sup> and that “[h]istorical practices thus demonstrate that there is a distance between acknowledgment of a single Creator and the establishment of a religion.”<sup>388</sup>

With respect to the second argument, the dissent noted that neutrality “ratchets up” *Lemon*’s hostility to religion by allowing for investigation into legislative history, not for evidence of actual religious purpose itself, but rather as a means to unearth evidence with which to ascertain the very appearance of government purpose, to the reasonable observer, thereby allowing neutrality to be measured against not actual intent, but by the opinion of a objective observer. Neutrality, then, in essence allows a “heckler’s veto,” or a substitution of judgment where direct evidence of purpose is nonexistent. Such a

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<sup>386</sup> *Id.* at 891-93. These examples perfectly illustrate laws that violate the Free Exercise Clause but do not violate Establishment.

<sup>387</sup> *Id.* at 893. Public acknowledgments of the Almighty or God by definition disregard polytheists or atheists, but do not violate the Establishment Clause. Our religious acknowledgments may pay tribute to a Creator or a God, or to the Judeo-Christian tradition, so long as such acknowledgment does not advance that belief upon others or disparage nonbelievers. Our religious tradition presupposes monotheism, and thus, public acknowledgment to God in that vein is valid. *Id.*

<sup>388</sup> *Id.* at 894.

standard creates an “odd jurisprudence” that “bases the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so,” and one where “the legitimacy of government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion.”<sup>389</sup>

The sum total of these latest opinions demonstrates that both models fail in that they both require conclusions to be drawn based on perception. History-and-traditions produces fair disagreement among the men and women of the judiciary, depending on the particular interpretive lens through which decisional rationale emerges. Likewise, neutrality is also subject to the perception of the judiciary as measured by a similar interpretive lens, through which, again, decisional rationale emerges. Given the imprecision of such constitutional jurisprudence, and the judicial temptation to substitute perception for sound judgment, the diametrically opposite outcomes reached in *Van Orden* and *McCreary* become not only predictable, but a foregone conclusion.

#### B. Grammatical and Linguistic Modality—A New Originalism

The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>390</sup>

The “Establishment Clause,” as it is called, has suffered with this label. The Establishment Clause is in fact not a clause at all, from the standpoint of grammar and usage: it exists as one of two participial adjectival phrases contained within one

<sup>389</sup> *Id.* at 901 (citation omitted).

<sup>390</sup> U.S. CONST. amend. I.

compound clause that might be more correctly called the “Religion Clause” of the First Amendment. As such, it is part of a single unit, and not one of two independent and disparate clauses.<sup>391</sup>

Grammatically, then, the First Amendment consists of one independent clause: “Congress shall make no law”; all parts that follow are, strictly speaking, adjectival phrases, not clauses: the adjectival participial phrases “respecting an establishment of religion” and “prohibiting the free exercise thereof,” separated by a comma and joined by the conjunction “or,” form one singular unit, which I have termed the “Religion Clause,” and both modify “law.” However, the remaining two adjectival participial phrases also modify “law”: (1) Congress shall make no law “abridging the freedom of speech, or of the press,” which sets forth a second independent prohibition as indicated by the semicolon that separates it from the following prohibition, and (2) Congress shall make no law “[abridging] the right of the people peaceably to assemble, and [the right] to petition the government for a redress of grievances.”<sup>392</sup> From the standpoint of parallel

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<sup>391</sup> See, e.g., Carolyn A. Deverich, Comment, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 BYU L. REV. 211 (2006).

<sup>392</sup> U.S. CONST. amend. I. Structurally, this portion of the First Amendment is somewhat awkward, as the phrase “the right of the people to peaceably assemble, and to petition the government for a redress of grievances” is also the object of the present participle “abridging,” even though it is separated from its previous object, freedom of speech, etc., by a semi-colon, not a comma (thereby indicating that it would stand apart as its own unit) and does not restate the term “abridging” as would seem it should. However, grammatically, this third prohibition as set forth after the second semicolon would make no sense within the First Amendment unless that phrase were implied to relate back to “abridging” as well. Furthermore, the object of the present participle “abridging” is “right,” with the two prepositional adjectival phrases “to peaceably assemble” and “to petition the government for a redress of grievances” serving as modifiers of the object, “right,” even though the word “right” is not restated with respect to petitioning the government.



sentence construction, these adjectival participles—respecting, prohibiting, and abridging—appear as a series of prohibitions in the same grammatical form, all modifying “law.”<sup>393</sup>

Thus, the First Amendment, according to its parallel structure, as determined by its three adjectival participles—respecting, prohibiting, and abridging—sets forth three independent protections: protection against laws respecting an establishment of religion and laws prohibiting free exercise of religion; protection against laws abridging the freedom of speech or of the press; and protection against laws abridging the right of the people to peaceably assemble, and the right to petition the government for redress of grievances.

So grammatically, reference to an “Establishment Clause” and a “Free Exercise Clause” within the First Amendment is not only incorrect, it also, erroneously, treats them as separate, stand alone clauses. In reality, they are part of one larger “Religion Clause” each affording not competing, but complementary and even supplemental protections as they relate to “law.” Furthermore, to speak of the “tension of competing values” (between the Establishment and Free Exercise Clauses) displays a misunderstanding and misapplication of the grammatical structure of the Religion Clause. This perceived tension, then, presents difficulty in implementation, unless such clauses be

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<sup>393</sup> Parallel structure within a sentence is a coordinate structure in which all coordinate parts are of the same grammatical form; in this instance, respecting, prohibiting, and abridging appear in parallel form as present participles. As coordinate parts, they all relate back to the same noun, “law,” with the same grammatical functions, i.e., participial modifiers. See MARTHA KOLLN, UNDERSTANDING ENGLISH GRAMMAR 401 (4th ed. 1994).

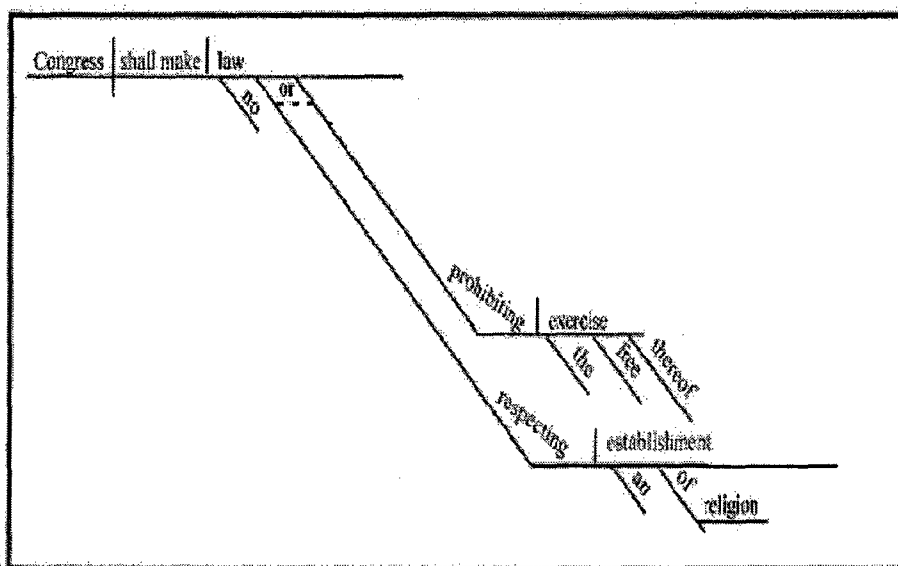
read *in pari materia*, which is to say, within the entire contextual structure of the First Amendment.

The two phrases “respecting an establishment of religion” and “prohibiting the free exercise thereof” stand as adjectival phrases (in that they do not contain a subject and a verb) written as present participles (“respecting” and “prohibiting”), which as participial phrases both contain an object that relates back to the term each modifies, those objects being “establishment” and “free exercise” (or more accurately, “exercise,” with “free” serving as an adjectival modifier), respectively. These two phrases then, grammatically, comprise a compound adjectival modifier of “law.” The use of “thereof,” which relates back to “religion” as contained in the previous phrase, indicates that the two are linked, and in fact, that the foregoing “establishment” presents a subsisting prohibition more limited and precise than the following “prohibiting”; if in such phrases were disjunctive or unconnected phrases, the use of the pronominal adverb<sup>394</sup> “thereof” in the free exercise portion would become ambiguous, and as such, misplaced. Nor do these two phrases constitute the predicate of the sentence; they do not complete the action of the verb “shall make”; “law” completes the action. Therefore, the two phrases are merely adjectival

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<sup>394</sup> In English, a pronominal adverb is formed in replacement of a preposition (“of”) and a pronoun (“it”), which is a relative pronoun relating back to the noun (“religion”) by turning the latter into a locative adverb (“there”) and the former into a prepositional adverb and joining them in reverse order, hence “thereof.” See <http://www.allwords.com/word-pronominal+adverb.html> (last visited Jan. 11, 2010).

restrictive modifiers<sup>395</sup> of law. The Religion Clause may properly be diagrammed as



follows:<sup>396</sup>

Likewise, “law respecting” must have as its object “establishment,” i.e. “respecting” what? In grammatical terms, “respecting an establishment of religion” is one sub-unit of the Religion Clause, and any analysis must begin with the whole of the clause and work backwards, thereby parsing its meaning from the sum of its parts, but not merely constructing such meaning as simply the product of the sum of its parts. As a present participial phrase, it serves in this respect as an adjectival participial phrase, modifying “law.” “Establishment” is the object of the present participle “respecting,” and the two cannot be separated—i.e., no analysis can be done on the participle itself without

<sup>395</sup> A “restrictive modifier” serves as a modifier in a noun phrase (here, “law respecting an establishment” and “[law] prohibiting the free exercise”) whose function is to restrict the meaning of the noun (“law”). A modifier is restrictive when it is needed to identify the referent of the headword (here, again, “law”). A restrictive modifier is never set off by commas. See KOLLN, *supra* note 393, at 404.

<sup>396</sup> Gene Moutoux, Sentence Diagrams, One Way of Learning English Grammar: Sentences from the United States Constitution, [http://www.geocities.com/gene\\_moutoux/diagramamend1.htm](http://www.geocities.com/gene_moutoux/diagramamend1.htm) (last visited Nov. 15, 2009).

including the object, establishment. Furthermore, “law” effectively serves as the subject of the entire adjectival phrase/restrictive modifier “respecting an establishment of religion” such that the true “Establishment Clause” must read as “Congress shall make no law respecting an establishment of religion.” While perhaps self-evident with respect to the language of the First Amendment, judicial treatment has not demonstrated such understanding, as the myriad tests developed to construe the Establishment phrase focus on the singular concepts of “respecting” and “establishment,” rather than upon the phrase “law respecting establishment of religion” as a single unit.”<sup>397</sup>

Similarly, “of religion” is an adjectival prepositional phrase modifying “establishment,” such that any analysis of “establishment” cannot exclude or be done in a vacuum absent inclusion therein of the term religion. None of these terms stand alone. However, because they each modify the other individually and likewise as a unit serve as the restrictive modifier of “law,” one must approach the analysis as a type of *sine qua non* approach where each element must be present: is there religion? If so, is there an establishment? Likewise, establishment is determined not by vague notions of “endorsement” or “entanglement,” but only with reference to “law;” and if there be law, is it one respecting an establishment? True fidelity requires that any establishment analysis must include all three concepts—law, establishment, and religion—as these concepts comprise the entirety of the establishment portion of the Religious Clause. Therefore, any proper textual analysis must encompass a two-tiered approach, involving (1) the concepts of law, establishment, and religion as they exist within the entirety of the Religion Clause, and (2) a *sine qua non* approach that requires a finding of law,

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<sup>397</sup> See KOLLN, *supra* note 393, at 186.

establishment, and religion as conjunctive, the absence of any one of which would thus require a finding of constitutionality. The concepts of “law” and “establishment” within the Establishment Clause necessarily involve some form of legal favor or compulsion, where adherence or nonadherence to the particular creed at issue (i.e., establishment) is rewarded, compelled, or punished, respectively, through the granting of political favor, civil or criminal penalty, or sanction, or through some form of compulsory taxation (i.e., law). However, “respecting” must be construed not with reference to “religion,” but with reference to “law,” such that a law respecting an establishment would necessarily involve a law, the primary purpose of which is to establish religion, and not merely recognize, aid, or promote religion in the general sense.

The primary weakness with all the Court’s attempts to fashion a decisional standard lies in the fact that all analysis presupposes religion and focuses only on the notion of establishment; and any analysis of “respecting” points not back to “law,” but forward to “establishment.” Moreover, the tests so fashioned stop not at establishment, but seek to ferret all perceived “steps toward” establishment. This approach fails in that it misconstrues text. A law respecting an establishment of religion cannot, from a textual and grammatical standpoint, become synonymous with a practice that might be considered a step toward establishment. The Court’s previous approaches appear to consider that the term “respecting” modifies “establishment,” whereby establishment becomes a broadened concept, and a “near miss” of establishment is nevertheless an establishment. Establishment as the object of the participial phrase completes the phrase, it does not relate back to “respecting,” but forward to “religion.” If the text of the Constitution stated, perhaps, that “Congress shall make no law tending to respect an

establishment of religion,” or one “respecting a tendency toward the establishment of religion,” then their myriad tests might prove closer to the mark. However, the Constitution does not say such things. Respecting modifies and restricts “law,” i.e., a law respecting.

However, any clear reading of the text of the Establishment Clause indicates that religion is also a “*sine qua non*” of the analysis; if the practice at issue is not religion, then further analysis must end, without reference to any establishment considerations. Religion is not synonymous with the general idea of God or what may be considered as “religious” concepts—e.g., a graduation prayer, a moment of silence, statues of religious symbols, or the inclusion of “intelligent design” in public school curricula. Religious symbols may, and in fact do, serve as symbolic expressions of concepts distinct from the religion from which they derive—concepts of justice, liberty, compassion, generosity, patience, etc. Government would use such symbols for the universal meaning contained therein, as perhaps expressed or implied through their religious meaning in a context apart from their religious significance, much like it could use the expression of such concepts by secular means, such as Hadrian’s Law, the writings of Epicurus or Kant, or Foucault’s theories of correction and punishment.

This approach mirrors the jurisdictional approach in all federal courts, where, say, the concept of subject matter jurisdiction must exist regardless of the merits of the Plaintiff’s asserted claims. Or, from the standpoint of state actions sounding in negligence, the elements of duty, breach, proximate cause, and damages all must exist to maintain a tort action. So if there be no duty, there can be no breach and proximate cause, and the action must fail regardless of the magnitude of damage.

As such, textual fidelity mandates the analysis to include all three nouns within the clause: law, establishment, and religion. Textual fidelity also requires assigning “hard” meaning to the terms “establishment” and “religion.” Establishment may be the more ambiguous of the two, but neither escape conceptualization. Each possesses certain immutable characteristics that courts may identify, and if any of these identified characteristics be lacking, then neither can be said to exist. Regarding “respecting,” the textual-linguistic approach makes clear the word itself links “law” with “establishment.” Thus, for any establishment to exist, it must by necessity involve the force of law, which may be thought of as the compulsion to act or not act by the dictates of statute or regulation. Government can act in such a way that might respect religion, but must always involve “law.” Regarding “religion,” while it is true that religion in the specific sense may potentially encompass an endless variety of embodiments, the term itself is not ambiguous in the general sense of those characteristics that embody or define religion as a concept. Religion promotes and establishes doctrine through canonical law and catechism. Religion then espouses and enforces orthodoxy and demands adherence to such doctrine. Religion often recognizes a hierarchy of authority. A *de rigueur* examination of the term may reveal that religion mandates orthodoxy; religion entails doctrine; religion espouses creeds.<sup>398</sup> Religion preaches an identifiable and specific message, adheres to the teachings of a particular individual or group of individuals,<sup>399</sup>

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<sup>398</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

<sup>399</sup> *E.g.*, Jesus, Moses, Mohammed, Buddha, St. Paul, John Smith, etc. Even nontraditional or “new age” forms of religion, such as Scientology (L. Ron Hubbard) or Unification Church (Sun Myung Moon), adhere to this principle.

and may venerate manifestations of divine beings,<sup>400</sup> often collected in some sacred work or text.<sup>401</sup> Religion may recognize some form of the afterlife involving reward or punishment, nonbeing, or reincarnation, and often requires official days of observation or observance.<sup>402</sup> Moreover, these terms must be understood within the parameters of their context within the entire Religion Clause, first and foremost; these parameters exist by virtue of the Clause's grammatical structure, which can only be gleaned through the rules of grammar and usage.

This exegesis comports with current Supreme Court jurisprudence. In *District of Columbia v. Heller*, the Court engaged in Second Amendment analysis employing a linguistic approach as an interpretive principle in constitutional adjudication: “[W]e are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.’”<sup>403</sup> In fact, in *Heller*, the Court endeavored to break down the various subparts of the Second Amendment, separately analyzing each clause (or phrase as the case may be) within the overall context of the entire structure of the Amendment. This approach is altogether proper, for it limits constitutional interpretation to the rules of English grammar—the rules that bound the Framers at the time of drafting—and thereby renders no word or phrase therein redundant or surplusage, further preventing subjugation and textual supplantation. In this way, then, grammatical exegesis allows for the application of *original text as written* to the various situations presented by modern

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<sup>400</sup> *E.g.*, God, Christ, Jehovah, Allah, Zeus, Vishnu, Isis, Zoroaster, etc.

<sup>401</sup> *E.g.*, The Torah, the Gospels, the Koran, the Book of Mormon, etc.

<sup>402</sup> *E.g.*, Christmas, Easter, Passover, Ramadan, etc.

<sup>403</sup> *See* *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008).



society, where any “evolution” of the text occurs only by application of that text within the confines of the grammar. As such, this approach also serves the essential function of binding judges to these rules: judges, as bound by the text, may interpret the text but may not stray from it. Any decision based on a provision of the Constitution must remain within the confines of that provision and must rest upon the precise language contained therein. This binding of judges further limits the capricious nature of the judiciary, preventing it from supplanting text with its own changing theories of modernity; concomitantly, it allows text to evolve while disallowing the evolution of perceived concepts (such as “religious liberty” embodied in the Religion Clause) that any particular judge or justice might “discover” in the Constitution. This permits the evolution of text, as opposed to the evolution of perceived but unstated principles “implicit” therein, whether they be notions of “liberty” apart from its context within the Due Process Clause or “implied” fundamental rights.<sup>404</sup>

This grammatical approach best preserves the original language of the First Amendment. And not only does it foster the required fidelity to the text of the Amendment; it ensures it, because it frames the text in linguistic norms and rules that bound the Framers, thereby best evidencing original meaning. If the Constitution be interpreted, such interpretation must occur within the confines of the document itself, and the explicit provisions contained therein, and those words immutably embodied in the document.

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<sup>404</sup> Any substantive evolution of constitutional principles can only and properly occur by amendment, as stated *supra* note 7.

When read against this backdrop, and when interpreting the entirety of the Religion Clause in accordance with the rules of grammar and usage, a new constitutional “linguistic modality” emerges. Far from becoming dissonant “clauses” that set forth competing rights, or conflicting protections, the Religion phrases exist in an entire continuum of one independent Religion Clause that defines complementary rights as they both relate back to the object they modify, “law.” This approach renders the Religion Clause uniform, achieves harmonization, and affirms the unity of the establishment and free exercise protections, in that, as stated *supra*, they both serve as restrictive modifiers of the same object, “law.” In this respect, removal of the phrases leaves the simple sentence “Congress shall make no law”; the absence of these phrases thus renders an absurd meaning, as Congress’s very purpose is to make law. As such, these two phrases are harmonized by their relationship to the common noun they modify, “law,” because as restrictive modifiers of “law”—necessary to identify the noun they modify, a “law respecting an establishment” and a “law prohibiting the free exercise” of religion—they must achieve harmony, not dissonance, within the parameters of the Religion Clause.

The majority in *McCreary* believed it could only reconcile the entirety of the Religion Clause through the imposition of a neutrality standard with respect to establishment. Neutrally-applied benefits or aid to religion, the refusal of which might lead to free exercise concerns, will accommodate free exercise but not constitute establishment, only so long as the provision of benefits is based on neutral criteria. This is nonsense. It is also, linguistically, impossible. Neutrality to religion cannot be determinative of both phrases, as these phrases, read together as part of a single clause, complement and qualify each other; they do not compete, and are not in tension. One provision must afford a

broader protection than the other, otherwise the inclusion of both would have been redundant, and one mere surplusage. Because a free exercise violation can exist independent of an accompanying establishment violation, but an establishment violation, by its very nature, cannot exist without an accompanying free exercise violation, the protections afforded by free exercise must encompass more than those of establishment. Therefore, the threshold for a free exercise problem must be less than that of an establishment violation, and for this reason, the standard for establishment must be more restrictive, or more narrow, vis-à-vis free exercise. In other words, the protections afforded against establishment subsist with the protections afforded free exercise, such that, by necessity, a former violation cannot exist without a violation of the latter, but the latter can exist in the absence of the former.

Within the Religion Clause, a linguistic modality emerges that clarifies the dual phrases contained therein, and the protections they afford. When read in conjunction, the “respecting establishment” and “prohibiting free exercise” phrases clarify the other, as they are dual modifiers of their object, law. As such, they cannot be seen as mutually exclusive or in any way competing. In fact, this linguistic modality indicates that free exercise *must* clarify establishment, in that the existence of one violation presupposes the existence of the other as well, but not vice-versa.<sup>405</sup> Any other analysis renders the free

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<sup>405</sup> In linguistics, modals are expressions broadly associated with notions of possibility and necessity. Modals have a wide variety of interpretations which depend not only upon the particular modal used, but also upon where the modal occurs in a sentence, the meaning of the sentence independent of the modal, the conversational context, and a variety of other factors. For example, the interpretation of an English sentence containing the modal “must” can be that of a statement of inference or knowledge (roughly, epistemic) or a statement of how something ought to be (roughly, deontic). This interpretation of the Clauses conforms with a type of modal ontology, or a type of

exercise clause redundant. How? Because if the Founders intended establishment protections to encompass the outermost limits of Religion Clause protections, inclusion of free exercise would have been redundant, because one would necessarily encompass the other. By its inclusion as an *additional*, and not separate, protection (no semicolon separates establishment and free-exercise; the speech protections in the First Amendment, separated by a semicolon, are clearly separate from the religion protections) within the Religion Clause, free exercise must constitute a broader protection than establishment, a prohibition to protect against legislative acts that might limit the practice of religion without necessarily requiring adherence to one established orthodoxy. Since establishment must prohibit free exercise, establishment occurs first within the Religion Clause, such that if establishment be found, the Religion Clause is violated; however, because free exercise encompasses a broader, more inclusive proscription, free exercise concerns may exist independent of establishment clause concerns, such that the free exercise phrase follows the establishment phrase, whereby a law not violating the establishment phrase may yet violate the free exercise phrase and thereby violate the Religion Clause.

Now it might fairly be asked that if an establishment violation always involves a free exercise violation, why include a separate free exercise protection? Or even, why have a

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ontological dependence, where two or more things, conditions, or facts exist, one of which is a classification of the other, and may not exist without the other, but not vice versa. In terms of logic, heat can exist in the absence of fire, but not vice versa—heat always exists in the presence of fire, but fire does not always exist in the presence of heat. In constitutional terms, the specific prohibition against Establishment exists alongside the general protection against the prohibition of Free Exercise, where infringement upon Free Exercise may exist without a violation of the Establishment Clause, but not vice versa; i.e., a violation of the Establishment Clause cannot exist without a violation of the Free Exercise Clause.

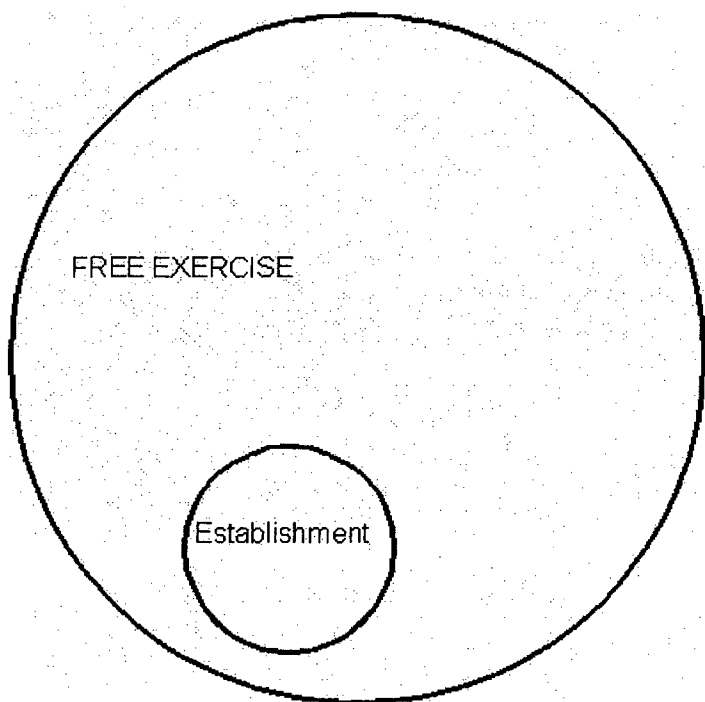
separate establishment prohibition? If the analysis begins and ends with a free exercise analysis, and if all violations of establishment involve prohibitions against free exercise, why not simply look to see if free exercise is infringed, or look to see if establishment is infringed, which would in turn determine a free exercise breach? Impossible. Each affords complementary but distinct protections. To assert that the two phrases provide competing protections, where the tension exists in that the furtherance of one protection approaches the violation of the other, suggests that (1) the drafters somehow did not understand the English language, and (2) in some fashion, the Framers did not comprehend that situations could arise where Free Exercise would be implicated where Establishment would not.

Because of this relationship, the government can never claim that efforts to accommodate a religious exercise—such as allowing for reimbursement of printing costs for a Christian-based newspaper, as in *Rosenberger*—might at some level threaten establishment. Allowing for the payment of costs for printing of a Christian newspaper, even if not neutrally applied, in no way threatens free exercise, and in this sense, can never threaten establishment. Conversely, the denial of benefits based on religion will always implicate free exercise, and thus have the potential, if such denial becomes (1) systematically oppressive, and (2) targeted at a particular religion or belief, to implicate establishment. This conclusion flows from the understanding that two phrases provide complementary, albeit independent, protections.

The protections afforded by establishment and free exercise thus exist within two distinct but interrelated “spheres” whereby the protections afforded by the establishment phrase exist within one sphere, that sphere subsisting within the broader sphere of free

exercise. In this way, then, establishment and free exercise cannot “compete” in any way, and an accommodation of free exercise can never result in a violation of establishment, because free exercise concerns always accompany establishment concerns. Moreover, because establishment concerns never exist once a free exercise violation is found lacking, and because establishment protections are more restrictive than those afforded free exercise, neutrality and accommodation analyses become irrelevant to any establishment examination.

An illustrative Venn diagram<sup>406</sup> of this subsistence would appear as:



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<sup>406</sup> Venn diagrams depict through the use of concentric and intersecting circles, all logical relations hypothetically possible between some finite collection of sets and the terms of propositions by the inclusion, exclusion, or intersection of the circles; in the case of the possible propositions included with establishment and within free exercise problems, the circles representative of each set would have some logical relation to the other, as depicted by the intersection of such circles. See <http://mathworld.wolfram.com/VennDiagram.html>.

In terms of the relationship of the two protections—outer sphere (free exercise) and inner sphere (establishment)—one exists as a subsistent protection within the other, or in other words, as an absolute prohibition, or more deeply imbedded right within a more expansive right. Therefore, if establishment be threatened, free exercise has already been violated. For example, the government might pass a law patently discriminatory to one particular religion, or a law hostile towards outward displays of that religion—say, a law banning the use of bumper stickers with Christian messages, under the guise of the state’s regulatory authority over the licensure and operation of motor vehicles. Leaving aside any equal protection arguments, such a law, while demonstrating clear hostility to religious messages, or particular strands thereof, establishes nothing, and does not respect the establishment of anything other than hostility. Such law does however, display (1) a lack of neutrality, (2) a purpose directly related to religion, (3) the effect of inhibiting a religious exercise, and (4) the coercive prohibition under penalty of law—thus bearing all the hallmarks of the Court’s different establishment models. Yet, while the law does not implicate establishment, it clearly implicates free exercise.

If such be the case, then in no way can any establishment analysis “eviscerate” the protections afforded free exercise—be it by requiring neutrality, coercion, or endorsement. Since establishment necessarily involves official sanction, then such sanction must occur at the expense or to the detriment of what is not sanctioned, or what falls outside the establishment. Conversely, if no threat exists to free exercise, then no threat can possibly exist as to establishment.

## V. CONCLUSION

Proper constitutional interpretation must involve sound methodology with a fixed point of reference. This methodology must begin and end with the textual language so construed, with analysis guided by the rules of grammar and usage inherent within the document. Foremost, this creates and sustains a constitutional jurisprudence founded upon clear, unwavering, and workable standards, by which courts may decide Establishment issues, and safeguards the primacy of the Constitution and the judicial adherence thereto. The development of a standard that operates within the confines of the rules of grammar and usage does not preclude a fact-intensive analysis that may be required in any given case. While facts always vary, the standard must not. Textual standards allow for unwavering decisional guidance within which the facts operate, maintain uniformity and consistency of application, and provide solid guidance to lower courts, legislators, and attorneys alike.

Because the tripart approach in *Lemon*, as well as the concepts of endorsement, coercion, and to a certain extent, neutrality, have all employed super-constitutional principles and surrogate concepts, they fail as constitutional standards. More importantly, they involve concepts that implicate free exercise analysis as well. Using a linguistic modality approach, as governed by the rules of grammar and usage, the test for establishment cannot be intermingled with free exercise analysis, because a free exercise violation can exist notwithstanding the absence of an establishment concern. Therefore, any discussion of establishment must involve a more extreme analysis as appropriate to its subject, that being, the punishment of dissent. In other words, the modality of the two clauses would presuppose a free exercise violation where an establishment violation



exists. If a passive Christmas display depicting the manger scene to the exclusion of secular material would not implicate free exercise, it could never constitute an establishment, or a law respecting one. Far from becoming an establishment problem, the manger scene, even if “endorsing” the Christian aspects of the holiday, would remain constitutionally harmless.

Likewise, a “history-and-traditions” approach is equally unworkable. History and tradition, while certainly illustrative, cannot provide a clear standard, because this history and these traditions only acquire relevance and meaning as seen through the eyes of the present, and any such perception must always be subject to the particularities of the lens through which they are viewed. As such, history-and-traditions become, from a constitutional standpoint, “[A] poor player / That struts and frets his hour upon the stage / And then is heard no more; it is a tale / Told by an idiot, full of sound and fury / Signifying nothing.”<sup>407</sup> The primary weakness with the history/traditions approach becomes its own brittleness, its own subjective character, and the capricious and contradictory interpretations of its audience, where selective borrowing from historical documents or traditions leads to hopelessly inconclusive or even contrary results. Neutrality analysis fails because, given the modality of the Religion Clause itself, such an approach creates inconsistency between the Establishment and Free Exercise phrases of the Religion Clause.

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<sup>407</sup> WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5; *see also Psalms* 90:9 (King James) (“For all our days are passed away in thy wrath: we spend our years as a tale that is told.”).

The rules of grammar and usage—modern linguistics—bear no such frailty, and must serve as the constitutional benchmark out of which emerges constitutional interpretation. Laws respecting establishment of religion remain that which are prohibited, and would require (1) law, and if there be a law, then the law (2) respecting establishment, and if it be a law respecting establishment, then (3) a determination of what is established. Therefore, endorsement, effect, or coercion, psychological or otherwise, become irrelevant as constitutional guides. If the display of the Ten Commandments in a county courthouse, even if by law, does not respect an establishment of Judaism, by requiring adherence to the tenets of that faith, the display does not implicate the Establishment Clause, even if such a display might be a patent governmental preference for a depiction of Mosaic law over that of Solon.

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