COMMENTS

"GOD SAVE THIS HONORABLE COURT"[1]: HOW CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE CAN BE RECONCILED WITH THE SECULARIZATION OF HISTORICAL RELIGIOUS EXPRESSIONS

ASHLEY M. BELL[*]

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[*] Associate Special Events Editor, *American University Law Review*, Volume 51; J.D. Candidate, 2002, *American University, Washington College of Law*; B.A., 1999, *James Madison University*. Thanks to the staff of American University Law Review for their assistance and suggestions during the publication process. Special thanks to Russell Upton and Kevin Willen for their insight and advice, which helped me to better articulate many of the thoughts expressed in this Comment. I am forever grateful to my parents, Robert and Marcia Bell, for their love and encouragement.

1. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE xiv (University of North Carolina 2d ed. 1994) (explaining the Supreme Court's sessions begin only after the Marshal has recited the opening chant containing the language "God Save the United States and this Honorable Court").

INTRODUCTION

When questioning the Supreme Court's modern Establishment Clause jurisprudence, critics consistently return to one theme—its lack of consistency.[2] The discrepancies found within the current Establishment Clause jurisprudence are especially apparent in the context of historical religious expressions.[3] When considering phrases such as "God Save the United States and this Honorable Court" and "In God We Trust," the Court has engaged in "secularization,"[4] justifying religious practices and expressions based

2. *See* Kevin D. Evans, *Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis*, 64 ST. JOHN'S L. REV. 41, 99 (1989) (describing Establishment Clause jurisprudence as "an area of constitutional law plagued by inconsistency"); LEVY, *supra* note 1, at xxi ("We live in an imperfect constitutional universe cluttered with ambiguities, mysteries, and inconsistencies."); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989) ("In a rare and remarkable way, the Supreme Court's [E]stablishment [C]lause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective."); *see also* Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (asserting that current Establishment Clause jurisprudence "has produced only consistent unpredictability").

3. For the purposes of this Comment, the term "historical religious expressions" is the author's term of art. The term describes those practices and declarations embedded in United States history that reference God or religion. Examples of such historical religious expressions include "In God We Trust," "God Save the United States and this Honorable Court," the language of the National Day of Prayer, prayers conducted by Legislative Chaplains, and the Pledge of Allegiance. Commentators often term such practices and expressions as "ceremonial deism." *See generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2095 (1996) (articulating the definition of "ceremonial deism" as including "God Save the United States and this Honorable Court," "In God We Trust," and others).

4. *See* Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis*, 146 U. PA. L. REV. 579, 584 (1998) (defining "secularization" as once-religious practices and symbols that have lost significance due to temporal or contextual erosion).

on their context or tradition.[5] At the same time, the Court has struck down facially similar religious practices on the ground they violate the Court's established doctrinal tests,[6] the most prominent being the *Lemon* test.[7]

The Framers were not clear in their attempt to explain the proper role of religion in the public realm,[8] stating that "Congress shall make no law respecting an establishment of religion . . . ."[9] Applying this vague clause[10] has resulted in an inconsistent litany of Supreme Court cases.[11] Further complicating the interpretation of the Establishment Clause is the relationship between the Establishment Clause and the other clauses of the First Amendment. On the other side of an Establishment Clause challenge, the Free Speech and Free Exercise Clauses are often invoked.[12]

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5. *See infra* Part I.D (explaining the doctrinal requirement of secularity and the Court's manipulation of this requirement through its secularization approach).

6. *See infra* Parts I.B and I.C and accompanying notes (describing the test known as the "*Lemon*" test developed under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice O'Connor's endorsement test, and Justice Kennedy's coercion test).

7. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (declaring that two state statutes violated the First Amendment's religious clauses and establishing a three-prong test for determining whether a practice violated the Establishment Clause); *see also infra* Parts I.B and I.C and accompanying notes (discussing the various tests, the *Lemon* test, Justice O'Connor's Endorsement test, and Justice Kennedy's Coercion test, the Supreme Court has formulated).

8. During the drafting of the First Amendment, the framers never precisely defined "establishment." *See* Levy, *supra* note 1, at 102-05 ("The history of the drafting of the [E]stablishment [C]lause does not provide us with an understanding of what was meant by 'an establishment of religion'.").

9. U.S. CONST. amend. I. *See also* 2 THE CONSTITUTION AND THE SUPREME COURT, A DOCUMENTARY HISTORY 53 (Louis H. Pollak ed., 1966) [hereinafter THE CONSTITUTION AND THE SUPREME COURT] (noting, as originally adopted, the Constitution mentioned religion only once, stating "no religious test shall ever be required as a qualification to any office or public trust under the United States.").

10. *See* ROBERT T. MILLER & RONALD B. FLOWERS, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 241 (3d ed. 1987) (commenting that the difficulty in interpreting the Establishment Clause is due in part to the "lack of clarity concerning what the framers of the Constitution intended when they wrote the clause"); *see also* THE CONSTITUTION AND THE SUPREME COURT, *supra* note 9, at 53 (noting that when the Framers added the Establishment Clause and the Free Exercise Clause to the First Amendment, they supplied "two far more important, and far less precise, injunctions").

11. *See infra* Part I and accompanying notes (detailing the evolution of Supreme Court jurisprudence). "The modern era of Supreme Court interpretation of the Establishment Clause began in 1947 with the decision of *Everson v. Board of Education*," in which the Court found no Establishment Clause violation but declared the need for a "wall of separation" between the church and the state. *See* Timothy R. Fox, Comment, Alabama v. ACLU*: A Missed Opportunity to Correct Flawed Establishment Clause Jurisprudence*, 11 REGENT U. L. REV. 193, 199 (1998) (noting after *Everson* the Court pursued a vigorous "separation of church and state" policy by striking down school invocations, Bible readings, and displays of the Ten Commandments).

12. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (examining the relationship between the Free Exercise Clause and the Establishment Clause in the context of prayer in graduation ceremonies in public schools). According to Justice Kennedy,

When confronted with an Establishment Clause challenge, the Supreme Court currently takes one of two routes, choosing its course based on the "religiousness" of the challenged practice.[13] The first analysis, used when a practice or symbol is sufficiently religious, subjects the challenged practice to existing constitutional scrutiny.[14] In the second approach, the Court takes a fact-specific inquiry into the context and tradition of the practice or expression to determine whether it has been "secularized."[15] Under this second analysis, the Court has typically deemed historical religious expressions such as "God Save This Honorable Court" and "In God We Trust" as secularized and not unconstitutional.[16]

Historical religious expressions are deeply embedded in various aspects of public life.[17] In fact, the government originally established and subsequently enforced many of these religious expressions.[18] For example, the phrase "In God We Trust" is imprinted on U.S. currency and is the named U.S. motto.[19] The Supreme Court's

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"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id.* at 587. Furthermore, in the most recent Establishment Clause case before the Supreme Court, *Good News Club v. Milford Central School*, the Court analyzed the tension between the Free Speech Clause and the Establishment Clause. *See* Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2096 (July 11, 2001) (holding that by denying the Good News Club access to the school's facilities on the ground that the Club was religious, Milford engaged in viewpoint discrimination in violation of the Free Speech Clause). The Court held that the Establishment Clause was not a viable defense to the school's restriction of access. *Id.* at 2103.

13. *See* Furth, *supra* note 4, at 583 (arguing that when the Court analyzes an Establishment Clause case, the Court determines first the religiousness of a practice or symbol on a case-by-case basis, subjecting sufficiently religious practices to Establishment Clause analysis and secularizing traditions that are not sufficiently religious).

14. *See infra* Part I and accompanying notes (describing the current Establishment Clause tests, which include the *Lemon* test, Justice O'Connor's Endorsement Test, and Justice Kennedy's Coercion test).

15. *See infra* Part I and accompanying notes (discussing the secularization approach to Establishment Clause challenges, in which the Court distinguishes between truly religious practices and those that have lost religious significance).

16. *See infra* Part I and accompanying notes.

17. *See* LEVY, *supra* note 1, at xiv (observing that despite the language of the Constitution, "religion saturates American public life"); *see also* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 212 (1963) ("It is true that religion has been closely identified with our history and government.").

18. *See Schempp*, 374 U.S. at 213 (noting that the Mayflower Compact and the Constitution evidence the Founding Fathers' belief in God and that this background continues today in, among other things, our oaths for office, the beginning of Supreme Court sessions, and the existence of Congressional chaplains).

19. *See* 36 U.S.C. § 186 (1994) ("The national motto of the United States is declared to be 'In God We Trust.'"); *see also* Jim Abrams, *House Urges Display of National Motto in Public Buildings*, ASSOC. PRESS NEWSWIRES, July 24, 2000, *available at* WL Database ALLNEWSPLUS, 7/24/00 APWIRES 18:58:00 (detailing the history of "In God We Trust").

> [T]he nation's association with 'In God We Trust' goes back to 1864 when

famous opening line is "God Save the United States and this Honorable Court."[20] American citizens salute the flag with the words "one nation, under God"[21] and "[e]very state legislature as well as Congress starts its daily session with a prayer from a chaplain whose salary is paid with public tax monies."[22] Additionally, the President has annually declared a National Day of Prayer[23] and made proclamations to commemorate Jewish Heritage Week.[24] Although Americans may not be very concerned with the religious aspects of these expressions,[25] they are very visible and invoke Establishment

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Abraham Lincoln signed a law putting the motto on all American currency. President Eisenhower in 1956 made it the official national motto and the phrase appears over the entrance to the Senate chamber and above the Speaker's dais in the House.

Id. In July 2000, the House voted to encourage the display of the national motto in public buildings with only one Congressperson voting against the non-binding measure. *See* H.R. Res. 548, 106th Cong. (2000); *see also* 146 CONG. REC. H5818-03 (daily ed. July 11, 2000) (statement of Rep. Schaffer) (arguing the National Motto has the valid secular purpose of fostering patriotism); Abrams, *supra*, at 7/24/00 APWIRES 18:58:00 (noting this bill represented one of "several recent moves by the House to give religion a more visible role in public life").

20. *See* The Court and Its Procedures, *at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/www.supremecourtus.gov/about/procedures.pdf (July 28, 2001) (citing the full text of the Marshal's chant); *see also Schempp*, 374 U.S. at 212-13 (detailing the many ways in which religion has been closely identified with our government, including the final supplication of the President's oath of office, "so help me God," and the Houses of Congress opening sessions through a chaplain-led prayer); Engel v. Vitale, 370 U.S. 421, 439 (1962) (Douglas, J., concurring) (noting the prayer that New York recommended for daily use at the beginning of public school was essentially the same as the Supreme Court crier's announcement convening the Court and adding "God Save the United States and this Honorable Court"); LEVY, *supra* note 1, at xiv (describing how "religion saturates American public life," including the way in which the Supreme Court opens its session).

21. *See* 36 U.S.C. § 172 (1994)(reciting the Pledge of Allegiance to the Flag and the manner in which it is to be delivered); *see also* Stuart Taylor Jr., *Banishing the Pledge?: Court May Be Hostile to Religion and More*, LEGAL TIMES, July 17, 2000, at 60 (arguing a plausible reading of *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), could lead to banning the Pledge of Allegiance as a violation of the Establishment Clause).

22. LEVY, *supra* note 1, at xiv.

23. *See* 36 U.S.C. § 169h (1994) ("The President shall set aside and proclaim the first Thursday in May in each year as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."); *see also National Day of Prayer Task Force*, *at* http://www.ndptf.org/AboutNDP/History_of_NDP.html (last visited Oct. 22, 2000) (detailing the history and evolution of the National Day of Prayer, specifically noting the concept of days of prayer began in 1775 when the Continental Congress designated a time to pray for the formation of the new nation).

24. *See* Proclamation No. 7423, 66 Fed. Reg. 18,867 (Apr. 9, 2001) (proclaiming the week beginning April 22, 2001, as Jewish Heritage Week because "[T]he Jewish community has played a vital role in our Nation's history."). President George W. Bush, author of this proclamation, "urge[d] all Americans to join in observing this week with appropriate programs, ceremonies, and activities." *Id.*

25. *See* John D. White, Casenote, *The Seventh Circuit Upholds Constitutionality of Student-Led Prayer at University Commencement Ceremony in* Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997); *The Fight That God (Allah, etc.) Started*, 39 S. TEX. L. REV. 165, 193

Clause issues—further blurring the line between what is constitutional and what is unconstitutional.

Recent events once again have injected religion into the public realm, invoking Establishment Clause questions.[26] In July 2000, the United States House of Representatives voted to encourage the display of "In God We Trust" in public buildings.[27] In January 2001, the Virginia House of Representatives supported a similar measure to ensure the prominence of the motto in public schools.[28] During the 2000 Supreme Court term, two cases dealing with school prayer were appealed to the Supreme Court.[29] Ironically, on the very day the Court declared prayer before high school football games unconstitutional,[30] it opened its session with the Court Marshal invoking the grace of God.[31] Most recently, the Supreme Court found that allowing a private Christian organization to use public school facilities did not violate the Establishment Clause.[32] Furthermore,

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(1997) (asserting that most Americans are not concerned about the religious nature of "In God We Trust" or "One Nation, Under God").

26. The Establishment Clause is involved generally in issues of separation of church and state and the proper role of religion in the public realm. *See* RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 42 (1996) (stating the Establishment Clause has contributed the most "distinctive concept" to political ideas: the principle of separation of church and state).

27. *See* H.R. Res. 548, 106th Cong. (2000); *see also* Abrams, *supra* note 19, at 7/24/00 APWIRES 18:58:00 (describing the adoption of House Resolution 548, which passed by a voice vote with only one Representative speaking against it). "Representative Robert Scott, D-Va., said church and state matters should be left to the courts, not Congress, and noted that the Supreme Court has recently sent mixed signals on complex issues such as school prayers and Christmas displays." *Id.*

28. *See* Va. H.B. 1613 (2001); *see also* Lisa Rein, *Learning Under the Word of 'God': Virginia House Backs Requiring Schools to Display National Motto*, WASH. POST, Jan. 27, 2001, at B5 (describing House Bill 1613, which passed "overwhelmingly on a voice vote," but still needs approval by the Senate and the Governor). The measure's sponsor, Robert G. Marshall, stated he was certain the bill did not violate the principle of separation of church and state. *See id.* (noting others questioned "whether a practice that's constitutional in one setting is necessarily constitutional in another," such as prayer in legislatures and schools). *See also* Lisa Rein, *Bill to Post Godly Motto Defeated*, WASH. POST, Feb. 20, 2001, at B1 (noting the Senate struck the bill down because they believed it "would bring religion into places it does not belong").

29. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding prayer before high school football games unconstitutional); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 349 (5th Cir. 1999) (holding the reading of a disclaimer before students studied evolution violated the Establishment Clause), *cert. denied*, 530 U.S. 1251 (2000).

30. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (finding student-led, student-initiated prayers before football games violates the Establishment Clause).

31. *See supra* note 20 and accompanying text (describing the use of "God Save the United States and this Honorable Court" when the Supreme Court begins its sessions).

32. *See* Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (June 11, 2001) (finding that not allowing the club to meet in school facilities was viewpoint

during the 2000 presidential election, both candidates made numerous religious references.[33] In fact, President George W. Bush has indicated a school voucher program ranks among one of his top priorities[34] and has proposed an initiative providing public funds to religious groups engaged in social service efforts.[35] Thus, reconciling

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discrimination not outweighed by any valid Establishment Clause interest).

33. *See* Nancy Gibbs, *Whose Bully Pulpit Now?*, TIME, Sept. 11, 2000, at 38 (describing how Joe Lieberman likened Al Gore to Joseph and compared Clinton to Moses, George W. Bush called Jesus his favorite philosopher, and Al Gore said he makes decisions by asking "[w]hat would Jesus do?"); *see also* Anti-Defamation League, *ADL to Senator Lieberman: Keep Emphasis on Religion out of Campaign*, *at* http://www.adl.org/frames/front_government.html (Aug. 28, 2000) (chastising Senator Lieberman for his religious emphasis during his campaign for Vice-President) (on file with author). In a letter from Howard P. Berkowitz, National Chairman of the Anti-Defamation League, and Abraham F. Foxman, National Director of the Anti-Defamation League, the ADL warned Lieberman that "[t]he First Amendment requires that government neither support one religion over another nor the religious over the non-religious." *Id. Cf.* Helen Thomas, *Keep the Wall Between Church and State*, FT. LAUDERDALE SUN-SENTINEL, Sept. 2, 2000, at 13A (urging the candidates to reaffirm their beliefs in separation of church and state).

> No one made clearer his devotion to the wall between church and state than John F. Kennedy . . . . The issue of religion in politics has been on the back burner until the current campaign. Today, the four national candidates are flaunting their spiritual beliefs as they run for the top jobs in the nation.

Id. More recently, President George W. Bush's administration was criticized for mentioning "Jesus" too often at the inauguration. *See* Michael Paulson, *Debating the Wisdom of Invoking Jesus at Inauguration*, BOSTON GLOBE, Jan. 27, 2001, at B2 (assessing the Christian tone of the benedictions offered at Bush's inauguration). Harvard Law School Professor Alan Dershowitz is quoted as stating "[t]he plain message conveyed by the new administration is that George W. Bush's America is a Christian nation, and that non-Christians are welcome into the tent so long as they agree to accept their status as a tolerated minority rather than as fully equal citizens . . . ." *Id.*

34. See S. 717, 107th Cong. (2001) (providing for a three year national voucher program); s*ee also* CNN.com, *Bush sends education package to Capitol Hill*, *at* http://www.cnn.com/2001/ALLPOLITICS/stories/01/23/bush.wrap/index.html (Jan. 23, 2001) (describing President Bush's education plan, which, if in place, would allow him to move forward with his school voucher scheme, as the most controversial initiative). Although the Supreme Court has never ruled on school vouchers, the issue invokes Establishment Clause questions due to the close relationship between federal funds and religion. *See* Jean-Paul Jassy & Jeffrey H. Blum, *The First Amendment: Gore Versus Bush*, 18 COMM. LAW. 1, 29 (2000) (noting the similarity between school vouchers and a program granting aid to parochial schools and teachers for teaching secular subjects that was deemed unconstitutional in *Lemon*). Lower courts have split on this issue. *See id.* at 30 (describing Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (upholding a voucher program) and Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (rejecting a similar voucher scheme)). *See generally* Catherine L. Crisham, Note, *The Writing Is on the Wall of Separation: Why the Supreme Court Should and Will Uphold Full-Choice School Voucher Programs*, 89 GEO. L.J. 225, 229 (2000) (rejecting the argument that school voucher programs violate the Establishment Clause). Opponents of voucher programs assert the vouchers excessively entangle church and state and claim there exists no guarantee that the money will be used for only secular purposes. *See id.* at 227, 244-45 (explaining that school choice programs distribute vouchers directly to parents rather than to religious schools, and government money is granted on the basis of neutral, secular criteria).

35. *See* H.R. 7, 107th Cong. (2001) (providing faith-based organizations the opporuntity to compete for federal grant dollars); Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001) (establishing the White House Office on Faith-based and

the Supreme Court's Establishment Clause jurisprudence, whether regarding current politicians' agendas or historical religious expressions, remains an issue of relevant concern.[36]

This Comment argues for the need for one consistent analysis in Establishment Clause jurisprudence instead of the current dual-tracked system. Such a test would allow historical religious expressions and practices that the Court has otherwise deemed secular to be scrutinized under an identical Establishment Clause analysis. A single, unified analysis would eliminate the need to make arbitrary distinctions based on a determination of "religiousness." Additionally, a single approach would better guide society as to what practices violate the clause. Furthermore, a single inquiry would eliminate the secularization approach, which is applied inconsistently and tends to devalue ordinarily religious practices.[37] Most practically, the outcome of Establishment Clause cases will remain unchanged under this unified analysis as this Comment does not propose a test that would force the Supreme Court to reverse prior rulings.

Part I of this Comment details the evolution and development of the Supreme Court's current Establishment Clause jurisprudence.

Community Initiatives). *See generally* CNN.com, *Bush rallies support for 'faith-based' services package, at* http://www.cnn.com/2001/ALLPOLITICS/stories/01/30/bush.faith/index.html (Jan. 30, 2001) (describing Bush's announcement of the creation of a new White House office that seeks to distribute federal money to religious groups and charities). "The proposals must overcome opposition from many who fear that providing federal funds to religious organizations would violate the Constitution's ban on the separation of church and state." *Id.* In recognizing government cannot fund religious activities, President Bush stated, "[w]hen people provide faith-based services, we will not discriminate against them." *Id.* The American Civil Liberties Union is concerned the President's proposal "could put the government in the position of determining what is a legitimate religious organization." *See* CNN.com, *ACLU worried about Bush's faith-based initiative, at* http://www.cnn.com/2001/ALLPOLITICS/stories/01/30/aclu.faith/index.html (Feb. 1, 2001) (articulating the ACLU's fear that because faith-based organizations are not subject to federal civil rights law, they could refuse to hire someone on a basis otherwise in violation of civil rights law). Some also worry federal money might "spawn any number of agencies, faith-based and otherwise, that are in it primarily for the money." William Raspberry, *Faith, Church and State*, WASH. POST, Feb. 2, 2001, at A23.

36. The necessity of reconciling Establishment Clause jurisprudence has prompted Senators to suggest amending the U.S. Constitution. *See Reversing Historical Irony*, 141 CONG. REC. S18-01, 104th Cong. (1995) (citing the irony in the co-existence of historical religious expressions and the prohibition of prayer in schools). Senator Byrd proposed an amendment that would "make clear that the words that the Constitution uses with regard to religious freedom do not mean that voluntary prayer is prohibited from our public schools or public school activities." *Id.* at *S19. Senator Byrd's proposed amendment reads as follows: "Nothing in this Constitution, or amendments thereto, shall be construed to prohibit or require voluntary prayer in public schools, or to prohibit or require voluntary prayer at public school extracurricular activities." *Id.* at *S19.

37. *See infra* Parts II.B and II.C and accompanying notes (describing the discrepancies and harmful consequences of the secularization approach).

Furthermore, Part I explains the doctrinal requirement of secularity and how the Court has manipulated this requirement through their secularization approach. Part II analyzes the weaknesses of the current jurisprudence and identifies why it needs to be altered. This section demonstrates that without a secularization analysis, historical religious expressions would not survive current Establishment Clause jurisprudence. Part II also examines the inconsistencies and detrimental effects of secularization. Finally, Part III suggests a solution to the shortcomings of current Establishment Clause jurisprudence, arguing the analysis should incorporate a non-preferentialist stance on religion, determined in part by a historical inquiry. This Part also addresses the main criticism of Establishment Clause jurisprudence, its failure to accommodate atheists, and concludes non-preferentialism, while imperfect, is the least flawed approach.

I. ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Building up to Lemon

Two competing theories—"strict separation"[38] and "mutual cooperation,"[39]—underly the interpretation of the Establishment Clause and are the starting point to understanding the development of the current jurisprudence.[40] These two theories operate in conjunction with other clauses in the First Amendment.[41] Both theories base their support on the history surrounding the Establishment Clause's enactment.[42]

The strict separation theory rests on "the assumption that the

38. Thiemann, *supra* note 26, at 64-65 (identifying and introducing the "essential tension" examined by both the "strict separation" and "mutual cooperation" doctrines).

39. *Id.* at 64-65 (same).

40. *See* Miller & Flowers, *supra* note 10, at 241 (reasoning the uncertainty of the Framers' intent has resulted in different theories of Establishment Clause interpretation that guide the Supreme Court Justices' decisions).

41. *See* Thiemann, *supra* note 26, at 64-65 (summarizing the two independent but related patterns of reasoning that describe the interpretation of the religion clauses: strict separation and mutual cooperation); *see also* Miller & Flowers, *supra* note 10, at 241-42 (naming the two basic approaches to interpretation of the Establishment Clause as the "accommodationist" or "no preference" approach and the "separationist" or "no aid" approach).

42. *See* Miller & Flowers, *supra* note 10, at 241 (warning that although historical data can shed some light on the Framers' intentions and purposes, it can also be used as a policy device to read partisans' own preferences into the Constitution); *see also* Fox, *supra* note 11, at 193-94 (reasoning religion has played such a pervasive role in our history that the intensity of the public debate over Establishment Clause issues is not surprising).

independent and autonomous institutions of church and state should be kept rigorously separated."[43] Strict separation requires the government not to involve itself in the affairs of religious institutions.[44] The strict separation is based first, on the Framers' intent to divide church and state, as discussed by Thomas Jefferson in a letter when he stated that a "wall of separation" should exist between the church and state.[45] Second, separation remains necessary to assure the integrity of both religion and government.[46] According to this view, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[47]

In the alternative, adherents to the mutual cooperation theory believe the Founding Fathers merely sought to hinder the development of a national religion or national church[48] but did not intend strict separation.[49] This theory "begins from the assumption

43. Thiemann, *supra* note 20, at 64.

44. *See id.* at 65 (asserting the government should only participate in the affairs of religious institutions in exceptional cases involving the free exercise of religion; and, in those cases, its involvement should only be a policy of "accommodation").

45. *See* James E. M. Craig, *"In God We Trust," Unless We Are A Public Elementary School: Making A Case For Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 532 (2000) ("The first known use of the 'wall of separation between church and State' metaphor was in a letter from Thomas Jefferson to the Danbury Baptist Association—a simple note of courtesy written fourteen years after Congress passed the Bill of Rights."); *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's belief that religion is "a matter which lies solely between man and his God" and that the Establishment Clause essentially builds a "wall of separation between church and state"). James Madison reiterated the same principle, writing "the [religious] devotion of the people has been manifestly increased by the total separation of the church from the state." *See* Anti-Defamation League, *Separation: Good for Government, Good for Religion*, *at* http://www.adl.org/issue%5Freligious%5Ffreedom/separation%5Fcs%5Fprimer.html (last visited Apr. 9, 2001) (arguing for absolute separation between church and state because the Framers intended strict separation).

46. *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) (viewing the purpose of the Establishment Clause as resting on the belief that "a union of government and religion tends to destroy government and to degrade religion"). *Accord* Thiemann, *supra* note 26, at 74-75 (interpreting "political liberalism" as a contemporary defense of separation, which maintains religion and democracy are best preserved in "a constitutional system that precludes religious argumentation within the public realm").

47. *See Engel*, 370 U.S. at 431 (asserting that the influence of government on religion would have the effect of threatening the integrity of minority religions not supported by government).

48. *See* Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting) (arguing, instead of focusing on a "wall of separation," the concern of most members of Congress when debating the First Amendment surrounded the establishment of a national church).

49. *See* Walz v. Tax Comm. of N.Y. 397 U.S. 664, 668 (1970) ("It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active

that church and state, although independently governed, share a common history and tradition."[50] Mutual cooperation seeks to acknowledge and preserve the harmonious existence of church and state, but attempts to prevent their intermixing.[51] In other words, the state should recognize and respect "the cultural and religious heritage of its citizens by developing a policy of *benevolent neutrality* toward religious groups."[52] This type of neutrality requires the government to treat various religious groups with a policy of impartiality.[53]

These different methods of interpreting the Establishment Clause provided the foundation for Supreme Court tests when the Court

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involvement of the sovereign in religious activity."). Recognizing that history does not support the interpretation of strict separation, Chief Justice Rehnquist noted that assuming that the government must remain neutral in all aspects of religion is a "deviation from [the] intentions" of the Founding Fathers that "frustrates the permanence" of the First Amendment. *See Wallace*, 472 U.S. at 113; *see also* THE CONSTITUTION AND THE SUPREME COURT, *supra* note 9, at 62 (noting that because Jefferson and Madison supported a scheme in which students at the University of Virginia would attend religious worship each morning, they could not have intended strict separation).

In addition to the belief that the Framers' words did not intend for strict separation, mutual cooperationists argue the Framers' actions demonstrate they did not urge strict separation. *See Wallace*, 472 U.S. at 100 (noting the First Congress reenacted the Northwest Ordinance, the text of which suggests Congress did not intend for strict separation, on the same day that it started to debate the First Amendment). Article III of the Northwest Ordinance states "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Craig, *supra* note 45, at 533 (quoting the Northwest Ordinance, 1 Stat. 51 (1789)). *But see* THE CONSTITUTION AND THE SUPREME COURT, *supra* note 9, at 63 (noting that the Northwest Ordinance did not entirely support religion).

> On the other hand, although the Land Ordinance of 1785 (a precursor of the Northwest Ordinance) contained a reservation of one lot (a thirty-sixth share) of ever square mile of the territories 'for the maintenance of public schools,' Congress (much to Madison's delight) declined to include in that Ordinance a further proviso reserving one lot for religious purposes.

THE CONSTITUTION AND THE SUPREME COURT, *supra* note 9, at 63.

Another way in which the Framers' actions indicate they did not intend for complete separation is the fact the First Congress voted to appoint and pay a chaplain for the legislature in the same week that they voted to approve the draft of the First Amendment. *See* Marsh v. Chambers, 463 U.S. 783, 790-91 (1983) (reasoning the close temporal proximity of the First Congress' approval of the First Amendment and the appointment of chaplains could not possibly mean that they intended the First Amendment to forbid what they had just declared acceptable).

50. Thiemann, *supra* note 26, at 65.

51. *See id.* (stating the strict separation position strives for legal disestablishment while "ignoring the patterns of cooperation between church and state created by our history of civic piety").

52. *Id.* (emphasis in original).

53. *See id.* (maintaining strict neutrality would lead to practices that are hostile to the beliefs and practices of a majority of religious Americans). "While the government should never coerce or proselytize, it should seek to encourage widespread *public sphere accommodation* of religious symbols and behavior." *Id.* at 65 (emphasis in original).

began to confront potential violations of the clause. Although the Establishment Clause was drafted in 1789, *Everson v. Board of Education* in 1947, was the first case where the Court focused on the Establishment Clause.[54] In *Everson*, the Court upheld a New Jersey policy that reimbursed parents for their children's bus transportation to private, religious and public schools.[55] The Court had reservations about government assistance to students attending religious schools and urged government neutrality towards religion.[56] Nevertheless, the Court ultimately upheld the policy, justifying its decision by finding New Jersey's payments for the transportation of students to Catholic schools promoted the public welfare.[57] Justice Rutledge argued for the dissent that the majority failed to recognize the importance of the principle involved and justified the policy based on the relatively small encroachment on First Amendment liberties.[58]

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54. 330 U.S. 1 (1947). While a few cases exist prior to *Everson* raising similar issues to current Establishment Clause cases, they were heard on different grounds. *See* Miller and Flowers, *supra* note 10, at 242 (naming Bradfield v. Roberts, 175 U.S. 291 (1899) (deciding challenge to federal funding of a religiously affiliated hospital on corporate law grounds); Quick Bear v. Leupp, 210 U.S. 50 (1908) (allowing a federally controlled trust fund to pay for Native American children to attend Catholic schools under the theory that the money belonged to the Native Americans, not the federal government); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (deciding, under the 14th Amendment, a state law requiring all children to attend public school was unconstitutional); and Cochran v. Bd. of Educ., 281 U.S. 370 (1925) (finding, under the 14th Amendment, state funds could be used to provide textbooks for children attending parochial schools) as early cases echoing Establishment Clause issues.)

> One can surmise that there were at least three reasons why no Establishment Clause litigation was decided by the Court prior to 1947. For one reason, persons who wanted to challenge the use of tax monies in support of religious institutions or practices encountered extreme difficulty in obtaining standing to sue. Second, many states have statutory or constitutional provisions that are more specific than those of the federal Constitution in prohibiting use of governmental funds for particular religious activities. . . . Third, the application of the Establishment Clause to the states is a relatively recent development.

Miller & Flowers, *supra* note 10, at 298.

55. *See Everson*, 330 U.S. at 16 (deciding the First Amendment does not permit New Jersey to contribute tax-raised funds to an institution that teaches a religious faith, but at the same time, the First Amendment mandates religions cannot be excluded from receiving the benefits of public legislation because of their faith).

56. *See id.* at 18 (noting while 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").

57. *See id.* at 17-18 (reasoning that because public funds also are used to pay for policemen to guard Catholic school students and for firemen to protect their property, state tax funds also may be used to help parents get their children to church schools as well as public schools).

58. *See Everson*, 330 U.S. at 39 (Rutledge, J., dissenting) (noting Madison "opposed every form and degree of official relation between religion and civil authority"). Justice Rutledge continued, "[s]tate aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference." *Id.* at 40.

The fundamental doctrinal approach that emerged from *Everson*, though, was that religious *neutrality* is constitutional.[59] This case marked the beginning of the Court's attempt to define the parameters of the Establishment Clause.[60]

One year after *Everson*, the pendulum swung towards a strict separation approach in *Illinois ex rel. McCollum v. Board of Education*.[61] An atheist student challenged a school board's "release time" program that allowed teachers to offer religious instruction in the school for an hour a week.[62] The Court determined allowing religious classes in public school facilities violates the Establishment Clause.[63] The Justices, purportedly following the principles set forth in *Everson*, reasoned the situation in this case moved far closer to government support of religion than did the New Jersey policy in *Everson*.[64] The holding, however, hardly settled the issue, prompting four justices to write a separate opinion emphasizing the need for a "wall of separation."[65]

In *Zorach v. Clauson*,[66] the Court took the separation approach announced in *McCollum* and attempted to define its parameters.[67] In

59. *See id.* at 18 (setting forth the principle that the First Amendment requires neutrality).

60. *See* RELIGIOUS LIBERTY IN THE SUPREME COURT 59 (Terry Eastland ed., 1993) [hereinafter RELIGIOUS LIBERTY] ("*Everson* was the Court's first significant effort to interpret the [Establishment] Clause."); Miller & Flowers, *supra* note 10, at 242 ("The judicial interpretation of the Establishment Clause has a relatively short history that dates from *Everson*").

61. 333 U.S. 203 (1948).

62. *See McCollum*, 333 U.S. at 205 (explaining the school board program permitted religious teachers, employed by private religious groups, to come into the school buildings weekly during the regular hours set apart for secular teaching and substitute their religious teaching for the secular education for a period of thirty minutes).

63. *See id.* at 209 (noting "[t]he operation of the state's compulsory education system assists and is integrated with the program of religious instruction carried on by separate religious sects," both of which the First Amendment prohibits).

64. *See id.* at 210-11 (finding the school program fell "squarely under the ban of the First Amendment . . . as interpreted in *Everson*"). *But see id.* at 241 (Reed, J., dissenting) (noting "the history of American education is against [the proposition that] religious instruction of public school children during school hours is prohibited").

65. *See McCollum*, 333 U.S. at 213 (Frankfurter, J., concurring) (arguing the Founding Fathers designed the First Amendment to erect a "wall of separation" but not "[to] preclude a clash of views as to what the wall separates"). Justices Frankfurter, Jackson, Rutledge and Burton noted they dissented in *Everson* because the principle of separation of church and state required invalidation of the New Jersey ordinance. *See id.* at 212 (asserting that the instant case, in light of the *Everson* decision and its contradictory holding, demonstrates that "the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer").

66. 343 U.S. 306 (1952).

67. *See Zorach*, 343 U.S. at 312 (asserting *McCollum*, *Everson*, and the First Amendment reflect the philosophy that church and state should be separated but

Zorach, the Court upheld a release time program similar to the one in *McCollum*, different only in that the religious instruction occurred off the school campuses.[68] The Court stated First Amendment prohibitions did not require a "separation of church and state" in "every and all respects."[69] Douglas' approach has been called a "permissive" or "accommodationist" view of the Establishment Clause.[70] The dissents noted, even though the New York City program did not use the public school classrooms, it employed "the State's compulsory public school machinery,"[71] and thus had a coercive nature.[72]

A pair of public school cases in the 1960s further defined the meaning of the Establishment Clause and moved more towards strict separation. In both *Engel v. Vitale*[73] and *School District of Abington Township v. Schempp*[74] the Court recognized the clause applied to state-sponsored religious activities through the Fourteenth Amendment.[75] In *Engel*, the Court held a state may not, consistent with the First Amendment, sponsor prayer in its schools.[76] Notwithstanding the fact

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not completely alienated). The majority opinion argued, under complete separation, public service practices would be illegal. *See id.* at 312 ("Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution.").

68. *See id.* at 308-09 (acknowledging the released time program was unlike the one in *McCollum* because it did not involve religious instruction in public school classrooms or the expenditure of public funds).

69. *See id.* at 312 ("The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the matter, the specific ways, in which there shall be no concert or union or dependency one on the other.").

70. *See* RELIGIOUS LIBERTY, *supra* note 60, at 105 (noting Justice Douglas' view resulted in very strong dissents). Justice Douglas, however, later abandoned this "accommodationist" view. *See id.*

71. *Zorach*, 343 U.S. at 316 (Black, J., dissenting) (quoting *McCollum*, 333 U.S. at 212).

72. *See Zorach*, 343 U.S. at 321 (Frankfurter, J., dissenting) (disagreeing with the majority's finding that coercion was not present in this case).

73. 370 U.S. 421 (1962).

74. 374 U.S. 203 (1963).

75. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). In this Free Exercise Clause case, the Court determined the First Amendment applied to the states through the Fourteenth Amendment, writing "[t]he First Amendment declares that Congress shall make no law respecting an establishment of religion or free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* at 303. This application of the First Amendment religion clause to the states made it "inevitable that the Court would be asked to decide the constitutionality of state-sponsored religious activities." RELIGIOUS LIBERTY, *supra* note 60, at 125.

76. *See Engel*, 370 U.S. at 424-25 (holding a New York program of daily prayer in schools unconstitutional because "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country that it is no part of the business of government to compose official prayers for any group of

the prayer at issue was nondenominational, the Court based its holding on the general proposition, "a union of government and religion tends to destroy government and to degrade religion."[77]

Similarly, in *Schempp*, the Court, relying on the principle set forth in *Engel*, held a state may not sponsor Bible reading and recitation of the Lord's Prayer in public school.[78] Justice Clark's opinion in *Schempp* delineated a two-prong test for determining when a practice violates the Establishment Clause: (1) whether a secular legislative purpose exists for the practice; and (2) whether the practice's primary effect neither advances nor inhibits religion.[79] This test foreshadowed the more formulaic approach to Establishment Clause jurisprudence adopted less than a decade later.[80]

B. The Current Standard—The Lemon *Test*

The frequency of the Court's pre-*Lemon* Establishment Clause holdings, and the increasing number of challenges under the clause,[81] set the stage for the Court to declare a methodical and uniform approach for deciding when a practice violates the First Amendment. In *Lemon v. Kurtzman*,[82] the Court proclaimed its new, formulaic approach when it addressed the constitutionality of Rhode

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the American people to recite").

77. *Engel*, 370 U.S. at 431.

78. *See Schempp*, 374 U.S. at 225 (holding a Pennsylvania statute and a Maryland mandamus unconstitutional because they involved religious exercises that the states required in their public schools). The exercises at issue violated "the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion." *Id.* at 225.

79. *See id.* at 222 (asserting a new Establishment Clause test looking to the purpose and primary effect of the enactment).

80. Justice Clark's opinion "articulated two parts of what eight years later would become the three-part *Lemon* test for determining the constitutionality of a challenged government action." RELIGIOUS LIBERTY, *supra* note 60, at 147-48.

81. *Everson v. Board of Education*, 330 U.S. 1 (1947), set in motion an increasing amount of Establishment Clause challenges, particularly in the 1960s. Following *Everson*, the Supreme Court heard the following cases: *McCollum v. Board of Education*, 333 U.S. 203 (1948) (striking down as unconstitutional a "released time" program that allowed teachers to offer religious instruction in the school); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding off-campus "released time" program); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (disallowing a religious test for government office); *Engel v. Vitale*, 370 U.S. 421 (1962) (ruling against state-sponsored daily non-denominational prayer in public schools); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (forbidding state-sponsored Bible reading and recitation of the Lord's Prayer in public schools); *Board of Education v. Allen*, 392 U.S. 236 (1968) (upholding a New York state policy requiring local schools to lend textbooks free of charge to students, including those attending religious schools); and *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970) (allowing tax exemptions to religious organizations when property is used for religious purposes). *See generally* RELIGIOUS LIBERTY, *supra* note 60 (describing the cases following *Everson*).

82. 403 U.S. 602 (1971).

Island and Pennsylvania statutes that allocated state monies to non-public schools (primarily Catholic schools) for teaching secular subjects.[83] In deciding both policies excessively entangled church and state,[84] the Court added a new, third prong to Justice Clark's *Schempp* analysis.[85] This three-step inquiry to discern whether a practice violates the Establishment Clause is: (1) whether the statute has a "secular legislative purpose"; (2) whether its "principle or primary effect" is one that "neither advances nor inhibits religion"; and (3) whether the statute does not foster "an excessive government entanglement with religion."[86] Generally, the Court requires each prong be satisfied to survive a constitutional challenge.[87] The *Lemon* test remains the law today,[88] yet the Court has placed less emphasis on the test and has employed alternative analyses to Establishment Clause challenges.[89]

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83. *See Lemon*, 403 U.S. at 625 (holding state aid to parochial schools in the form of salary supplements and subsidization of course materials could not be "squared with the dictate of the Religion Clauses").

84. *See id.* at 624-25 (noting that while some involvement and entanglement between religion and government remain inevitable, these particular policies exceeded the First Amendment's permissible scope).

85. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (articulating what would become the first two prongs of the *Lemon* analysis). In *Schempp*, the Court applied the following test: "what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 374 U.S. at 222. *See also supra* notes 78-79 and accompanying text (discussing the *Schempp* analysis). The Court actually articulated what would become the third prong of *Lemon* one year prior to *Lemon* in *Walz v. Tax Commission of New York*. *See* 397 U.S. 664, 670 (1970) ("No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid *excessive entanglement*.") (emphasis added).

86. *See Lemon*, 403 U.S. at 612-13 (combining the excessive entanglement test from *Walz*, 397 U.S. at 674, with the secular purpose and effects prongs under first used in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), resulting in the three-prong *Lemon* test).

87. *See* Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) (stating that if a statute violates any of the three prongs of the *Lemon* test, the statute must be struck down).

88. *See* Koenick v. Felton, 190 F.3d 259, 264 (4th Cir. 1999), *cert. denied*, 528 U. S. 1118 (2000) (citing *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1343 (4th Cir. 1995) as a basis for holding that until the Supreme Court overrules *Lemon* and provides an alternative test, the lower courts must rely on *Lemon*). The *Lemon* test has remained the standard used by the Court for nearly thirty years. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (applying *Lemon* to the school prayer policy and examining whether the policy has a secular legislative purpose in order to survive constitutional muster).

89. Recently, the Court has placed less emphasis on *Lemon* alone, combining it with other analyses promulgated by Justices O'Connor and Kennedy. *See* Marcia Coyle, *Justices Struggle with a 'Lemon'*, NAT'L L.J., July 3, 2000, at A1 (explaining *Lemon* was not the core of the *Santa Fe* ruling, rather the justices employed other approaches, signaling dissatisfaction with *Lemon*). "Traditionally, Establishment Clause cases have been evaluated using the test set out in *Lemon*. In more recent Establishment Clause cases, however, the Supreme Court has employed several

The Court considered an unprecedented number of Establishment Clause cases in the 1980s.[90] In these cases, the Court used the *Lemon* test as the primary determination of constitutionality, repeatedly striking down several state policies.[91] Nevertheless, despite its apparent clarity and formalism, the *Lemon* test is often criticized in both the concurring and dissenting opinions.[92] Further, Justices have

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different tests presented as either glosses on or replacements for the *Lemon* test; therein lies the confusion as to the applicable standard." *Koenick*, 190 F.3d at 264. In *Santa Fe*, the Court noted it was guided by the most recent application of the *Lemon* test to school prayer in *Lee v. Weisman*, 505 U.S. 577 (1992). *See Santa Fe*, 530 U.S. 301-02 (realizing *Lee v. Weisman* is applicable, even though it involved school prayer at a different type of school function). The same day that the Supreme Court decided *Santa Fe*, it also denied certiorari to *Tangipahoa Parish Board of Education v. Freiler*, 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2706 (2000) thereby refusing to rule on the Fifth Circuit's decision. In that case, the Fifth Circuit held unconstitutional the required reading of a "disclaimer" before elementary and high school students studied evolution. *See* Freiler, 185 F.3d at 344-48 (finding the reading of the disclaimer violated the *Lemon* test, as well as the endorsement test as articulated in *Lambs Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)). The disclaimer stated the evolution lesson would be "presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept." *Id.* at 341. Although the Court applied the *Lemon* test to *Santa Fe* the very same day, Justice Scalia, in his dissent from the denial of certiorari to *Freiler*, noted his dissatisfaction with the *Lemon* test and stated he would grant certiorari to the case if only to abolish the *Lemon* test altogether). *See* 120 S. Ct. at 2708. Furthermore, in the most recent Establishment Clause case, the Supreme Court made no mention of the *Lemon* test, nor did it ever cite the *Lemon* case. *See* Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093, 2104-06 (June 11, 2001) (justifying its decision on the grounds that allowing the Good News Club to meet in a public school did not coerce or endorse religion). In *Good News Club*, the Supreme Court emphasized the importance of neutrality in the context of Establishment Clause cases. *See Good News Club*, 121 S. Ct. at 2104 ("We have held that 'a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their *neutrality* towards religion.'") (quoting Rosenberger v. Rector & Visitors of Univ. of Virg., 514 U.S. 819, 839 (1995)).

90. *See* William P. Marshall, *"We Know it When We See It:" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 497 (1986) (acknowledging that although many thought the 1984-1985 Supreme Court term would clarify the "doctrinal chaos" associated with *Lemon*, the Court maintained the test and applied it to four Establishment Clause cases, the most the Court has heard in one term). "[T]he new term left establishment jurisprudence essentially in the same condition it had been before; a patchwork of *ad hoc* decisions inside a legal framework that had long before lost its intellectual integrity." *Id.* at 498.

91. *See Stone*, 449 U.S. at 39-41 (stating Kentucky's law requiring public schools to post a copy of the Ten Commandments violated *Lemon*); *see also* Wallace v. Jaffree, 472 U.S. 38, 38 (1985) (enunciating that in addition to not sponsoring public school prayer, a state may not, under *Lemon*, set aside a moment of silence in which students can meditate or pray); Aguilar v. Felton, 473 U.S. 402 (1985) (striking down a New York policy sending public school teachers into parochial schools to teach secular subjects); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985) (rejecting Michigan's "Shared Time" program in which the public school system financed classes for non-public school children, taught by public school teachers, and held in public school classrooms).

92. *See* Coyle, *supra* note 89, at A1, A10 (noting *Lemon* is "repeatedly criticized by a majority of justices as a lemon of a constitutional test for church-state violations," and explaining Justice Scalia has expressed a desire to "inter the *Lemon* test once and

suggested various other approaches when analyzing the Establishment Clause.

C. Alternative Analyses Emerge

Although *Lemon* remains the standard, Justices have proposed modifications to the test. In 1983, Justice O'Connor, in her concurrence in *Lynch v. Donnelly*,[93] called for a refinement of Establishment Clause jurisprudence. Justice O'Connor suggested the proper inquiry under the purpose prong of the *Lemon* test is "whether the government intends to convey a message of endorsement or disapproval of religion,"[94] instead of merely whether the government activity has a secular purpose.[95] Justice O'Connor argued the government should avoid endorsing religion because "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community."[96] Under her analysis, Justice O'Connor found the display of a crèche[97] did not "communicate a message that the government intends to endorse . . . Christian beliefs."[98]

Justice Kennedy offered another modification to Establishment Clause analysis in his 1991 majority opinion *Lee v. Weisman*.[99] In

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for all. Consider Justice Scalia's concurring opinion in *Lambs Chapel v. Center Moriches Union Free School District*:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys of Center Moriches Union Free School District. . . . The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. . . . When we wish to strike down a practice it forbids, we invoke it . . . [and] when we wish to uphold a practice it forbids, we ignore it entirely. . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

508 U.S. at 398-99 (citations omitted).

93. 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

94. *Lynch*, 465 U.S. at 691.

95. *See Lemon*, 403 U.S. at 612 (denoting the purpose prong as demanding "a secular legislative purpose"). *See generally* Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1051 (1986) (explaining Justice O'Connor's refined test also precludes government from conveying "a message that anyone is inferior or superior because of his or her religion"). Furthermore, this author noted the Court should take seriously the implementation of this prohibition to achieve appropriate neutrality. *Id.*

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

97. *See* THE MERRIAM-WEBSTER DICTIONARY 186 (5th ed. 1997) (defining crèche as "a representation of the nativity scene").

98. *Lynch*, 465 U.S. at 692.

99. 505 U.S. 577 (1992).

striking down Rhode Island's policy of inviting clergy to offer invocation and benediction prayers during graduation ceremonies in public schools, Justice Kennedy maintained "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.'"[100] Applying his coercion standard, Justice Kennedy reasoned, in the case of invocations at graduation, a reasonable dissenter in the procedure would likely stand and remain silent, thus signifying acceptance of the prayer.[101] This forced acceptance, or lack of an appropriate alternative, signified the coercive nature of the prayer policy.[102] Chief Justice Rehnquist and Justice Scalia have noted their support for Kennedy's coercion test,[103] despite its possible incompatibility.[104]

Although *Lemon* is still the law that courts most often apply,[105] Justices O'Connor's and Kennedy's alternative suggestions signal the Justices' willingness to apply different tests. Moreover, their tests heighten the requirements of Establishment Clause scrutiny, offering elements of "endorsement"[106] and "coercion,"[107] respectively, instead of merely requiring the government have a secular purpose and to avoid the excessive entanglement with religion, as *Lemon* mandates.[108] Justice Scalia has even proposed relinquishing *Lemon* altogether,

100. *Lee*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678).

101. *See id.* at 593.

102. *See id.* at 593, 598 (describing the injury incurred by a dissenter who has the perception that she is being forced by the state to pray in a manner against her conscience). *But see id.* at 639 (Scalia, J., dissenting) (recognizing, under the majority's reasoning, recitation of the Pledge of Allegiance, which includes the phrase "under God," would raise the same kind of Establishment Clause issue).

103. *See id.* at 641-42 (Scalia, J., dissenting) (accepting the majority's proposition that the Constitution precludes government coercion of religion but rejecting and dismissing the Court's definition of coercion as "psycho-coercion" as compared to legal coercion, a position that he advocates); *see also* Levy, *supra* note 1, at 159 ("The Rehnquist-Scalia wing [sic] favors a coercion test for determining violations of the [E]stablishent [C]lause.").

104. *See* LEVY, *supra* note 1, at 159 (noting the flaw in the coercion test is that it would make the Establishment Clause repetitive of the Free Exercise Clause, which protects against coercion based on religion).

105. *See supra* note 88 (discussing how *Lemon* remains the appropriate standard for lower courts to follow).

106. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (reasoning government endorsement of religion more directly infringes the Establishment Clause than does excessive entanglement); *supra* notes 93-98 and accompanying text.

107. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (recognizing the constitutional prohibition against coercion designed to establish a religion is one of the central principles of the Establishment Clause); *supra* notes 99-104 and accompanying text.

108. *See Lemon*, 403 U.S. 602, 612-13 (1971) (enunciating what is now the prevailing test under the Establishment Clause); *supra* notes 82-87 and accompanying text.

arguing the Court manipulates the test to achieve its desired conclusion.[109] As evidenced by the Justices' suggested alternative approaches, the Court is not completely satisfied with the *Lemon* test.

D. The Secularization Approach

The evolution of the Establishment Clause,[110] culminating with the *Lemon* test, has resulted in a secular purpose and effect test. Yet, several problems inhere with this current philosophy. First, the Supreme Court has failed to define an unambiguous definition of the term "secular."[111] Second, the lack of a clear definition precludes public actors from determining when their actions are secular in nature.[112] Third, requiring secularity might conflict with other constitutional guarantees, namely the Free Speech Clause and Free Exercise Clause of the First Amendment.[113] Perhaps, as an effort to overcome these flaws in the *Lemon* secularity requirement, the Court has determined certain expressions and practices have become sufficiently secularized by virtue of their context or tradition to justify

109. *See supra* notes 88, 92 (opposing the use of the *Lemon* analysis).

110. From *Everson* to *Lemon*, the Court's guiding requirement when applying the Establishment Clause shifted from "religious neutrality" to secularity. *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (finding the First Amendment required religious neutrality); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (interpreting the Establishment Clause to require a "wall" of separation between Church and State); Zorach v. Clauson, 343 U.S. 306, 312 (1952) (adopting a more accommodationist view of the First Amendment and accepting the premise that church and state should be separated, but recognizing that separation in "every and all respects" would defy common sense); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (suggesting the Establishment Clause means government must maintain "strict neutrality" without aiding or opposing religion); *Lemon*, 403 U.S. at 612-13 (1971) (holding the Establishment Clause requires a statute to have both a secular purpose and effect and to refrain from excessive entanglement between church and state).

111. *See* Smith, *supra* note 2, at 999-1000 (articulating the ambiguity of "secular," as the Court views it). "Although courts have applied the secular purpose and effect requirements for at least a quarter of a century, they have yet to arrive at any clear, consistent conception of what 'secular' means. Instead, courts employ the concept of the 'secular' in at least two different senses: the 'exclusionary' and the 'inclusive.'" *Id.* *See also* Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting) ("The secular purpose prong has proved mercurial in application because it has never been fully defined."). Black's Law Dictionary defines "secular" as "[w]orldly; as distinguished from spiritual." BLACK'S LAW DICTIONARY 1356 (7th ed. 1999).

112. *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE 25 (1984) ("In everyday fact, people do not and cannot bifurcate themselves so at one moment they are thinking religiously and at another secularly, so to speak."); *see also* Frederick Mark Gedicks, *Some Political Implications of Religious Belief*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 429-32 (1990) (suggesting religion believers experience religious spirituality at both a conscious and an unconscious level and concluding the believer cannot escape religion's influence on behavior at the unconscious level).

113. *See* Smith, *supra* note 2, at 989-99 (arguing the interpretations of separate constitutional provisions should remain internally consistent).

circumventing the *Lemon* analysis.[114] To achieve this desired result, the Court, without explicit explanation,[115] decides initially not to subject certain practices to the *Lemon* test, or, at a minimum, to weaken the demands of *Lemon*. The Court's analysis of historical religious expressions demonstrates this scenario.

"Secularization"[116] remains the Court's justification for upholding the legitimacy of historical religious expressions and other overtly religious practices.[117] In examining practices that otherwise would fail existing scrutiny under an objective application of the Establishment Clause, the Court upholds the legitimacy of the religious practices by manipulating or loosening the *Lemon* test;[118] or, by rationalizing the constitutionality of the practices for other reasons, namely tradition and context.[119] Indeed, one commentator described secularization as the "Supreme Court's determination that practices and symbols

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114. *See infra* notes 121-122 and accompanying text (discussing the Court's loosening and flat rejection of the *Lemon* analysis after deeming the challenged practice secular).

115. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 794-95 (1983) (rationalizing the Court's disinclination to strike down the content of a chaplain's convocation in a state legislature by simply concluding, without any supporting authority, that the prayer did not evidence an attempt to proselytize a particular faith). The *Marsh* majority failed even to discuss *Lemon*, much less explain why it did not apply the *Lemon* test, in spite of the obvious entanglement issues implicated by the chaplaincy practice. *See id.* at 800-01 (Brennan, J., dissenting) ("[I] have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.").

116. *See* Furth, *supra* note 4, at 579-80 (describing "secularization" as the preservation of symbols and practices, such as invocations of God and the Pledge of Allegiance, which many people find fundamental to the American identity); *see also* Gedicks, *supra* note 112, at 432 (acknowledging "secularization" originally meant "merely the transfer of legal title to ecclesiastical property to individuals and the state for nonecclesiastical uses"). "[S]ecularization in many circles of contemporary American life has come to mean the total and mandatory exclusion of religious influence from large and important spheres of American life—from public education, government, law and politics." *Id.*

117. *See* Furth, *supra* note 4, at 580 (criticizing the secularization approach as "strained legal justification").

118. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 679-86 (1984) (noting the Court is not confined to the *Lemon* test when deciding Establishment Clause challenges). In *Lynch*, the Court essentially secularized the practice of displaying a crèche, using the *Lemon* prongs, but focused its inquiry on "the context of the Christmas season." *Id.* at 679.

119. *See* Fox, *supra* note 11, at 199-201 (summarizing the Court's evolution in the Establishment Clause analysis from strict application of the *Lemon* test to a broader analysis employing such inquiries as the "endorsement test," requiring an examination of the challenged practice by a "reasonable observer" who is familiar with the history and context of the religious display, and the "historical-precedent" test); Furth, *supra* note 4, at 587 (noting the Court's invocation of secularization "is clear evidence that the Court is willing to look beyond the language of the Establishment Clause in order to ascertain whether or not practices are constitutional").

which were once religious have lost their religious significance, through either temporal or contextual erosion."[120]

The Supreme Court applies its secularization analysis in two ways. First, the Court employs the *Lemon* test in secularizing a practice, achieving a result inconsistent with the demands of the *Lemon* test.[121] Alternatively, the Court uses tradition and context to forego the *Lemon* test, uphold a practice, and deem the practice sufficiently secular.[122] The Court employs secularization on a case-by-case basis[123] and its rationale might turn on the practice's long and familiar tradition rather than the "content of its meaning."[124] Thus, the Court perceives certain practices and invocations as symbols of national or historical importance rather than as rituals of religious significance.[125] To banish them somehow would appear "un-American."[126]

1. The dawn of secularization—Marsh v. Chambers

The concept of "secularization" can be traced back to *Marsh v. Chambers*,[127] marking the first time the Supreme Court deviated from its methodological application of *Lemon* in the 1980s.[128] In *Marsh*, a taxpayer and state legislator challenged the Nebraska legislature's

120. Furth, *supra* note 4, at 584.

121. *Compare Lynch*, 465 U.S. at 679-86 (applying *Lemon* to the display of a crèche but also emphasizing context and tradition to find the display sufficiently secular to withstand constitutional scrutiny), *with* County of Allegheny v. ACLU, 492 U.S. 573, 598-600 (1989) (upholding the appellate court's application of *Lemon* that found a crèche display violated the Establishment Clause).

122. This tactic is most apparent in *Marsh*, in which the Court made no mention of *Lemon* but upheld the practice of legislative prayer based on history and tradition. *See* Marsh v. Chambers, 463 U.S. 783, 792-95 (1983) (suggesting the importance of historical tradition outweighed an ostensible violation of the Establishment Clause under a purely constitutional analysis).

123. The Court has upheld daily public prayer in legislatures but struck down the same in schools. *Compare Marsh*, 463 U.S. at 792 (declaring the opening a legislative session with a prayer has become "part of the fabric of our society"), *with Schempp*, 374 at 212-24 (noting that although religion has enjoyed a close relationship with American history and government, requiring the recitation of Bible passages in public schools is unconstitutional). *See* Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 41 (1993) ("The Court has failed to offer a principled justification for holdings that banished civic prayers from public schools . . . but permitted civic prayers in state legislative assemblies.").

124. Hall, *supra* note 123, at 50.

125. *See Schempp*, 374 U.S. at 303 (Brennan, J., concurring) ("[W]e have simply interwoven the motto ['In God We Trust'] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.").

126. Furth, *supra* note 4, at 584 (recognizing American's "deep-seeded attachment" to traditional religious practices and invocations).

127. 463 U.S. 783 (1983).

128. *See supra* note 91 (setting forth examples of the Court's application of *Lemon* to several cases in the 1980s).

practice of opening each session with a prayer by a publicly funded chaplain.[129] The United States Court of Appeals for the Eighth Circuit applied the *Lemon* test and held the chaplaincy practice violated all three prongs of *Lemon*.[130] The circuit court noted the legislature's practice of appointing the same minister for sixteen years, publishing his prayers, and funding this practice through public coffers, promoted a particular religion and led to entanglement.[131] The Court of Appeals, therefore, prohibited Nebraska from engaging in any aspect of its established chaplaincy practice.[132]

On appeal, the Supreme Court reversed the Eighth Circuit by declining to apply the *Lemon* test.[133] Instead, the Court focused on historical patterns,[134] emphasizing the Framers did not intend for the Establishment Clause to forbid employing legislative chaplains.[135] Recognizing historical analysis depends on revisionist interpretation of ambiguous facts,[136] Justice Burger determined the legislature's use of a chaplain constituted more "than simpl[e] historical patterns."[137] Justice Burger further noted that in the same week Members of the First Congress voted to appoint and pay a Chaplain for each chamber of Congress, they also approved the draft of the First Amendment.[138] In upholding Nebraska's use of a legislative chaplain, the Court

129. *See Marsh*, 463 U.S. at 785 (reiterating the genesis and history of the case).

130. *See id.* at 786 (reiterating the Court's conclusions that the purpose and effect of repeatedly selecting the same minister to perform the opening prayers was to further a religion, and that publicly funding the practice constituted entanglement).

131. Chambers v. Marsh, 675 F.2d 228, 234-35 (8th Cir. 1982) (comparing the chaplaincy program with a voluntary religious invocation practice at county board hearings in *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979)).

132. *See id.* at 235 (proscribing the state from continuing its traditional chaplaincy practice).

133. *See* Fox, *supra* note 11, at 199-201 (describing the Court's failure to use *Lemon* in *Marsh* as establishing a "historical-precedent test," which "requires the court to examine historical evidence in discerning the original intent of the framers regarding the Establishment Clause").

134. *See Marsh*, 463 U.S. at 790 ("[H]istorical 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 the practice authorized by the First Congress—their actions reveal their intent.").

135. *See id.* at 790-91 (citing several Supreme Court cases construing the meaning the Framers intended to give to the Establishment Clause).

136. *See id.* at 791 (explaining evidence of opposition to chaplain-led prayer among the Founding Fathers does not weaken the impact of the historical argument but rather "infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society").

137. *Id.* at 790.

138. *See id.* at 790-91 (reasoning the close temporal proximity of the First Congress' approval of the First Amendment and appointment of chaplains could not possibly mean they intended the Establishment Clause to forbid what they had just declared acceptable).

reasoned it would be inconsistent with the letter and spirit of the First Amendment to impose a more exacting constitutional standard on the state than the Framers intended for the Federal Government.[139]

Relying on history and tradition, the Supreme Court upheld the Nebraska legislature's practice of opening each session with the recitation of nondenominational prayers.[140] The Court's use of historical precedent in *Marsh* demonstrates that history can be used as "a vehicle for altering the religiousness of certain practices and symbols."[141] The Court's use of history bypasses the *Lemon* test; therefore, employing a legislative chaplain is sufficiently secular.[142]

2. Secularization of historical religious expressions

In the context of historical religious expressions, secularization justifies their incompatibility with current Establishment Clause jurisprudence.[143] The Supreme Court has yet to explicitly secularize historical religious expressions, because it has not ruled on any challenges to historical religious expressions.[144] The Court denied

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139. *See id.* at 791 ("[I]t would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.").

140. *See* Marsh v. Chambers, 463 U.S. 783, 783 (1983) (holding the Nebraska legislature's practice of opening each session with a prayer led by a chaplain paid with public funds did not violate the Establishment Clause, even though clergy of only one denomination had been selected for sixteen years to open each session).

141. Furth, *supra* note 4, at 587 (explaining that the Court analyzes history not only for original intent, but also for its perspective on the religious nature of symbols and practices).

142. *See Marsh*, 463 U.S. at 793 ("We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church."). The Court declines to evaluate whether the prayer itself is secular:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-95.

143. *See* Lynch v. Donnelly, 465 U.S. 668, 674-79 (1984) (finding that "[t]here is an unbroken history of official acknowledgement" of religion, including the Pledge of Allegiance, "In God We Trust," and the National Day of Prayer, that are part of American national heritage, and to which the Court has declined to apply the rigid, absolutist view of the Establishment Clause); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring) (noting that reciting the Pledge of Allegiance with its reference to God is merely an allusion to what many understand to be a "historical fact" that the United States was founded "under God"); Sherman v. Cmty. Consol. Sch. Dist., 980 F.2d 437, 439 (7th Cir. 1992) (rejecting a challenge to the Pledge of Allegiance's reference to God as an Establishment Clause violation provided that participation in reciting the Pledge is not compulsory).

144. *See Sherman*, 980 F.2d at 445 (including the pledge of allegiance among "ceremonial invocations of God" in American civil life that are not establishments of

certiorari to a case challenging the constitutionality of the words "One Nation Under God" in the Pledge of Allegiance.[145] Leonard Levy, author of *The Establishment Clause*, believes that even though historical religious expressions may be unconstitutional, "wisdom sometimes dictates against pressing a suit."[146] Because the Court is not ignorant to public opinion and does not want to overturn historical religious expressions, writes Levy, those passionate about complete separation of church and state should focus on the broad purpose of the Establishment Clause, and not challenge every potential violation.[147]

The Court, in dicta, has alluded to the secularization of historical religious expressions in Establishment Clause cases.[148] The Court cited "In God We Trust" and "One Nation Under God" as examples of our nation's religious heritage, noting it would probably not accommodate such phrases using a "rigid, absolutist view of the Establishment Clause."[149] The Court prefers an analysis based on the context of the challenged practice.[150] Moreover, according to Levy, the Court has "referred to 'ceremonial deism' as a way of sweeping under the rug theistic practices like the invocation 'God save this

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religion); *see also* LEVY, *supra* note 1, at 240-41 ("The Court had the political good sense in 1993 to refuse consideration of a case in which an atheist, with ACLU support, sought to prevent daily recitation of the pledge of allegiance because of its 'one nation under God' language."). Levy continues to note that if the Court decided the issue, it might have to rule the language unconstitutional. *See id.* at 241. He asserts further that the reference to God in the pledge is "literally religious," but has "lost all religious significance and ought not be taken seriously." *Id.*

145. *See Sherman*, 508 U.S. at 950 (declining to consider the decision of the Seventh Circuit).

146. LEVY, *supra* note 1, at 240 (asserting that the broad purpose of the Establishment Clause does not support challenging every religious-based incident).

147. *Id.* (proffering the notion that the public should allow the "wall of separation" to "leak a little at the seams, [because] if it did not leak a little, pressure on the wall might generate enough force to break it"). Levy also notes that given that historical religious expressions now have de minimus religious significance, "atheists should be howling in glee at the corruption of religion by irrelevant ceremonial references to God on our money or in our pledge of allegiance that schoolchildren so often garble." *Id.* at 241.

148. *See* Furth, *supra* note 4, at 585 (suggesting that even before the Supreme Court employed secularization as a rationale for upholding some religious expressions, it referred to secularization and historical tradition in earlier Establishment Clause cases).

149. *See* Lynch v. Donnelly, 465 U.S. 668, 674-77 (1984) (naming the National Day of Prayer and Proclamations to commemorate Jewish Heritage Week as an "official acknowledgement . . . of the role of religion in American life").

150. *See id.* at 679 (noting that the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area" and "in this case the focus of [the Court's] inquiry must be on the crèche in the context of the Christmas season."). The Court cites two cases in which it did not find *Lemon* useful. *See id.* at 679 (stating that the Court did not employ *Lemon* in deciding *Marsh v. Chambers*, 463 U.S. 783 (1983) or *Larson v. Valente*, 456 U.S. 278 (1982)).

honorable Court' or 'In God We Trust.'"[151] The difficulty arises in determining which practices will be swept under the rug.[152] Cases after *Marsh*[153] demonstrate the inconsistencies of secularization and its detrimental effects on religion and society.

II. THE FLAWS OF CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE

A. But for Secularization, Historical Religious Expressions Would Fail Current Establishment Clause Jurisprudence

The major inconsistency in current Establishment Clause jurisprudence (including the *Lemon*, endorsement, and coercion tests)[154] is its failure to account for historical religious expressions.[155] Perhaps, because of this deficiency, the Court developed the secularization rationale, justifying historical religious expressions on the basis of tradition or their context. In the absence of secularization, historical religious expressions would violate the *Lemon* test, O'Connor's endorsement test, and Kennedy's coercion test.[156]

Under *Lemon*, historical religious expressions would likely violate the Establishment Clause.[157] Using the example of the National Day

151. LEVY, *supra* note 1, at 240 (illustrating that permitting seemingly religious content does not weaken the wall of separation between church and state, and may reinforce it).

152. *See* LEVY, *supra* note 1, at 240-41 (highlighting the struggle between accomodationists and separationists).

153. *See infra* Part II.B.1 (articulating the inconsistencies of secularization in the cases following *Marsh*—*Lynch v. Donnelly* and *County of Allegheny v. ACLU*).

154. *See supra* Part I.C (discussing the origins and applications of current Establishment Clause jurisprudence).

155. *See infra* Part I.D (describing the introduction of the secularization approach to remedy the Court's lack of application of historical significance to Establishment Clause cases).

156. One potential obstacle to challenging a historical religious expression is the standing doctrine. As the Supreme Court articulated in *Allen v. Wright*, 468 U.S. 737, 750 (1984), the standing doctrine maintains that the Constitution limits Supreme Court jurisdiction to hearing "actual 'cases' and 'controversies.'" Justice O'Connor, writing for the majority, determined that in order for a litigant to have standing, he or she must demonstrate: (1) a distinct and palpable injury; (2) the injury is traceable to the defendant; and (3) the injury is redressable by the Court's relief. *See Allen*, 468 U.S. at 751 (noting that a litigant's injury cannot be "abstract" or "hypothetical" and that relief from the injury must be "likely" to follow from a favorable decision). In *Allen*, the Court decided that the plaintiff's claimed injury of stigmatic discrimination was not sufficient to establish standing. *See id.* at 757 (holding that plaintiff's injury was not sufficiently traceable to the government-provided financial aid to discriminatory private schools or to the federal tax exemptions provided to racially discriminatory private schools). Using the example of U.S. currency, it is questionable whether or not there is a distinct and palpable injury that arises from using money imprinted with the words "In God We Trust."

157. *See* Marsh v. Chambers, 463 U.S. 783, 786 (1983) (noting that when the Court of Appeals applied the *Lemon* test to the Nebraska legislature's chaplaincy practice, it

of Prayer,[158] the incompatibility of *Lemon* with this historical religious expression is readily apparent. First, the government's declaration of a National Day of Prayer does not have a secular purpose.[159] Rather, the Act's intent is to set aside a day for the people of the United States to "turn to God in prayer and meditation at churches, in groups, and as individuals."[160] The Day earmarks one day a year as a day to pray. Although the National Day of Prayer does not necessarily favor one religion over another, it does favor religion over non-religion, which is one of the core prohibitions of current Establishment Clause jurisprudence.[161] Second, it likely would not have a secular effect under *Lemon*. This act resulted in widespread religious activity.[162] Thus, the effect of the act is not secular at all, but entirely religious.

Finally, a court would likely find the National Day of Prayer an excessive entanglement of state action with religion. Congress passed the statute authorizing the President to declare a National Day of Prayer.[163] This act involves two branches of government promoting religion, or at least religious observance.[164] For the foregoing reasons, a court could find that the National Day of Prayer—a historical religious expression—violates *Lemon*. Furthermore, Congress enacted the National Day of Prayer less than fifty years ago, and amended it relatively recently;[165] therefore, the Court would unlikely

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concluded that the practice violated all three prongs of *Lemon*). The Supreme Court declined to apply *Lemon* to *Marsh*, instead opting for an historical analysis, in part because the appellate court found the practice failed the *Lemon* test. *See id.* at 793-95. The Court, relying on history, upheld the constitutionality of Nebraska's legislative chaplain. *See Marsh*, 463 U.S. at 792 (observing that the practice of opening legislative sessions with prayer has become part of the fabric of American society).

158. *See* 36 U.S.C. § 169h (1988) (defining the National Day of Prayer).

159. *See National Day of Prayer Task Force*, *supra* note 23 (explaining the National Day of Prayer is "an annual event established by an act of Congress which encourages Americans to pray for our nation, its people and its leaders").

160. 36 U.S.C. § 169h (providing the statutory definition of the National Day of Prayer).

161. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (recognizing that the Establishment Clause means, at least, that the government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another.").

162. *See National Day of Prayer Task Force*, *supra* note 23 ("In 1999 more than 20,000 events were held nationwide. For 2001, prayer observances are scheduled for all 50 states. Local volunteers hold a variety of events ranging from prayer breakfasts, Bible reading marathons, concerts of prayer, rallies, and student flag pole gatherings.").

163. *See* 36 U.S.C. § 169h (describing the National Day of Prayer as a day that "[t]he President shall set aside").

164. *See id.* (declaring the National Day of Prayer as a day "on which the people of the United States may turn to God in prayer and meditation").

165. The National Day of Prayer was enacted on April 17, 1952 and amended on May 5, 1988. *See* An Act to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated, Pub. L. No. 100-307, 102 Stat. 456 (codifying the National Day of Prayer).

determine that it is part of our national heritage[166] or a reference to a "historical fact."[167]

Applying Justice O'Connor's Endorsement test to historical religious expressions has similar results.[168] In her concurrence in *Lynch*, Justice O'Connor replaced the first prong of *Lemon*, secular purpose, with "whether the government intends to convey a message of endorsement or disapproval of religion."[169] This refined approach requires the government's action to endorse or disapprove of religion to violate the Establishment Clause.[170] Codification of the National Day of Prayer endorses religion. It promotes the President's designation of a day each year on which people are to "turn to God in prayer and meditation at churches, in groups, and as individuals."[171] Although the statute does not specifically encourage the people of the United States to adopt religion, its promotion of church and prayer-related activities would likely endorse religion sufficiently to violate Justice O'Connor's test.[172]

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166. *See* Lynch v. Donnelly, 465 U.S. 668, 676 (1983) (justifying the Pledge of Allegiance and "In God We Trust" as allusions to American national religious heritage).

167. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J. concurring) (construing "Under God" in the Pledge of Allegiance as a suggestion of what many believe is an historical fact of how the United States was founded).

168. *But see Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring) (referring to legislative prayers, government declaration of Thanksgiving as a public holiday, "In God We Trust," and "God save the United States and this honorable court" as acceptable expressions under the Establishment Clause).

> Those government acknowledgments of religion serve, in only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 693 (O'Connor, J., concurring).

169. *Id.* at 691 (O'Connor, J., concurring) (proposing an alternative interpretation of the *Lemon* test).

170. *See generally* Loewy, *supra* note 95, at 1051 (proposing a universal implementation of Justice O'Connor's Endorsement test, in the hope that its application will ascertain neutrality towards religion and prevent the government from imposing an "insider/outsider message" on religious minorities).

171. 36 U.S.C. § 169h (describing the Day of Prayer).

172. In recent applications of Justice O'Connor's Endorsement test, the Supreme Court found Establishment Clause violations. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315-16 (2000) (stating that the school district implemented its policy to endorse school prayer and thus was unconstitutional); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 348 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2706 (2000) (noting that because the disclaimer advanced religion, it failed the second prong of the *Lemon* test and also failed the Endorsement test). In *Tangipahoa*, a school board required the reading of a disclaimer maintaining that evolution lessons were intended to inform students of the scientific theories and not to dissuade Creationism or Biblical beliefs. *See Tangipahoa*, 120 S. Ct. at 2707 (Scalia, J.,

Justice Kennedy's coercion test requires the highest level of government sponsorship of religion for a practice to violate the Establishment Clause.[173] His test maintains the "government may not coerce anyone to support or participate in religion or its exercise . . . ."[174] Thus, instead of merely requiring a secular purpose, or forbidding endorsement of religion, Justice Kennedy's test demands that the government refrain from compelling or forcing religion on anyone.[175] Some of the historical religious expressions would probably pass constitutional muster under this analysis.[176] The Pledge of Allegiance, however, would likely fail the coercion test. The Court has already determined that mandating that students recite the pledge violates the First Amendment, as it compels speech or requires an affirmation of a belief with which a person may disagree.[177] As such, compulsion is analogous to coercion, and one

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dissenting) (citing the lengthy resolution of the Tangipahoa Parish, Louisiana, Board of Education, which articulates the disclaimer). This disclaimer seems to be much less of an endorsement of religion than the National Day of Prayer. The disclaimer merely states that the lessons are not intended to dissuade religion, while the National Day of Prayer specifically encourages Americans to use the day to pray.

173. *See* Bruce P. Merenstein, *Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of Marsh v. Chambers and the School Prayer Cases*, 145 U. PA. L. REV. 1035, 1087-88 (1997) (noting that the major disagreement over Justice Kennedy's "fairly narrow coercion-based analysis" concerns the definition of coercion); *cf.* Nancy E. Drane, Comment, *The Supreme Court's Missed Opportunity: The Constitutionality of Student-led Graduation Prayer in Light of the Crumbling Wall Between Church and State*, 31 LOY. U. CHI. L.J. 497, 510-11 (2000) (acknowledging that Justice Kennedy's test is difficult to apply because determining whether the public feels coerced is a complex psychological and emotional analysis).

174. Lee v. Weisman, 505 U.S. 577, 587 (1983) (asserting the Establishment Clause's fundamental limitations on government).

175. *See id.* at 587-88 (describing Kennedy's coercion test as a measure of a government's imposition of religion).

176. Some historical religious expressions may not rise to the level of coercing religion, because the public is free to choose not to acknowledge or support them and other members of the public will likely not infer support. Justice Kennedy described the coercive nature of prayer at high school graduations in *Lee v. Weisman*, by explaining that even if one disagreed with the prayer, that person's decision to remain silent still signaled acceptance. *See* Lee v. Weisman, 505 U.S. 577, 593 (1992) (noting that "[i]t 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."). Using the example of the National Day of Prayer, the mere existence and codification of this day does not infer support or acceptance of it from a majority of Americans, nor does it coerce their participation or acceptance of the day. Conversely, there exist many reasonable ways to express dissatisfaction with this day.

177. *See* West Virginia v. Barnette, 319 U.S. 624 (1943) (ruling that a school requirement mandating children pledge allegiance to the U.S. flag violates the First Amendment because it compels speech). The Court further reasoned that Government cannot compel an affirmation of a belief or a state of mind, ultimately determining that a student cannot be required to pledge allegiance to the flag. *See id.* at 634 ("To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."); *see also* Wooley v.

could argue the inscription of the Pledge of Allegiance into the United States Code with the words "One Nation Under God" coerces people to support religion.[178]

B. Secularization is an Inconsistent Solution

The aforementioned analysis demonstrates that there exists a substantial likelihood certain historical religious expressions would not conform to current Establishment Clause jurisprudence. Presently, however, the Court has an alternative approach, the secularization rationale, under which the Court would likely justify historical religious expressions as sufficiently secular.[179] Through secularization, the Court has essentially defined its own "wall of separation," preventing historical religious practices and expressions from being struck down by current Establishment Clause jurisprudence.[180]

In addition to Establishment Clause jurisprudence being inconsistent as a whole,[181] the secularization approach is internally

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Maynard, 430 U.S. 705 (1977) (determining that citizens of New Hampshire were not required to display "Live Free or Die" on their license plates). In *Wooley*, the court determined that residents of New Hampshire were not required to be carriers of a state motto that they did not endorse. *See id.* at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). Moreover, in *Sherman v. Community Consolidated School District*, 980 F.2d 437, 441 (7th Cir. 1992), the Seventh Circuit decided that a student and his father had standing to challenge the constitutionality of a statute requiring students' presence during the Pledge of Allegiance, because they found the words "Under God" objectionable. The Supreme Court, however, denied certiorari to the case. *See* Sherman v. Cmty. Consolidated Sch. Dist., 980 F.2d 437, 441 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

178. *But see Sherman*, 980 F.2d at 445-46 (7th Cir. 1992) (declaring that use of the phrase "Under God" in the Pledge of Allegiance is a ceremonial invocation of God and does not make recitation of the Pledge a form of prayer in school, which would violate the Establishment Clause). The District Court applied *Lemon* to the Pledge and found that it passed each prong. *See id.* at 440 (noting that the District Court reasoned that in addition to having a secular purpose, a secular effect, and not excessively entangling government and religion, the statute was not coercive as written). The Court of Appeals in *Sherman* found it unnecessary to invoke *Lemon* and rested its decision solely on the fact that the writers of the Constitution did not intend for ceremonial invocations of God to be determined as establishments of religion. *See id.* at 445-46 (recognizing that when Madison and Jefferson wrote about their support for separation of church and state, they invoked the grace of God for support).

179. *See supra* Part I.D and accompanying notes (delineating the secularization analysis).

180. *See* Furth, *supra* note 4, at 580 (observing that "[a]lthough secularizing religious practices conveniently preserves the inclusion of symbols and practices that many Americans understand as fundamental to the American identity, it also threatens the purity and integrity of both government and religion").

181. *See* Evans, *supra* note 2, at 99 (arguing for a new approach to Establishment Clause jurisprudence that would bring a degree of consistency to the current

inconsistent. The Court has established no clear formula for determining when it will deem a practice sufficiently secular to avoid an Establishment Clause violation.[182] For example, in *Marsh*, the Court decided that public prayer in a legislature does not violate the Establishment Clause because it is sufficiently rooted in history and tradition.[183] When the prayer is in schools, however, the Court has deemed it unconstitutional.[184]

1. The inconsistencies of secularization in caselaw—Lynch v. Donnelly *and* County of Allegheny v. ACLU

Following *Marsh*, the Court applied a secularization theory to a pair of cases in the 1980s, *Lynch v. Donnelly*[185] and *County of Allegheny v. ACLU*.[186] The subject of these cases is religious public displays—both involving the image of a crèche[187]—but the inherent inconsistencies in the secularization approach carry over to historical religious expressions. Although a crèche may not be a historical religious expression as defined in this Comment, it is a historical symbol of religion, with arguably similar characteristics as historical religious expressions.[188]

In *Lynch*, the Court applied *Lemon*, but relied more heavily on context in holding that a crèche displayed on government property

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inconsistent area of law). *But see* Loewy, *supra* note 93, at 1070 (citing Professor Phillip Johnson's opinion that the "muddled and internally inconsistent" religion cases are acceptable because "[o]ne major objective of the First Amendment is to keep the public peace on religious issues, and one way of doing this is for every religious and antireligious group to feel that government is neither squarely on its side nor squarely on the other side.").

182. *See* Furth, *supra* note 4, at 591-92 (pointing out that the lack of consensus among the justices in *Lynch* and *Allegheny*, and the inconsistent results of the cases, "make it difficult to distill any coherent rule from these cases").

183. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (holding that the practice of opening the Nebraska legislature with prayer is "part of the fabric of society," and, thus, does not violate the Establishment Clause).

184. *See* Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 212-24 (1963) (holding that although religion has been tied closely with American history, prayer and Bible reading in public schools violates the Establishment Clause).

185. 465 U.S. 668, 679-81 (1983) (justifying the inclusion of a crèche in a holiday display as a sufficiently secular recognition of a national holiday).

186. 492 U.S. 573, 598-99 (1989) (distinguishing the instant case from *Lynch* and finding that a crèche, when displayed alone in the grand stairway of a courthouse, is an endorsement of religion).

187. *See* THE MERRIAM-WEBSTER DICTIONARY, *supra* note 97, at 186 (defining crèche as "a representation of the nativity scene").

188. *Lynch*, 465 U.S. at 680 (describing the City of Pawtucket's display of the crèche as recognition of "a significant historical religious event long celebrated in the Western World."); *see also supra* Introduction (detailing the history of the historical religious expressions that are the subject of this Comment as recognition of the long held union between religion and government).

did not violate the Establishment Clause.[189] The Court held a crèche, when placed in a city park among several other Christmas decorations including a Santa Claus house, reindeer, an elephant, a teddy bear, and others, was sufficiently secular to pass Establishment Clause scrutiny.[190] Adhering to *Lynch*, the Court in *Allegheny* noted, although a crèche can in some cases be secularized, when placed alone in a stairway, it is not sufficiently secular to guard it from Establishment Clause scrutiny.[191]

These decisions crystallize the disparity caused by the secularization analysis: in some situations, a crèche is secular, but in other situations, it is not. Similarly, in *Allegheny*, the Court found that a menorah, when placed next to a 45-foot Christmas tree, did not violate the Establishment Clause.[192] From these cases, the only perceivable rule is: the placement of an object and its surroundings indicate whether it will be deemed secular.[193] Such a rule appears illogical and capricious. Further, no mention is made regarding the proper placement and the necessary number of surrounding objects that make a display secular. Instead, the justices draw arbitrary lines as to whether a display is sufficiently secular based on the fact-specific inquiry of context and surroundings.[194]

2. The inconsistencies of secularization of historical religious expressions

The secularization of historical religious expressions contributes to the internal inconsistency of the justification. The Court has noted "In God We Trust" and "One Nation Under God" are references to our national heritage and are not accommodated by current

189. *Id.* at 679 (holding that "in the context of the Christmas season," the crèche has a secular purpose of celebrating the holiday).

190. *Id.* at 680 (maintaining that the crèche, in this context, "depicts the historical origins of this traditional event long recognized as a National Holiday").

191. *See Allegheny*, 492 U.S. at 599-600 (noting that the grand staircase on which the crèche sits is the "main" and "most beautiful part" of the building). The Court opined that "[n]o viewer could reasonably think that [the crèche] occupies this location without the support and approval of the government." *Id.*

192. *See id.* at 588 (accepting the constitutionality of the menorah "in light of the Court's disposition of the Establishment Clause"); *see also* Furth, *supra* note 4, at 602 (pointing out that not all Jews were satisfied with Justice Blackmum's plurality opinion in *Allegheny* describing the menorah as "simply a recognition of cultural diversity").

193. *See* Furth, supra note 4, at 591-92 ("[T]he [*Lynch* and *Allegheny*] opinions do stand for one discernible proposition: where a practice or symbol is perceived as integral to American culture, or where the context of a display which includes religious articles creates an impression of mere holiday celebration or religious pluralism, the symbols will be recharacterized as secular."); *cf. Allegheny*, 492 U.S. at 598 ("[T]he effect of a crèche display turns on its setting.").

194. *See* Furth, *supra* note 4, at 580 (recognizing that the Court's adoption of this fact-specific inquiry prevents the more daunting question of what is at stake in defining practices as either truly religious or secularized).

Establishment Clause tests.[195] The Court arguably based this determination on the context of the expressions and may not make the same determination in other situations. For example, in *Stone v. Graham*,[196] the Court held a statute requiring the posting of the Ten Commandments in public school classrooms violated the Establishment Clause.[197] The Ten Commandments, like the historical religious expressions analyzed in this Comment, have historical, religious, and legal significance.[198] Based on the Court's treatment of historical religious expressions, though, a public school could presumably post a copy of the Pledge of Allegiance or "In God We Trust" without violating the Constitution.[199] It seems unlikely a public school student would perceive the posting of the Ten Commandments as any more religious than the forthright declaration "In God We Trust." Thus, the Court's treatment of the Ten Commandments, which "bear a relationship to civilized secular conduct,"[200] and historical religious expressions, only lend credence to the proposition that secularization is an inconsistent approach.

C. Secularization is a Detriment to Religion and Society

In addition to being an inconsistent solution, secularization does a great disservice to both religion and society. In secularization, the Court essentially dilutes the religious import in a certain practice or display, by "imposing a watered-down version of religion on the

195. *See Lynch*, 465 U.S. at 676-78 (citing the Pledge of Allegiance and "In God We Trust" as references to our national heritage); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring) (noting that stating "One Nation Under God" in the Pledge of Allegiance was no more a religious exercise than reading aloud the Gettysburg Address, which contains an allusion to the same "historical fact").

196. 449 U.S. 39 (1980).

197. *See Stone*, 449 U.S. at 41 (concluding that Kentucky's statute had no legislative secular purpose and thus violates the *Lemon* test).

198. *See id.* at 45 (Rehnquist, J., dissenting) ("[T]he Ten Commandments have had a significant legal impact on the development of secular legal codes of the Western World.").

199. *See* LEVY, *supra* note 1, at 197 (stating that a public school could likely post a copy of the Pledge of Allegiance, because the "currency, the coinage, the pledge, and ['The Star-Spangled Banner'] are not sacred texts"); *see also Opinion of the Justices*, 228 A.2d 161, 164 (N.H. 1967) (holding constitutional the posting of "In God We Trust" in New Hampshire public schools). The court commented that "[n]o constitutional provision prohibits a patriotic or ceremonial exercise which may include the singing of patriotic songs, the reading from historical or literary masterpieces . . . , or the recitation of the Pledge of Allegiance even though they may contain some reference to God." *Id.* at 164.

200. LEVY, *supra* note 1, at 197 (arguing that the Court's holding in *Stone* "does not inspire confidence in the separation of government and religion or in the good judgment of the Court.").

general population."[201] For example, in *Lynch*, the Court characterized a crèche, which symbolizes the foundation of Christianity, as "engender[ing] a friendly community spirit of good will in keeping with the season."[202] Thus, because the crèche was surrounded by many generic, secular holiday symbols,[203] it somehow lost its individual religious meaning.

This point is further demonstrated in *Allegheny*, in which the Court held that a crèche in the grand stairwell of a courthouse endorsed religion, but a menorah, placed next to a Christmas tree outside of the courthouse did not.[204] The Court seems to suggest that a crèche is more religious than a menorah. *Lynch* and *Allegheny* seem to imply further that if you dilute the message of a religious symbol enough, perhaps by placing it among secular symbols, then it will not violate the Establishment Clause.[205] Thus, the more a religious symbol begins to look like a generic greeting, the more constitutional protection it will receive. The Court's decision in *Marsh* also degrades religion for similar reasons. Although the Court was trying to preserve history and tradition, "it would, no doubt, come as a surprise to those who offer legislative prayers that their efforts are constitutional only because the Court construes their words to be the functional equivalent of the gavel used to bang a meeting to order."[206]

For similar reasons, the secularization approach also harms society. Although secularization is sometimes characterized as an "acknowledgement"[207] of religion, government support of a particular religious symbol or display often looks like more than acknowledgement.[208] The crèche in *Lynch* and legislative prayer in

201. Furth, *supra* note 4, at 602. *See* Gedicks, *supra* note 2, at 434 ("Public secularization, then, is oppressive to the believer. It requires that she divide and compartmentalize her life at the same time that her religious experiences testify that life is an indivisible and unified whole.").

202. *Lynch*, 465 U.S. at 685.

203. *See id.* at 671 (detailing the City of Pawtucket's display, which included a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing a clown, an elephant, a teddy bear, hundreds of colored lights, and a large banner reading "Season's Greetings," in addition to the crèche at issue in the case).

204. *See Allegheny*, 492 U.S. at 573 (holding that the display of the crèche endorsed religion, but the menorah, next to a Christmas tree, did not endorse religion).

205. *See supra* notes 191 and 193 (describing the importance of context and setting in determining whether a symbol is secularized in the *Lynch* and *Allegheny* cases).

206. Hall, *supra* note 123, at 63.

207. *See Lynch*, 465 U.S. at 677 (describing the National Day of Prayer as an "acknowledgement" of religion); *see also Marsh*, 463 U.S. at 792 (viewing legislative prayer as "a tolerable acknowledgement of beliefs widely held among the people of this country").

208. *See* Furth, *supra* note 4, at 604 (arguing that "[i]ncorporation of religious

Marsh were constitutional because the Court determined them mere acknowledgements of religion based on history and tradition.[209] These decisions, however, do not make the symbol or practice any more neutral or less religious.[210] To the contrary, "[b]y officially incorporating elements of any single religion into civic culture, the government upsets the organic relationships existing among religious communities."[211] Moreover, the Court seems more apt to secularize practices derived from Christianity, thus preferring Christianity over other religions.[212] This consequence results in "religious divisiveness, violating the fundamental principles behind the religion clauses."[213] Thus, the entire purpose of secularization backfires in its process. While attempting to neutralize religious influence, the Court in actuality prefers some religions, namely Christianity, over others.

Secularization essentially provides a shortcut for rationalizing and maintaining religious expressions and practices that can be justified by context or diluted by secular symbols.[214] Because of the foregoing religious and societal injuries resulting from secularization, as well as the inherent inconsistencies in the approach, an alternative Establishment Clause analysis is preferable.

III. THE SOLUTION—A NEW ESTABLISHMENT CLAUSE ANALYSIS

A. Combining Nonpreferentialism and Marsh *is the Most Appropriate Test*

The *Lemon* test resulted in the doctrine of secularity. To be constitutional, a practice must have a secular purpose and effect.[215]

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icons into civic culture suggests that the government *endorses* the particular religion invoked") (emphasis added).

209. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (justifying the constitutionality of legislative prayer on the basis that it has an "unambiguous and unbroken history of more than 200 years"); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (declaring that there was a secular purpose in the display of the crèche as a representation of "the historical origins of this traditional event long recognized as a National Holiday").

210. *See* Furth, *supra* note 4, at 605 ("[T]he crèche is no less Christian than it was before the Court's opinion.").

211. *Id.*

212. *See id.* at 604 (noting that because secularized practices are most frequently derived from Christianity, the Court also is choosing religion over no religion and "Christianity over all").

213. *Id.*

214. *See Marsh*, 463 U.S. at 786-92 (focusing on the history and tradition of legislative prayer instead of subjecting the practice to the *Lemon* test); *Lynch*, 465 U.S. at 679-80 (commanding that the inquiry be on the crèche in the context of the entire display of holiday decorations). "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.* at 680.

215. *See supra* Part I.B and accompanying notes (describing the requirements of

The inherent difficulties in ascertaining what is "secular" and the overwhelming presence of religion in the public realm forced the Court to adopt the secularization rationale.[216] Thus, the Court could uphold certain practices, justifying their inclusion based on context and tradition.[217] The result is two divergent approaches to Establishment Clause analysis—sometimes *Lemon* is strictly applied and followed, and other times, practices are deemed secularized.[218] To provide some consistency to Establishment Clause jurisprudence, and eliminate the difficult determination of what is "secular," a new analysis is appropriate.

A nonpreferentialist theory of the Establishment Clause would provide needed consistency and reconcile the constitutionality of historical religious expressions. "Nonpreferentialism" is defined as the belief the Establishment Clause does not prohibit government aid for religion so long as the government does not support one religion over another.[219] Nonpreferentialism focuses on a theory of the Establishment Clause interpretation much like the mutual cooperation theory.[220] Chief Justice Rehnquist's dissent in *Wallace v. Jaffree* provides perhaps the strongest support for this theory.[221] Rehnquist begins his opinion by dismantling the belief that the Establishment Clause intended to build a "wall of separation."[222] He cites some of the historical religious expressions as evidence of the "absence of a historical basis for this theory of rigid separation."[223]

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the *Lemon* test).

216. *See supra* Part I.D and accompanying notes (articulating the secularization justification).

217. *See supra* Parts I.D and II.B.i and accompanying notes (describing the Court's use of secularization to uphold practices based on context and tradition, as was done in the *Lynch* and *Allegheny* cases).

218. *See supra* Part I.D and accompanying notes (describing the two ways in which the Court applies the secularization rationale).

219. *See* Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 247-48 (1991) (defining three versions of nonpreferentialism: "religious nonpreferentialism," "nonpreference as to matters of conscience," and "nonpreferentialism between religion and nonreligion").

220. *See supra* Part I.A and accompanying notes (examining the different theories of interpreting the Establishment Clause: the strict separation doctrine and the mutual cooperation approach). Like adherents to mutual cooperation, Evans believes that the Establishment Clause was not meant to strictly separate church and state. *See* Evans, *supra* note 2, at 99 (arguing that the clause was written "to prevent the creation of a national church and the federal preference of one" religion over others).

221. Rehnquist has been called "the judicial leader of the nonpreferentialists." LEVY, *supra* note 1, at 113.

222. *See* Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (arguing that the Establishment Clause jurisprudence is based on a "mistaken understanding of constitutional history" and "has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years").

223. *Wallace*, 472 U.S. at 100-07 (citing George Washington's adoption of the

Rehnquist concludes with the philosophy that the Establishment Clause forbids "preference among religious sects or denominations."[224]

Although the Court has not adopted this view, it has not entirely rejected it either.[225] In *Wallace*, written by Justice Stevens, the majority "rejected Justice Rehnquist's conclusions on the basis of precedent, but it did not refute Justice Rehnquist's account of history."[226] Thus, the Court has not disavowed the basis for the nonpreferentialists' position—the historical support for the theory.[227] Nonpreferentialism has also garnered support in cases in which the Court has been hesitant to apply *Lemon*, and looked more to whether there was an endorsement of a particular religious message.[228]

The most appropriate application of nonpreferentialism is the "practicable nonpreferential" standard suggested by Kevin D. Evans,[229] formerly an attorney at the law firm of Schiff, Hardin & Waite in Chicago. Like Justice Rehnquist, Evans argues that the Framers did not intend to prohibit the encouragement or furtherance of religion in a nonpreferentialist manner; they merely sought to forbid the establishment of a national church or religion, or the religious preference of one or more sects.[230] Touted as a "suggested historically justifiable approach to Establishment Clause analysis,"[231] his "practicable nonpreferential" analysis involves two steps.[232] The first inquiry is whether the practice or expression is nonpreferential on its face.[233] The second prong is whether all religions can be treated

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Thanksgiving Proclamation as proof that the Framers did not intend for complete separation).

224. *Id.* at 106.

225. *But see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 876 (1986) (observing that the nonpreferential theory "does not go away despite repeated rejection by the United States Supreme Court").

226. *Id.* at 876.

227. *See* LEVY, *supra* note 1, at 113 (describing the nonpreferentialists' view as relying on the legislative history of the Establishment Clause and its final phrasing).

228. *See* Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (noting that the crèche display implicates "a variety of motives and purposes").

229. *See generally* Evans, *supra* note 2, at 98-103 (suggesting the nonpreferentialist approach as a means of applying the Establishment Clause "in a way least offensive to its intended purpose").

230. *See id.* at 99 (asserting that the Establishment Clause was a "federalism compromise designed to ensure the rights of the states to legislate on matters of religious import," and its only limitation was preventing a national church and the preference of one religion over others).

231. *Id.* at 98.

232. *Id.* at 99 (identifying the two-prong test for nonpreferential practice).

233. *See id.* at 100 (asserting that most Establishment Clause challenges would survive the first prong).

similarly.[234] In other words, the party challenging the practice must demonstrate that similar treatment of a religion or to a non-religious practice, is not possible.[235]

One major criticism of the nonpreferentialism approach is that it relies too heavily on history, and on a selective reading of history.[236] Thus, a nonpreferentialist approach alone may be insufficient. To overcome this criticism, this Comment suggests combining the "practical nonpreferential" approach with a *Marsh* analysis.

The Court's decision in *Marsh* has been oft questioned and criticized as secularizing religion and misapplying history.[237] Moreover, critics have condemned the Court's reliance on "historical patterns" and justification based on "contemporaneous practices" as failing to take into account changing times and treating the Framers as infallible.[238] The crux of the criticisms of *Marsh* focuses on the idea the Constitution is not a static document.[239] Furthermore, as demonstrated in the critique of the secularization approach, a fact-specific inquiry into history for the purposes of achieving secularity is often misguided.

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234. *See id.* at 100 (suggesting that the challenging party also must prove that similar treatment of another religion is impossible).

235. *See id.* at 100 (asserting that to disprove the second prong of the nonpreferentialism analysis, the challenging party must prove factually that all religions could not be treated similarly).

236. *See* LEVY, *supra* note 1, at 112 (stating that "nonpreferentialists are innocent of history, but quick to rely on a few historical facts that, when yanked out of context, seem to provide a patristic lineage to their views").

237. *See* M. Greg Crumpler, *Constitutional Law—Legislative Chaplaincy Program Held Not To Violate the Establishment of Religion Clause*—Marsh v. Chambers, 6 CAMPBELL L. REV. 143, 155 (1984) (explaining that in *Marsh* the Court made no attempt to apply the *Lemon* test and "ignored formerly well-settled principles of neutrality"); *see also* Merenstein, *supra* note 173, at 1062-74 (criticizing the Court's application of history in *Marsh*, and noting that "looking to the eighteenth or even nineteenth century to determine what is constitutionally permissible today would lead to a number of results that are almost universally considered unacceptable").

238. *See generally* Merenstein, *supra* note 173, at 1035 (examining the Court's reasoning in *Marsh* and determining that the Court's two main justifications for the decision are flawed). Using historical patterns as a basis for the decision is illogical because it presupposes "[a]dverse [p]ossession of the Constitution"—the idea that those who violate the Constitution can gain immunity for their longstanding transgressions. *See id.* at 1064-65 ("A half-century of unconstitutional police misconduct would not grant a law enforcement agency adverse possession of the constitutional prohibitions on illegal searches and seizures or violations of due process."). Furthermore, invocation of historical patterns ignores societal change. *See id.* at 1066 (suggesting that there are "numerous examples in which changes in social relationships, cultural attitudes or material conditions led to the updating of constitutional jurisprudence"). The Court's second principle rationale in *Marsh*, defending legislative prayer as an act in which the Framers participated, assumes that the Framers were infallible and reinforces the notion of a static Constitution.

239. *See* Epstein, *supra* note 3, at 2155 (arguing that the Constitution is not "frozen in time" and a belief that it is "frozen in time" leads to a return of Jim Crow laws, segregated schools and other historical practices).

The importance of *Marsh*, however, is underestimated. First, *Marsh* recognized that the *Lemon* analysis fails to take into account history and demonstrated the Court's willingness to forego *Lemon*,[240] even if it resulted in the development of the secularization approach. *Marsh* may have even given incentive to O'Connor and Kennedy to develop their divergent Establishment Clause analyses.[241] Second, a *Marsh* inquiry would likely uphold many of the historical religious expressions, because like the practice of having a legislative chaplain, historical religious expressions can arguably be traced back to the Framers and are part of the "fabric of our society."[242]

Because of the apparent shortcomings of secularization[243] and powerful criticisms of, and dissents in, *Marsh*,[244] a *Marsh* approach

240. *See* Furth, *supra* note 4, at 587 (concluding that the *Marsh* opinion is significant because it is evidence that the Court is willing to look beyond the language of the Establishment Clause and their current modes of interpreting it).

241. Decided in 1983, *Marsh* did not invoke the *Lemon* test, as the Court determined that each feature of the prayer at issue was consistent with historical tradition. *See* Furth, *supra* note 4, at 586 (noting that since the chaplaincy practice was based on history, the Court found no violation of the Establishment Clause). In 1984, Justice O'Connor concurred in *Lynch* and set forth her endorsement test. *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (arguing that "[f]ocusing on institutional entanglement and on endorsement or disapproval of religion" improves the analytical value of the *Lemon* test). Justice O'Connor noted the consistency of her approach with *Marsh*. *See id.* (describing that under an endorsement test, the crèche in *Lynch* would be no more of an endorsement than legislative prayer in *Marsh*, thus both practices would be sustained). In 1992, Justice Kennedy employed his coercion test in the majority opinion in *Lee v. Weisman*. *See* Lee v. Weisman, 505 U.S. 577, 587-93 (1992) (asserting that the Establishment Clause guarantees that government may not coerce anyone to participate in religion and the lack of a reasonable method of dissention can result in perceived acceptance or coercion). Justice Kennedy recognized that although *Marsh* upheld public prayer, *Marsh* is distinctly different because it involved prayer in a legislature where people are free to enter and leave if they do not want to hear a prayer. *See Lee*, 505 U.S. at 597 (viewing the atmosphere of a legislature as less likely to result in coercion than a school graduation). The subsequent timing of both *Lynch* and *Lee*, as well as Justices O'Connor's and Kennedy's invocation of the principles of *Marsh*, may demonstrate that the justices were guided by the principles in *Marsh* when they developed their analyses.

242. Marsh v. Chambers, 463 U.S. 783, 792 (1983). *See supra* Introduction (describing the history and tradition of many of the historical religious expressions, as well as their codification into the United States Code).

243. *See supra* Part II.C and accompanying notes (discussing secularization as an inconsistent solution and as a detriment to religion and society); *see also* Furth, *supra* note 4, at 585-87 (describing *Marsh* as a "precursor to secularization").

244. *See Marsh*, 463 U.S. at 814-16 (Brennan, J., dissenting) (arguing that the Court's historical argument does not take into account the legislative history of the Establishment Clause and "treats the First Amendment as simply an Act of Congress"). Brennan argued that "[f]inally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers." *Id.* at 816. *See id.* at 823-24 (Stevens, J., dissenting) (arguing that the practice of designating a member of one religious faith to serve as the sole chaplain in the Nebraska legislature is the preference of one faith over another in violation of the Establishment Clause); *see also supra* note 241 (describing some of the criticisms

(taking into account historical patterns and contemporaneous practices) should be modified to allow courts to take a nonpreferentialist approach. Under this approach, *Marsh* would not be employed to uphold certain practices merely because they are rooted in history. Rather, a *Marsh* approach would inquire into the historical basis of the practice as guidance for their nonpreferentialism. Thus, this new approach would look to whether practices are deeply rooted in history[245] and whether they were historically nonpreferentialist.[246] This suggested approach does not uphold practices based only on the Framer's intent or original interpretation of the Constitution. Rather, this approach looks to history to determine if all religions have been accommodated as a guide for whether they can be treated similarly in the future. In essence, this analysis employs *Marsh* to ensure and strengthen the core tenants of the nonpreferentialist approach.

An approach combining nonpreferentialism and *Marsh* would overcome many of the shortcomings of current Establishment Clause jurisprudence. First, this refined approach would bring consistency to Establishment Clause jurisprudence because it would allow historical religious expressions to be subject to the same scrutiny as other Establishment Clause challenges.[247] The Court could apply the same scrutiny to historical religious expressions and other challenges and achieve end results similar to applying *Lemon* and the secularization approach.[248] Thus, the constitutionality of historical

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of *Marsh*).

245. *See Marsh*, 463 U.S. at 786-90 (examining the history of the tradition of opening legislative sessions with prayer in the Continental Congress); *see also Lee*, 505 U.S. at 597 (distinguishing the public school context from the facts set forth in *Marsh*).

246. *See* Evans, *supra* note 2, at 99 (explaining that a proper Establishment Clause analysis should take into account history and should also bring consistency to this area of law, both of which requirements could be met by a nonpreferentialism approach).

247. Criticisms of *Marsh* often focus on the Court's abandonment of *Lemon*. *See supra* note 241 (discussing critiques of *Marsh* and the Court's use of an alternative standard to justify a historical practice). However, if the Court declined to employ *Lemon*, and used only an approach incorporating *Marsh*, the criticism of inconsistency could be avoided. Disagreements as to the reasoning of a *Marsh* analysis likely would still exist; however, many of the shortcomings of relying solely on history and tradition could be overcome by incorporating nonpreferentialism.

248. For example, if the Court applied the suggested approach to *Santa Fe* or *Schempp*, there still may be Establishment Clause violations. Although prayer and Bible reading may be part of American history and tradition, *Santa Fe* and *Schempp* still may be unconstitutional because the challenged practices are not nonpreferential. Even if the programs are deemed facially preferential, proof that "there is insufficient space at a given locale for all religious groups" demonstrates that the practice is not "practically nonpreferential." Evans, *supra* note 2, at 103. Thus, the results of cases like *Santa Fe*, *Schempp*, and *Allegheny* may remain unchanged

religious expressions would be legitimately proven through a constitutional test, instead of justified by the arbitrary determination of secularization. This analysis would move closer towards rendering "unified and principled results in Establishment Clause cases."[249]

Furthermore, this analysis would also overcome the detrimental effects resulting from secularization.[250] A "nonpreferential" analysis would take into account whether an action is nonpreferential on its face and whether all religions can be treated similarly.[251] The Court would still have to inquire into the religiousness of a practice, but its analysis would focus on the objective treatment of religions, instead of the subjective public's perception.[252] Moreover, non-preferentialism would help alleviate the problem with religious divisiveness that accompanies the secularization approach.[253]

B. Historical Religious Expressions are Constitutional Under this Suggested Analysis

In addition to providing consistency and eliminating the damaging effects of secularization, a test incorporating *Marsh* and nonpreferentialism would allow historical religious expressions to

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under the suggested analysis. It would be difficult to prove that all religions could be represented in the context of prayers before football games, Bible reading, or displays on the grand staircase at a courthouse. *But see* Evans, *supra* note 2, at 101 (proffering that under a nonpreferentialism approach, the following programs would be constitutional: salary supplements for parochial school teachers; moments of silence used for meditation or voluntary prayer; and the use of public school property by religious groups, among others).

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

250. *See supra* Part II.C and accompanying notes (illustrating the harmful effects that secularization has on society and religion).

251. *See* Evans, *supra* note 2, at 100 (declaring these two considerations as the two prongs of a "historically justifiable approach to Establishment Clause analysis").

252. *See supra* Part II.C and accompanying notes (explaining how secularization harms religion because it treats religious practices as secularized when they become generic enough as to lose their individual meaning). In *Lynch*, the Court determined that when placed among various secular holiday symbols, the crèche did not impart enough of a religious message in order to be an Establishment Clause violation. *See* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (noting that the holiday setting changes what viewers perceive as the purpose of the displayed crèche). The nonpreferential approach recognizes the individual meaning or purpose of religious displays, such as crèches, and does not dilute or change their meaning based on their surroundings; instead, the nonpreferential approach realizes the need to preserve the various differing religions of the country by assuring that they receive equal treatment. *See* Evans, *supra* note 2, at 99-100 (defining an aspect of the nonpreferentialism test as the requirement that all religions be treated similarly without a showing that such treatment is impossible).

253. *See supra* Part II.C and accompanying notes (recognizing that the Court seems more apt to secularize practices derived from Christianity over other religions, contributing to religious divisiveness). Conversely, nonpreferentialism aims at treating all religions similarly. *See* Evans, *supra* note 2, at 100 (stating that this goal is the second prong of nonpreferentialism).

survive an Establishment Clause challenge.[254] The Court has alluded to the fact that some historical religious expressions are grounded in history, in the language of Establishment Clause cases.[255] Thus, like the legislative chaplain in *Marsh*, "In God We Trust," the use of which dates back to 1864,[256] is arguably "part of the fabric of our society."[257] Similarly, the National Day of Prayer, the concept of which began in 1775,[258] may be justified based on historical patterns. Under this suggested approach, the history of these expressions would be further evaluated to determine whether the expressions were historically nonpreferential.

Historical religious expressions must also be nonpreferential to be constitutional under this suggested new approach. As described above, the "practical nonpreferential" analysis is instructive in accomplishing this principle. First, the expressions and practices must be nonpreferential on their face.[259] Using the example of "One Nation Under God," this expression is facially nonpreferential; it does not prefer one religion over another. The use of the word "God" may accommodate many religions and is not specific to one religion.[260] Along the same line of reasoning, "In God We Trust" and

254. Standing to challenge a historical religious expression in court is no more or less of an issue under this proposed analysis than it would be under current jurisprudence. *See supra* note 156 (entertaining the notion that standing is one of the potential obstacles in challenging a historical religious expression).

255. *See* Lee v. Weisman, 505 U.S. 577, 633-35 (1992) (recognizing that prayer has been a part of governmental ceremonies since our nation's origin, and that Congress urged the President to proclaim a day of public prayer the day after the First Amendment was passed); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (calling "In God We Trust" and "One Nation Under God" "reference[s] to our religious heritage"); Marsh v. Chambers, 463 U.S. 783, 786 (1983) ("The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 213-14 (1963) (proclaiming that religion has been closely identified with history, evidenced by the oaths of office ending with "So help me God" and the Court crier opening sessions by invoking the grace of God).

256. *See supra* note 19 (detailing the history of "In God We Trust" as the national motto and as an important aspect of American currency).

257. *Marsh*, 463 U.S. at 792 (Brennan, J., concurring).

258. *See supra* note 23 (tracing the history of the National Day of Prayer back to the founding of the nation).

259. *See* Evans, *supra* note 2, at 100 (describing the first consideration, whether all religions can be treated similarly, as a scrutiny that most actions would survive).

260. *See* PAUL VARO MARTINSON, FAMILIES OF FAITH 3 (1999) (noting that in Judaism, Christianity and Islam, God is central to the understanding of the self and the outer world). Martinson writes, "[w]ithout God there is no Judaism, Christianity, or Islam. . . . [T]hese three understand God in somewhat different ways, which is important, but what they all share deep down is a commitment to faith in God." *Id.* The use of the word "God" is general enough to accommodate believers of many religions, including Christianity, Judaism, and Islam. *See* THE MERRIAM-WEBSTER DICTIONARY, *supra* note 97, at 37 (defining "Allah" as "God"). *But see* MARTINSON, *supra*, at 5-7 (explaining that one may or may not speak about God in the Indian family of religions, and whether or not one relates to God is not important in Daoism

"God Save This Honorable Court" are facially nonpreferential.[261]

The second prong of the nonpreferentialism analysis is whether all religions necessarily can be treated similarly.[262] Evans describes this prong as requiring "practical nonpreferential[ism]."[263] Using the example of the *Allegheny* case, Evans states proof of insufficient space for religious displays at the given locale would violate this prong.[264] Historical religious expressions would likely pass this test. An obvious example is the National Day of Prayer. Although Congress has codified this day as a day with religious significance, Congress has also codified other days and months for secular reasons,[265] and other religions have sufficient opportunity to celebrate their religion on other days or the same day as the National Day of Prayer.

Viewing historical religious expressions generally, merely as expressions, instead of scrutinizing their particular qualities, also demonstrates that they are practically nonpreferential.[266] While there exists only one national motto and Pledge of Allegiance, there are wholly secular expressions, such as the national floral emblem[267] and national anthem[268] that embody secular notions, or may have religious import to some people.[269] Thus, in the realm of public expressions, there are arguably indefinite possibilities through which to express

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and Confucianism).

261. These expressions arguably use the term "God" in the same sense that the Pledge of Allegiance does. Thus, they are facially nonpreferential for the same reason that "One Nation Under God" is facially nonpreferential.

262. *See* Evans, *supra* note 2, at 100 (explaining that in order to pass this hurdle, the party challenging the action must demonstrate that similar treatment of all religions is impossible).

263. *Id.* at 103.

264. *See id.* (stating that absent any showing of insufficient space in an *Allegheny*-type case, the religious displays would be constitutional).

265. *See* 36 U.S.C. § 114 (1994 & Supp. V 1999) ("The President of the United States is authorized to officially proclaim October 9 in each year as Leif Erikson Day."); 36 U.S.C. § 142 (1994 & Supp. V 1999) ("The President is hereby authorized to issue annually a proclamation designating October 15 as White Cane Safety Day and calling upon the people of the United States to observe such day with appropriate ceremonies and activities.").

266. *See* Evans, *supra* note 2, at 100 (describing practical nonpreferentialism as the ability of the government to realistically treat all religions similarly).

267. *See* 36 U.S.C. § 303 (1994 & Supp. V 1999) (adopting the rose as the national floral emblem).

268. *See* 36 U.S.C. § 301 (Supp. V 1999) (designating the Star-Spangled Banner as the national anthem).

269. *See Flaming Rose Home Page* http://www.flamingrose.com (last visited Jan. 5, 2001) (describing The Flaming Rose as an organization dedicated to "creating the awareness that everyone is both human and Spirit"). The website proclaims, "[t]he rose is one of the most important symbols in the world. . . . The white rose is linked to the Virgin Mary and was also a medieval symbol of virginity. The red rose is symbolic of the blood of Christ and a symbol of martyrdom, charity, the passion and resurrection. In Islam, the rose signifies the blood of Mohammed and his two sons." *Id.*

the beliefs of many religions or of no religion.[270] The abundance of opportunities to express the views of any religion, and the lack of limitations on expression, make historical religious expressions practically nonpreferential.

C. The Criticism of a Nonpreferentialist Approach—Failure to Accommodate Atheists

The theory of nonpreferentialism turns on the belief government can aid religion so long as it does not prefer one religion over another.[271] The main criticism of this approach is that, by aiding any religion, the government prefers religion over no religion, thus alienating atheists. Proponents of this criticism believe the Establishment Clause forbids any preference of religion, as a way of ensuring that atheists are not excluded.[272] As the majority opinion in *Wallace* states, "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[273]

One solution to this criticism is to construe atheism as a religion or belief system.[274] Thus, application of Evan's "practical nonpreferential" analysis may overcome this criticism.[275] In order to pass the second prong of his test, one must demonstrate that all religions can necessarily be treated similarly.[276] If all religions or belief systems can be treated similarly, atheism could likely also be accommodated.[277] Such a construction of nonpreferentialism may

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270. *See* Evans, *supra* note 2, at 101 (asserting that an *Everson*-type statute would not be practically nonpreferential, because it could not be shown that the government could afford to reimburse parents of every religious denomination for transportation to school). Public expressions are different, though, because limitations such as expense do not exist.

271. *See supra* note 219 (defining "nonpreferentialism").

272. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (maintaining that the Establishment Clause means, at least, that the government cannot pass laws that aid one religion, that aid all religions, or that prefer one religion over another); *see also* LEVY, *supra* note 1, at xiv ("The Establishment Clause separates government and religion so that we can maintain civility between believers and unbelievers as well as among the several hundred denominations, sects, and cults that thrive in our nation, all sharing the commitment to liberty and equality that cements us together.").

273. Wallace v. Jaffree, 472 U.S. 38, 53 (1985).

274. *But see Atheism—What It Is and What It Isn't* (2000), *at* http://www.atheists.org/drive.thru/atheism.html (last visited Mar. 3, 2001) (asserting that Atheism is not a "belief" or a "religion," based on the definition of religion as including the "belief in a divine or superhuman power").

275. *See supra* Part III.B and accompanying notes (explaining that, in the context of historical religious expressions, when all religions can be treated similarly, there also will be room for nonreligious expressions).

276. *See supra* note 234 (defining the second prong of Evan's analysis).

277. Atheism may itself be a religion or belief system. Thus, if the goal of nonpreferentialism is to treat all religions similarly, atheists are not necessarily

not adequately address the criticism, however, because atheists generally do not view atheism as a "religion" or "belief."[278]

The predicament is further unresolved if any public mention of God is government's preference of religion, thus alienating atheists. Under such a reading of the Establishment Clause, the only meaningful interpretation may mandate eliminating all public mention of God, including historical religious expressions.[279] Thus, we ultimately face the decision of whether to alienate atheists or abolish historical religious expressions. In an article articulating this dilemma, Professor Steven B. Epstein examines historical religious expressions under current jurisprudence, concluding the Court should have the "intellectual honesty and fortitude" to recognize that ceremonial deism (including historical religious expressions) violates the Establishment Clause.[280] In proposing the Court strike down historical religious expressions, Epstein recognizes his suggestion will be very unpopular in America.[281] He believes, however, his proposal is preferable to government endorsing the religious majority and alienating the minority, including atheists.[282]

Other commentators argue against eliminating historical religious

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excluded from this goal. The values underlying atheism seem very similar to some religious thought. *See* Madalyn Murray O'Hair, Address Before the American Rationalist Federation Annual Convention (Aug. 25, 1962), *available at* www.atheists.org/Atheism/atheism.html (last visited Mar. 3, 2001) ("The indestructible foundation of the whole edifice of Atheism is its philosophy, materialism, or naturalism, as it is also known."). O'Hair explained, "[t]hat philosophy regards the world as it actually is, views it in the light of the data provided by progressive science and social experience. Atheistic materialism is the logical outcome of scientific knowledge gained over the centuries." *Id.*

278. *See supra* note 274 (describing the reasons why atheism may not be a "belief" or a "religion").

279. *See generally* Epstein, *supra* note 3, at 2083 (advocating a reading of the Establishment Clause that forbids public mention of God in the form of ceremonial deism, because it alienates those outside of the majority religion).

280. *See* Epstein, *supra* note 3, at 2174 (believing that the Court has created a slippery slope by allowing ceremonial deism to remain in the public realm).

281. *See id.* at 2174 ("[S]uch a decision will be very unpopular in an America in which the religious majority has grown all too accustomed to seeing its practices and traditions endorsed by the government.").

282. *See id.* at 2174 (strengthening his position by comparing his suggestion to some of the Court's unpopular actions in the past, including abortion, school prayer, and segregation decisions). Epstein illustrates the necessity of his suggestion by beginning his article as follows: "[t]he year is 2096. Due to radically altered immigration and birth patterns over the past century, Muslims now comprise seventy percent of the American population, while Christians and Jews comprise only twenty-five percent collectively." *Id.* Epstein then suggests that the Pledge of Allegiance now includes "Under Allah" and the national motto is "In Allah We Trust." *Id.* at 2085. Invoking a sense of alienation, Epstein questions whether the reader would view these actions as the government establishing Islam. *Id.* This example clearly demonstrates that ceremonial deism includes practices accepted by the religious majority in society.

expressions, even if demanded by a strict application of current jurisprudence.[283] First, although atheists tend to believe that historical religious expressions prefer religion and violate the constitution,[284] eliminating such expressions may not, however, be the answer to their "prayers." According to Leonard Levy, "atheists should be howling in glee at the corruption of religion by irrelevant ceremonial references to God in our money or in our pledge of allegiance that schoolchildren so often garble."[285] Thus, although historical religious expressions facially appear to prefer religion and alienate atheists, eliminating them to appease atheists may be counterproductive. Second, striking down historical religious expressions may undermine the Court in the eyes of the public. Levy writes, "a decision [challenging "one nation under God"] would publicly discredit the Court . . ." and society should not challenge such an "inconsequential issue."[286] Levy notes, however, that if faced with the issue and honestly adhering to current jurisprudence, the Court would likely have to rule the language unconstitutional.[287]

Failure to accommodate atheists (through inclusion of historical religious expressions) is thus not just a criticism of the nonpreferentialist approach. The Court's current jurisprudence (the secularization approach) also upholds historical religious expressions, but inconsistently with the requirements of *Lemon* and inexplicably to the rational observer.[288] According to Epstein, the only way to completely overcome this dilemma is to honestly apply current Establishment Clause jurisprudence and rid society of public mention of God.[289] In the thirty years of its existence, however, the Court has repeatedly declined strict application of *Lemon*, signaling the need for a new approach.[290]

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283. *See* White, *supra* note 25, at 193 (stating that most Americans are not concerned about the religious undercurrents contained in "In God We Trust" or "One nation, under God").

284. *See Hearing on H.R. 3314 before the House Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance, and Urban Affairs*, 100th Cong. (1988) (written statement of Jon G. Murray, President American Atheists, Inc.), *available at* http://www.atheists.org/public.square/coins.html (last visited Mar. 3, 2001) (arguing that "In God We Trust" violates the *Lemon* prongs and stating that American Atheists only want to display their patriotism in secular ways).

285. LEVY, *supra* note 1, at 241.

286. *Id.*

287. *Id.* (arguing that separationists should not push the Court to decide on historical religious expressions and should "[l]et sleeping dogmas lie").

288. *See supra* Part I.D.2 and accompanying notes (articulating how the Court currently secularizes historical religious expressions).

289. *See* Epstein, *supra* note 3, at 2174 (concluding that a decision to eliminate ceremonial deism will ensure that no one, regardless of their faith, will feel like an outsider in the political community).

290. *See supra* Parts I.C and I.D.1 and accompanying notes (describing the Justice's

The inclusion of historical religious expressions, either through current Establishment Clause jurisprudence or a suggested nonpreferentialist approach, arguably excludes atheists. When faced with the decision of either alienating atheists or excluding all religion from the public realm, the Court's preferred approach is to allow nonpreferential religious expression. First, the prominence of religion in the public realm in recent events[291] demonstrates the difficulty in eliminating all public mention of religion. Second, although *Lemon* may be the Court's attempt at moving towards a secular country, arguably religious practices and expressions remain, justified by the Court as sufficiently secular.[292] Nonpreferentialism would at least provide a rational baseline for the inclusion of religious practices—the guaranty that the practices do not prefer one religion over another.[293] Third, the potential public distrust of the Court if it struck down historical religious expressions[294] further outweighs striking down such mention of religion. Finally, the criticism that atheists are alienated by any preference of religion may be misplaced.[295] Perhaps atheists would not criticize the "watered-down version of religion"[296] that current Establishment Clause jurisprudence bestows on society. Instead, they would be delighted that historical religious expressions, whether they facially prefer religion or not, may "have lost [all meaningful] religious significance."[297] Although nonpreferentialism is not perfect, it is the least flawed analysis, and thus the best alternative to the Court's current inconsistent jurisprudence.

CONCLUSION

The Supreme Court's Establishment Clause jurisprudence has evolved into an inconsistent analysis based on an arbitrary determination of the religiousness of practices. When the Court

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alternative suggestions to *Lemon* and the beginning of the Court's abandonment of *Lemon* in *Marsh*).

291. *See supra* Introduction (citing some of the recent events that sparked Establishment Clause issues, including the 2000 Presidential election).

292. *See supra* Part I.C and I.D.1 and accompanying notes (articulating the notion that *Lemon* is not comprehensive).

293. *See supra* Part III.A and accompanying notes (describing nonpreferentialism as the theory that the Establishment Clause does not prohibit government aid of religion, as long as the government does not support one religion over another).

294. *See supra* note 280 (noting that Epstein's suggestion would be unpopular in America).

295. *See supra* note 284 (arguing that atheists should be content with the weakened version of religion that historical religious expressions impart).

296. *See* Furth, *supra* note 4, at 602.

297. *See* Furth, *supra* note 4, at 584.

deems a practice sufficiently religious, it subjects it to current Establishment Clause tests.[298] Historical religious expressions would likely be deemed unconstitutional under these tests. To shield such expressions from review, the Court has noted that the historical religious expressions are a categorical exception to traditional scrutiny because they have been secularized, or diluted of any significant religious value.[299] This exclusion saves the Court from answering the difficult question of whether these expressions are constitutional under the current scrutiny, and protects the Court from delivering an unfavorable opinion to the American public. Even less satisfying, the Court may deem them constitutional but fail to provide a legitimate or clear basis for that determination.

Secularizing historical religious expressions does a great disservice to religion and society.[300] Secularization is also an inconsistent solution; there is no clear formula for ascertaining when a practice or symbol has reached the requisite degree of secularity. For the foregoing reasons, an analysis based on nonpreferentialism, taking historical treatment into account, as in *Marsh v. Chambers*, is a more appropriate test. This type of scrutiny would legitimately uphold the constitutionality of historical religious expressions—subjecting them to the same standard as all other Establishment Clause challenges, instead of arbitrarily excluding them. Even if equally unsatisfying for atheists, this refined approach would at least add consistency to "an area of constitutional law plagued by inconsistency."[301]

298. *See supra* Part I and accompanying notes (describing the Supreme Court's current Establishment Clause jurisprudence, including the *Lemon* test, Justice O'Connor's endorsement test, and Justice Kennedy's coercion test).

299. *See supra* Part I.D and accompanying notes (explaining secularization as the Court's determination that a particular practice or expression has lost any true religious importance).

300. *See supra* Part II and accompanying notes (discussing the criticisms of secularization).

301. Evans, *supra* note 2, at 99 (citing Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree* for a discussion of the inconsistencies in Establishment Clause jurisprudence and the need for a historical analysis).