University of Dayton Law Review

Volume 47 | Number 3 Article 5

8-1-2022

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Cover Page Footnote

Charles J. Russo: I extend my greatest thanks and love to my wonderful wife, Debbie Russo, for proofreading and commenting on drafts of this Article along with everything else that she does in our life together, not just for me, but also for our children and grandchildren. Thanks, too, to my research assistant, Jaren Hardesty, University of Dayton School of Law, class of 2022, for his excellent work in tracking down citations, formatting them, and proofreading drafts of the manuscript. Almost needless to say any errors, omissions, and misjudgments are our own.

LEMON V. KURTZMAN AT 50: FROM A WALL OF SEPARATION TO A CHAIN LINK FENCE?

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The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.
—Justice William Rehnquist[1]

I. INTRODUCTION

Many authors have reflected on, studied, and examined the development and writing of the First Amendment Religion Clauses, which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." in attempting to divine the original public meaning of the Founding Era.[2] Given the distinct cultural differences that existed between and among New England, New York, the Middle Atlantic States, Virginia, and the Deep South, it is not surprising that there is some ambiguity about the history of the Religion Clauses.[3] This lack of clarity may partially trace its origins to the close ties between religion and government during the Colonial Period. In fact, until the Revolutionary War, there ". . . were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five."[4]

History aside, the perspective most often associated with the Supreme Court and religion started with its 1947 judgment in *Everson v. Board of Education of Ewing Township* ("*Everson*"); the Court's first case on the merits of a dispute involving education and religion embodies the "Wall of Separation," a metaphor coined by Roger Williams in 1644 but

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[1] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (invalidating a statute from Alabama mandating a period of meditation or voluntary prayer in public schools as an endorsement of religion lacking any clearly secular purpose).

[2] U.S. CONST. amend. I. *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489 (2011); Kent Greenwalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CON. L. 479 (2006); Stephen K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7 (2001); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (N.C. Press, 2d ed. 1994) (1986). These various sources discuss the general background and debate regarding the Free Exercise and Establishment Clauses.

[3] *See generally* David Jaffee, *Religion and Culture in North America, 1600–1700*, THE METRO. MUSEUM OF ART (Oct. 2004), http://www.metmuseum.org/toah/hd/recu/hd_recu.htm (discussing the religious differences in the Colonial regions); *Religion in Colonial America: Trends, Regulations, and Beliefs*, FACING HISTORY AND OURSELVES, https://www.facinghistory.org/nobigotry/religion-colonial-america-trends-regulations-and-beliefs (last visited June 10, 2022) (discussing the cultural differences in the Colonial regions).

[4] Engel v. Vitale, 370 U.S. 421, 428 n.10 (1962).

popularized by Thomas Jefferson's Letter to the Danbury Baptist Convention of January 1, 1802.[5] Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[6]

As popular as the "Wall" metaphor became, the Supreme Court did not cite it until 1878—seventy-six years after Jefferson used it when writing that letter in his personal capacity—in *Reynolds v. United States* ("*Reynolds*"), a dispute from the then Utah Territory.[7] In *Reynolds*, the Justices rejected a claim that the Free Exercise Clause exempted a member of the Church of Jesus Christ of Latter-day Saints from a federal statute prohibiting polygamy.[8] Instead, the Court ruled that while the federal government cannot generally interfere with the beliefs of individuals, it may do so if their religious practice violates the law.[9] The Court concluded that although the plaintiff was free to believe in polygamy, an act it described as "always [having] been odious among the northern and western nations of Europe," the Court emphasized that he could not practice it because doing so violated a duly-enacted statute.[10]

The Supreme Court did not apply "the Wall" in an education case until *Everson*, where they upheld a New Jersey statute that permitted local school boards to regulate student transportation that some parents relied on to send their children to Roman Catholic schools.[11] Justice Black's opinion essentially articulated the Child Benefit Test—sometimes termed "parochaid," the use of public aid to support non-public schools—because many schools, especially those affiliated with the Roman Catholic Church at the elementary level, were, and largely still are, associated with

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[5] 330 U.S. 1 (1947); Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered* (1644), *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 313, 392 (1963) ("and that when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wilderness of the world . . . .").

[6] 16 THE WRITINGS OF THOMAS JEFFERSON 281–82 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

[7] *See* 98 U.S. 145, 164 (1879).

[8] *See generally id.*

[9] *See id.* at 162, 165–66.

[10] *Id.* at 164–67.

[11] *See generally* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

specific parishes.[12] The Child Benefit Test is a legal construct under which the Court permitted states and local school boards to provide publicly funded aid to assist children rather than their faith-based non-public schools.[13] Essentially analogous to a third-party beneficiary situation—the students gain the most in the relationship by being educated in the schools their parents have selected.

On the question of aid, *Everson* stands out because, without naming it per se, Justice Black's opinion initiated the Child Benefit Test—a measure that has played a significant role in Establishment Clause analysis since its inception.[14] Over the decades following *Lemon v. Kurtzman* ("*Lemon*"), historically the Court's most significant case involving the Establishment Clause and education, the Justices reviewed a considerable amount of litigation on religion and schooling as well as in various aspects of public life, addressing the boundaries of state aid to faith-based schools or institutions and their students.[15]

In *Lemon*, the Justices created the now-familiar albeit malleable, tripartite test.[16] When courts apply this test to evaluate interactions between faith-based institutions and the state, jurists must be convinced: "[F]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[17]

As significant as *Lemon* has become in its First Amendment jurisprudence, the Supreme Court occasionally relied on two other tests

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[12] *Id.* at 14, 17–18. The Court essentially presaged the Child Benefit Test in *Cochran v. Louisiana State Board of Education*. *See generally* 281 U.S. 370 (1930) (upholding a program that provided textbooks to all students regardless of where they attended school because the children, rather than their schools, were the beneficiaries of the law as far as it served a valid secular purpose). The most recent data reveal that 65.2%, or 3,138 of 4,812 of Catholic elementary schools in the United States are operated by single parishes while 12.2% or 587 are interparish schools, 15.7% or 754 are run by dioceses, and 6.9% or 333 are private in nature. Dale McDonald & Margaret Schultz, UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 2020–2021: THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLMENT AND STAFFING 10 (2021). Conversely, only 9.1% or 106 of the 1,169 Catholic secondary schools are operated by parishes while 8.6% or 101 are run as interparish schools, 37.5% or 438 are diocesan, and 44.8% or 524 are private. *Id.* Although the table does not specify it, many schools it identifies as private were founded by religious orders. *See* Ali Trachta, *What Is a Parochial School*, NICHE, https://www.niche.com/blog/catholic-school-vs-parochial-school/ (July 24, 2018).

[13] *See* George R. La Noue, *The Child Benefit Theory*, *in* 4 THEORY INTO PRACTICE 18, 18 (1965).

[14] *See id.* at 18–19.

[15] *See generally* 403 U.S. 602 (1971). Because many, if not all, of the cases discussed, have been subject to considerable academic scrutiny, except for key decisions, the summaries tend to be thumbnail sketches rather than detailed analyses because they are helping to make the larger point, discussed in Part V of this Article, that the all-too-familiar tripartite *Lemon* test in its current form has outlived its judicial usefulness.

[16] *Id.* at 612–13.

[17] *Id.* (citation omitted) (quoting Waltz v. Tax Comm'n, 397 U.S. 664, 674 (1970). For a representative commentary on point, see generally Josh Blackman, *This Lemon Comes as a Lemon: The* Lemon *Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. CIV. RTS. L.J. 351 (2010).

involving religion and public education. In *Lee v. Weisman*, Justice Kennedy announced the psychological coercion test to forbid prayer at public school graduation ceremonies.[18] Under this test, the Court rejected school prayer because the state, through the principal, played a pervasive role in the process both by selecting who would pray and by directing its content.[19] The Justices also feared inviting a religious leader to pray could psychologically coerce students because—as members of a captive audience who may have been forced, against their wishes, to participate in ceremonies—they are not freely excused from attending and being exposed to beliefs they disagree with; the Court has avoided this part of the psychological coercion test in later cases.[20]

Earlier, in *Lynch v. Donnelly*, a non-school case about the inclusion of a Nativity scene in a Christmas display on public property, Justice O'Connor's plurality opinion created the endorsement test regarding the status of religious activity in public settings, asking whether the purpose of the governmental action is to endorse or approve of a religion or religious activity.[21] A plurality of the Supreme Court upheld the inclusion of a Nativity scene, or crèche, in a Christmas display on public property because with a Christmas tree and menorah, other parts of the display, the crèche was set in the broader context of the season, meaning the display did not endorse a particular religion.[22]

As to prayer and religious activity, beginning with *Engel v. Vitale*, the Supreme Court has been more consistent.[23] More specifically, in the context of public education, the Court banned school-sponsored prayer and Bible reading at the start of school days or at public school graduation ceremonies, as well as student-led prayer prior to high school football games.[24]

Against this background, the remainder of this Article is divided into four substantive parts. Part I examines the prehistory of *Lemon*. Part II reviews the Supreme Court's judgment in this seminal case along with its progeny. This section largely focuses on cases involving aid to faith-based schools and their students because they represent the lion's share of litigation

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[18] 505 U.S. 577, 591–93, 598–99 (1992). For representative commentaries on this case, see generally Ralph D. Mawdsley & Charles J. Russo, Lee v. Weisman*: The Supreme Court Pronounces the Benediction on Public School Graduation Prayers*, 77 EDUC. L. REP. 1071 (1992); David Schimmel, *Graduation Prayers Flunk Coercion Test: An Analysis of* Lee v. Weisman, 76 EDUC. L. REP. 913 (1992).

[19] *Weisman*, 505 U.S. at 591–93, 598–99.

[20] *Id.*

[21] 465 U.S. 668, 687–91 (1984) (O'Connor, J., concurring).

[22] *Id.* at 692–94.

[23] *See generally* 370 U.S. 421 (1962).

[24] *See generally* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); *Weisman*, 505 U.S. 577; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

in this contentious area.[25] Part III examines the fundamental flaws of *Lemon*. Part IV offers an alternative to the now-discredited tripartite *Lemon* test that reflects the original public meaning of the Establishment Clause. This Article rounds out with a brief conclusion.

II. PREHISTORY OF *LEMON*

The First Amendment Religion Clauses explicitly apply only to Congress.[26] Consequently, the Supreme Court initially applied the Free Exercise Clause to the States in a dispute involving religion through the Fourteenth Amendment in *Cantwell v. Connecticut*.[27] In Cantwell, the Court invalidated the actions of Jehovah's Witnesses when they violated a statute against the solicitation of funds for religious, charitable, or philanthropic purposes without prior approval of public officials because the law essentially granted authorities unfettered power over the plaintiff's right to express their religious views in a peaceful manner.[28] Following *Cantwell*, individuals have the same rights in suits against the federal and state governments under the Religion Clauses.[29]

A. Everson

As noted in *Everson*, the Justices articulated the Child Benefit Test, thereby permitting publicly funded assistance to faith-based schools and their students because the aid primarily assists children rather than their schools.[30] Moreover, *Everson* is the initial case in the first of three stages through which the Court's modern Establishment Clause jurisprudence has evolved.[31]

At issue in *Everson* was a statute from New Jersey permitting local school boards to adopt rules allowing them to enter contracts for student transportation.[32] After a local board authorized reimbursement to parents for the money they spent on bus fares sending their children to Catholic schools, a taxpayer challenged the law as unconstitutional on two grounds.[33] First, he alleged that the law authorized the state to tax some citizens and bestow their money on others for the private purpose of supporting non-public

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[25] For a then comprehensive review of Religion Clause litigation, see generally Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563 (2006).

[26] U.S. CONST. amend. I.

[27] 310 U.S. 296, 303 (1940). For an earlier, similar case, see Gitlow v. New York, 268 U.S. 652, 666 (1925) (applying the First Amendment rights to freedom of speech and press to the states through the Fourteenth Amendment).

[28] *Cantwell*, 310 U.S. at 307.

[29] *Id.* at 303.

[30] *See supra* notes 11–13 and accompanying text.

[31] *See generally* Charles J. Russo & Ralph D. Mawdsley, *The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: "Bristl[ing] with Hostility to All Things Religious" or Necessary Separation of Church and State?*, 2001 BYU EDUC. & L.J. 231 (2001).

[32] Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947).

[33] *Id.* at 3–4.

schools in violation of the Fourteenth Amendment.[34] Second, the plaintiff argued that the law was one "respecting an establishment of religion" because it allegedly forced him to help support church-run schools in violation of the First Amendment.[35]

Everson is noteworthy because the Opinion of the Court, written by Justice Black, more deeply involved the Jeffersonian metaphor in the lexicon of the Supreme Court's First Amendment jurisprudence.[36] Black declared that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[37]

B. Prayer and Other Religious Activity

Subsequent litigation during the pre-*Lemon* period also involved religious activities in public schools. In its first case on point, *People of State of Illinois ex rel. McCollum v. Board of Education* ("*McCollum*"), the Court vitiated a program under which students were released from their classes, with the approval of their parents, to receive instruction provided by religious leaders in their faiths: Judaism, Roman Catholicism, and Protestantism.[38] The Court struck the release program down for two reasons: the local board made tax-supported buildings available to those who offered instruction on religious doctrines and because, in so doing, its officials gave religious groups invaluable, impermissible aid in helping them by providing students for the classes through their ability to control the machinery and operations of the state's compulsory education laws.[39]

Starting with *Engel v. Vitale* ("*Engel*"), the Supreme Court handed down an unbroken line of cases prohibiting school-sponsored prayer and religious activities in public schools.[40] In *Engel*, the Justices forbade the daily use of prayer, composed by the New York State Board of Regents, in public

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[34] *Id.* at 5.

[35] *Id.*

[36] *See* Hall, *supra* note 25, at 583 (explaining that Justice Black's opinion in *Everson* as a turning point in First Amendment jurisprudence).

[37] *Everson*, 330 U.S. at 18. For critiques of this case, see Raymond W. Kaselonis, Jr., Everson *and "The Wall of Separation Between Church and State": The Supreme Court's Flawed Interpretation of Jefferson's Letter to the Danbury Baptists*, 17 REGENT U.L. REV. 101 (2004); Carl H. Esbeck, *The 60 Anniversary of the* Everson *Decision and America's Church-State Proposition*, 23 J. L. REL. 15 (2008).

[38] 333 U.S. 203, 207–09, 212 (1948).

[39] *Id.* at 212. *But see* Zorach v. Clauson, 343 U.S. 306, 308–09 (1952) (upholding the constitutionality of New York City's release time program both because officials had the authority to accommodate the religious wishes of parents by releasing their children at their request and insofar public schools were not used for religious instruction, suggesting that it was like granting students excused absences for religious reasons).

[40] 370 U.S. 421, 435 (1962).

schools even if parents agreed to permit their children to participate.[41] The Court banned the prayer because "[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."[42]

A year later, in the companion cases of *School District of Abington Township v. Schempp* ("*Abington*") and *Murray v. Curlett*, the Supreme Court invalidated a statute from Pennsylvania and a board policy from Maryland mandating the students' recitation of the "Lord's Prayer"/"Our Father" and Bible reading as part of the opening of school days.[43] Acknowledging that the Bible is a religious document and the First Amendment mandates governmental neutrality, the Court struck down both practices on the basis that states cannot aid any or all religions, coupled with the fact that individuals have the right to make personal religious choices free from state compulsion.[44]

Creating a two-part test in *Abington* to evaluate the constitutionality of prayer and Bible reading in public schools, the Supreme Court declared that "[t]he test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[45] In what may have been an attempt to allay concerns that they and the Court were anti-religious, the Justices specified that nothing in its judgment prohibited the secular study of the Bible in public schools in appropriate contexts such as literature or history.[46] The Court added, "It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."[47]

The first stage of the Supreme Court's modern Establishment Clause jurisprudence culminated in 1968 with *Board of Education v. Allen* ("*Allen*").[48] In *Allen*, the Supreme Court upheld the constitutionality of

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[41] *Id.* at 422–23.

[42] *Id.* at 431.

[43] 374 U.S. 203, 205 (1963). Karen Barber, *The "Lord's Prayer" or the "Our Father,* PRAYER IDEAS (March 2, 2012), https://www.prayerideas.org/the-lords-prayer-or-the-our-father-prayer/ ("The prayer is usually called the Lord's Prayer by Protestant groups because our Lord Jesus Christ authored the Prayer. The prayer is called the Our Father (Pater Noster in Latin) in the liturgical/Catholic tradition based on Jesus teaching us to begin by addressing God as 'Our Father.'").

[44] *Abington*, 374 U.S. at 216.

[45] *Id.* at 222 (citations omitted).

[46] *Id.* at 300 (Brennan J., concurring).

[47] *Id.* at 225. Justice Brennan hastened to state that "[t]he holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history." *Id.* at 300 (Brennan, J., concurring).

[48] 392 U.S. 236, 238 (1968); *see* Russo & Mawdsley, *supra* note 31, at 236.

a statute from New York directing local boards to loan textbooks to all children in grades seven to twelve, regardless of where they were enrolled, including both public and non-public, whether nonsectarian or faith-based, schools.[49] Rather than order officials of local public school boards to loan students the same books and materials, the law authorized education officials to approve titles prior to their adoption.[50] The *Allen* Court was satisfied that the statute passed constitutional muster because its purpose was not to aid religion or non-public schools, and its primary effect was to improve the quality of education for all children.[51] The Justices upheld similar textbook provisions in *Meek v. Pittenger* ("*Meek*") and *Wolman v. Walter* ("*Wolman*").[52]

The years between the Court's 1971 judgment in *Lemon* and *Aguilar v. Felton* ("*Aguilar*") in 1985, the second phase, were the nadir of the Child Benefit Test, from the perspective of its supporters, as the Justices largely refused to move beyond the limits created in *Everson* and *Allen*.[53] The *Court's* 1993 ruling in *Zobrest v. Catalina Foothills School District* ("*Zobrest*") breathed new life into the Child Benefit Test, allowing it to enter a phase extending to the present.[54]

III. LEMON AND ITS PROGENY

A. The Lemon *Decision*

At issue in the companion cases of *Lemon v. Kurtzman* and *Earley v. DiCenso* were statutes from Pennsylvania and Rhode Island.[55] The Pennsylvania statute authorized the state Superintendent of Public Instruction to make specified secular educational services from non-public schools.[56] The Superintendent's office directly reimbursed officials in participating faith-based schools for teachers' salaries, textbooks, and

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[49] *Allen*, 392 U.S. at 238.

[50] *Id.* at 239.

[51] *Id.* at 243. In his dissent, Justice Black exhibited his antipathy to supporters of aid for faith-based schools and their students, describing them as "powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion." *Id.* at 251 (Black, J., dissenting). For a more detailed discussion of Justice Black's attitude toward Catholics, see *infra* notes 169–74 and accompanying text.

[52] 421 U.S. 349 (1975); 433 U.S. 229 (1977).

[53] *See* 473 U.S. 402 (1985).

[54] *See* 509 U.S. 1 (1993). *But see* Locke v. Davey, 540 U.S. 712 (2004) (upholding a law from Washington that denied a student a scholarship because he wished to pursue a degree in pastoral theology where doing so would have violated rules forbidding the release of funds to pay for those who wished to study for the ministry).

[55] Lemon v. Kurtzman, 403 U.S. 602, 606 (1971).

[56] *Id.* at 609.

instructional materials in specific secular subjects: mathematics, modern foreign languages, physical science, and physical education.[57]

The Rhode Island law allowed state officials to supplement the pay of certified teachers of secular subjects identified in the previous paragraph in non-public elementary schools by directly paying them amounts not more than fifteen percent of their current annual earnings; the salaries they received could not exceed the maximum paid to public school teachers.[58] The supplements were available to teachers in non-public schools, where "average per-pupil expenditure[s] on secular education [were] less than the average in the State's public schools . . . ."[59] Teachers in non-public schools were required to use the same materials as educators in public schools.[60]

Lemon stands out for the tripartite test the Supreme Court created that became the standard in cases involving the Establishment Clause.[61] In creating this measure, the Justices added a third prong, regarding excessive entanglement, taken from *Walz v. Tax Commission of New York City*, wherein it upheld New York State's practice of providing state property tax exemptions for church property used in worship services, to the two-part test it created in *Abington*.[62] According to the Court:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[63]

Addressing entanglement and state aid to religious institutions, the Supreme Court delineated three additional factors to take into consideration.[64] Explaining the scope of these factors, the Court observed that courts "must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[65]

The *Lemon* Court expressed its concern that the relationship between public officials and schools because these schools are an integral part of

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[57] *Id.* at 609–10.
[58] *Id.* at 607–08; *id.* at 637 (Douglas, J., concurring).
[59] *Id.* at 607 (majority opinion).
[60] *Id.* at 608.
[61] *Id.* 612–13.
[62] *See* 397 U.S. 664, 670 (1970).
[63] *Lemon*, 403 U.S. at 612–13 (citations omitted).
[64] *Id.* at 615.
[65] *Id.*

the mission of the Roman Catholic Church, involved substantial religious activities.[66] About 95% of the pupils who benefitted from the program attended schools affiliated with the Roman Catholic Church in Rhode Island, where "[a]pproximately two-thirds of the teachers in these schools are nuns of various religious orders."[67] Concomitantly, in Pennsylvania, "[m]ore than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic [C]hurch."[68] While Catholic schools clearly predominated in these jurisdictions, denying them aid on this basis may well represent an inference of impermissible religious discrimination.[69]

In *Lemon*, the Supreme Court distinguished aid for teachers' salaries from secular, neutral, or non-ideological services, facilities, or materials.[70] Citing *Allen*, the Court remarked that teachers have a substantially different ideological character than books or transportation.[71] As to the potential for involving faith or morals in secular subjects, the Justices feared that while the content of textbooks can be known, teachers' handling of subject matter is not.[72]

The *Lemon* Court further expressed its concern that the amount of oversight necessary to ensure that teachers avoided non-ideological perspectives, even absent feasible allegations of impropriety, gave rise to impermissible entanglement.[73] While acknowledging that "[t]axpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents," the Court was of the view that because "[t]he sole question [before it was] whether state aid to these schools can be squared with the dictates of the Religion Clauses," it had no choice but to invalidate both laws.[74]

In what has become a "catch-22" situation, programs typically passed *Lemon*'s first two prongs only to have various forms of aid to students in their faith-based schools invalidated on the basis of excessive entanglement.[75] This difficulty arises because while the first two prongs of the *Lemon* test were developed in the context of a case involving prayer and Bible reading,

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[66] *Id.* at 616.
[67] *Id.* at 608, 615.
[68] *Id.* at 610.
[69] *Id.* at 625.
[70] *Id.* at 616–17.
[71] *Id.*
[72] *Id.* at 618–19 (noting the inherent conflict when educators who work under the direction of religious officials in these schools' face having to separate religious and secular dimensions of education).
[73] *Id.* at 619.
[74] *Id.* at 625.
[75] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 413–14 (1985).

the third emerged in a non-educational context over tax exemptions.[76] Notwithstanding the challenges associated with applying *Lemon*, the Supreme Court applied it widely as a kind of "one size fits all" test in a variety of disputes involving aid to non-public schools and their students. This created more headaches for jurists, lawyers, and educators than it may be worth.

B. Lemon*'s Progeny during the 1970s and 1980s*

Following *Lemon*, the Supreme Court entered a period during which it was all but unwilling to stray far from the limits it set in *Everson* and *Allen*. Rather than engage in an exhaustive review of all the cases, this section highlights illustrative cases rather than all the many cases the Court examined. In *Meek* and *Wolman*, cases from Pennsylvania and Ohio, respectively, the Justices reviewed textbook provisions similar to the one in *Allen*.[77] However, in *Wolman*, the Court invalidated a law allowing the use of public funds to transport students from faith-based schools to field trips by categorizing such activities as curricular in nature and viewing them as instructional rather than non-ideological secular services.[78]

At the same time, in *Meek*, the Court struck down a program that provided periodicals, recordings, films, laboratory equipment, and equipment for recording and projecting, thereby interpreting the law as having the primary effect of advancing religion due to the predominantly religious character of participating schools.[79] The Justices maintained that insofar as the faith-based schools were the primary beneficiaries, the aid assisted their sectarian enterprises as a whole, demonstrating that they clearly did not understand the challenge of trying to teach high school chemistry without laboratory equipment such as beakers.[80] Still, the Court did allow public school personnel to receive textbook assistance on-site in faith-based schools but then forbade the delivery of auxiliary services, such as remedial and accelerated instructional programs, guidance counseling and testing, and services for children who were educationally disadvantaged—for fear that the amount of oversight needed to have ensured neutrality would have resulted in excessive entanglement.[81]

In *Wolman*, the Justices struck down a program that permitted loans of instructional equipment, including projectors, tape recorders, record

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[76] *See Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[77] *See* Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

[78] *Wolman*, 433 U.S. at 254–55.

[79] *Meek*, 421 U.S. at 354–55, 363.

[80] *Id.* at 664–66. The trial court in *Meek* mused that "[g]iving free rein to the imagination one could, perhaps, visualize a religious teacher storing holy water in a chemistry laboratory beaker, . . . [but added that] judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." Meek v. Pittenger, 374 F. Supp. 639, 660 (E.D. Pa. 1974).

[81] *Meek*, 421 U.S. at 367, 370–72.

players, maps and globes, and science kits.[82] As in *Meek*, the Court invalidated the law due to its fear that the aid supported the religious roles of the schools considering the difficulty of separating the secular and sectarian functions for which these items were being used.[83] The Court did allow public school officials to supply non-public schools with state-mandated tests while allowing public school employees to go on-site to perform diagnostic tests to evaluate whether students needed speech, hearing, and psychological services.[84] The Justices also permitted public funds to be spent on providing therapeutic services to students from non-public schools if they were delivered in neutral, off-site locations since doing so would not risk the impermissible effect of advancing religion.[85]

Mueller v. Allen ("*Mueller*") represented an exception during the second phase under *Lemon*.[86] In *Mueller*, the Supreme Court upheld the law from Minnesota granting all parents state income tax deductions of up to $500 for children in grades K–6 and up to $700 for those in grades seven through twelve for the costs of tuition, textbooks, and transportation associated with sending their children to K–12 schools.[87] The *Mueller* Court was persuaded that the law permitting the deductions passed constitutional muster because it passed all three of *Lemon*'s prongs.[88]

As indicated, the low point for the Child Benefit Test emerged in *Aguilar*.[89] At issue in *Aguilar* was the constitutionality of allowing the New York City Board of Education ("NYCBOE") to assign public school teachers to provide remedial instruction in such subjects as reading skills and remedial mathematics under Title I of the Elementary and Secondary Education Act of 1965 ("Title I") for children who were educationally disadvantaged, on-site in faith-based schools.[90] Even though the NYCBOE developed multiple safeguards to ensure that public funds were not spent for religious purposes, satisfying the first two prongs of the *Lemon* test, the Court vitiated the program based solely on its fear that a monitoring system might have created excessive entanglement between church and state.[91] The Court

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[82] *Wolman*, 433 U.S. at 249.
[83] *Id.* at 250.
[84] *Id.* at 241–42.
[85] *Id.* at 248.
[86] 463 U.S. 388 (1983).
[87] *Id.* at 390–91.
[88] *Id.* at 394–96, 402–04.
[89] Aguilar v. Felton, 473 U.S. 402 (1985).
[90] *Id.* at 404. For an earlier case involving the Elementary and Secondary Education Act, see Wheeler v. Barrera, 417 U.S. 402 (1974) (interpreting the law as not requiring public school officials to use federal funds to provide on-site instruction for children who were educationally deprived in their faith-based schools).
[91] *Felton*, 473 U.S. at 414. On the same day as *Aguilar*, in *Sch. Dist. of Grand Rapids v. Ball*, the Court invalidated a shared time program from Michigan, and ordered the discontinuation of

reached this outcome despite the lack of credible allegations of improper behavior, prompting Justice O'Connor to pen a strident dissent in *Aguilar*, presaging her opinion for the Court in *Agostini v. Felton* ("*Agostini*").[92]

C. Retreating from Lemon *during the 1990s and early 2000s*

Twelve years after *Aguilar*, in *Agostini*, the Supreme Court, in an unusual order authored by Justice O'Connor, dissolved the injunction it upheld in *Aguilar*.[93] In a major shift in its jurisprudence, due to changes in the composition of the Court, the Justices reasoned that the Title I program did not violate any of the three standards it used to consider whether state aid advanced religion absent governmental indoctrination.[94] The Court decided that Title I, which provided supplemental, remedial instruction and counseling services on a neutral basis to children whose families are economically disadvantaged, did not violate the Establishment Clause because the program contained adequate safeguards.[95] Perhaps the most significant aspect of *Agostini* was the Court's modification of the *Lemon* test by reviewing only its first two parts, purpose and effect while recasting entanglement as one criterion in reviewing a law's effect.[96]

Previously, *Zobrest* reinvigorated the Child Benefit Test, transitioning into the Supreme Court's third and current phase with regard to the Child Benefit Test.[97] Relying on the far-reaching Individuals with Disabilities Education Act, the Court determined that enabling a sign language interpreter to help a student in Arizona who was deaf was constitutional because it was neutral aid that did not offer financial

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an after-school community education program in which teachers from faith-based schools worked part-time for the local public board, instructing students in their own buildings. 473 U.S. 373, 375–76, 380–81 (1985).

[92] *See Aguilar*, 473 U.S. at 402; *id.* at 426 (O'Connor, J., dissenting).

[93] Agostini v. Felton, 521 U.S. 203, 208–09 (1997). For a commentary on this case, see Allan G. Osborne, Jr. & Charles J. Russo, *The Ghoul is Dead, Long Live the Ghoul*: Agostini v. Felton *and the Delivery of Title I Services in Nonpublic Schools*, 119 EDUC. L. REP. 781 (1997).

[94] *Agostini*, 521 U.S. at 209 (noting there were no distinctions between recipients based on religion and there was no excessive entanglement). Justices Brennan and Marshall, both supporters of the Wall, retired in 1990 and 1991, respectively; among the replacements joining the bench were critics of the Wall who did not uniformly, if at all, rely on it, Rehnquist (1986), Scalia (1986), Kennedy (1988), and Thomas (1991). *See* cases cited *infra* note 150; *About the Court, Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx (last visited June 11, 2022). Justice Souter, appointed in 1990, was generally a separationist who supported the Wall. Charles C. Haynes, *Farewell, Justice Souter, defender of Mr. Jefferson's wall,* HERALDNET (June 18, 2009, 12:15 PM), https://www.heraldnet.com/opinion/farewell-justice-souter-defender-of-mr-jeffersons-wall/; *see* Zelman v. Simmons-Harris, 536 U.S. 639, 685–86 (2002) (Stevens, J., dissenting) (raising the specters that allowing vouchers would create another "Balkans, Northern Ireland, and the Middle East"); *see also id.* at 687 (Souter, J., dissenting).

[95] *Agostini*, 521 U.S. at 234–35.

[96] *See id.* at 232.

[97] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993). For a representative commentary on this case, see Ralph D. Mawdsley & Cynthia Dieterich, *Limiting Services to Parochial School Students: What Does* Zobrest *Now Mean?*, 112 EDUC. L. REP. 555 (1996).

benefits to his parents or school as the interpreter served as a conduit of information helping him to learn.[98]

Another example of the shift in the Supreme Court's thinking transpired in *Mitchell v. Helms* ("*Mitchell*"), a case from Louisiana when it expanded the boundaries of permissible aid to faith-based schools.[99] A plurality of the Court upheld the constitutionality of Chapter 2 of Title I, then Title VI, of the Elementary and Secondary Education Act ("Chapter 2"), a federal law allowing loans of instructional materials such as library books, computers, television sets, tape recorders, and maps to faith-based schools.[100]

The *Mitchell* Court relied on *Agostini*'s modification of the *Lemon* test, discussed above, reviewing only its first two parts while recasting entanglement as one criterion in evaluating a statute's effect.[101] As the purpose part of the test was not at issue, the plurality thought it necessary only to consider Chapter 2's effect, finding that it did not foster impermissible indoctrination because aid was allocated based on neutral secular criteria neither favoring nor disfavoring religion and was available to all schools based on secular, non-discriminatory grounds.[102] The plurality explicitly reversed those parts of *Meek* and *Wolman* inconsistent with its analysis on loans of instructional materials.[103]

Two years later, in *Zelman v. Simmons-Harris* ("*Zelman*"), the Supreme Court upheld a voucher program from Cleveland that was part of a larger program designed to help inner-city students in a failing public school system that was not only taken over by the state but also operated under a federal desegregation decree.[104] The Court agreed that the program was constitutional because it was open to both religious and secular beneficiaries on a non-discriminatory basis.[105] Also, the Court acknowledged that that program offered aid directly to a broad class of parents who directed it to

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[98] 20 U.S.C. § 1400 *et seq*.; *Zobrest*, 509 U.S. at 3, 10. For a commentary on the delivery of special education services to students in faith-based schools, see Allan Osborne, Jr. & Charles J. Russo, *Providing Special Education Services to Students in Nonpublic Schools Under the Individuals with Disabilities Education Act*, 321 EDUC. L. REP. 15 (2015).

[99] 530 U.S. 793 (2000), reh'g denied, 530 U.S. 1296 (2000), on remand sub nom. Helms v. Picard, 229 F.3d 467 (5th Cir. 2000). For a commentary on this case, see Ralph D. Mawdsley & Charles J. Russo, *Religious Schools and Government Assistance: What is Acceptable After* Helms*?*, 151 EDUC. L. REP. 373 (2001).

[100] *Mitchell*, 530 U.S. at 801, 803.**Error! Bookmark not defined.**

[101] *Compare Mitchell*, 530 U.S. at 809, *with* Agostini v. Felton, 521 U.S. 203, 232 (1997).

[102] *Mitchell*, 530 U.S. at 834–35.

[103] *Id.* at 808.

[104] *See* 536 U.S. 639 (2002).

[105] *Id.* at 662–63.

faith-based schools based entirely on their own genuine and independent private choices rather than by operation of the law.[106]

D. The Roberts Court Ignores Lemon

The appointment of Chief Justice Roberts just before the Court's 2005 Term and the appointment of Justice Alito in early 2006 suggested a shift away from *Lemon*.[107] In this regard, it is important to note that in the sixteen years since John Roberts was appointed Chief Justice, the Court has mentioned *Lemon* but has never utilized it when resolving Establishment Clause cases in education or other contexts.[108]

Instead, as illustrated by *Trinity Lutheran v. Comer* ("*Trinity Lutheran*"), *Espinoza v. Montana Department of Revenue* ("*Espinoza*"), and *Carson v. Makin*, the Supreme Court has relied on both Religion Clauses to expand religious liberty, thereby undermining any notion of a "Wall of Separation."[109] More specifically, in *Trinity Lutheran*, the Court ruled that the Free Exercise Clause does not allow states to single out faith-based institutions and/or believers to be denied generally available benefits simply because they are religious.[110]

At issue in *Trinity Lutheran* was a program from Missouri that offered a limited number of reimbursement grants to reduce the volume of used tires in landfills and dump sites to provide funds to nonprofit organizations to purchase playground surfaces made from recycled tires.[111] Even though the school admitted students of any religion and was rated fifth out of forty-four applicants vying for aid, state officials rejected the school's request simply because it was religious in nature.[112] Writing for the Court, Chief Justice Roberts pithily reasoned that "the exclusion of Trinity Lutheran

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[106] *Id. But see* Locke v. Davey, 540 U.S. 712 (2004) (upholding a law from Washington that denied a student a scholarship because he wished to pursue a degree in pastoral theology in violation of rules forbidding the release of funds to pay for those who wished to study for the ministry).

[107] Marcia S. Alembik, Note, *The Future of the* Lemon *Test: A Sweeter Alternative for Establishment Cause Analysis*, 40 GA. L. REV. 1171, 1206–07 (2006).

[108] Since the decision in *Lemon*, the Supreme Court has relied on it in twenty-two cases, none of which occurred after Justice Roberts's appointment to the Court. *See* cases cited *infra* note 150. Since Justice Roberts's 2005 appointment, the Court has avoided applying *Lemon* in its decisions. *See* cases cited *infra* note 151.

[109] *See* Trinity Lutheran v. Comer, 137 S. Ct. 2012 (2017). For a commentary on this case, see William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of* Trinity Lutheran Church v. Comer, 346 EDUC. L. REP. 1 (2017). *See also* Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020). For a commentary on this case, see Charles J. Russo & William E. Thro, *The Demise of the Blaine Amendment and a Triumph for Religious Freedom and School Choice:* Espinoza v. Montana Department of Revenue, 46 U. DAYTON L. REV. 131 (2021). *See* Carson v. Makin, 2022 WL 2203333, — U.S. — (2022). For a brief review of this case, see Charles J. Russo, *State funds for students at religious schools? Supreme Court says 'yes' in Maine case—but consequences could go beyond*, CONVERSATION (June 21, 2022, 9:56 PM), https://theconversation.com/state-funds-for-students-at-religious-schools-supreme-court-says-yes-in-maine-case-but-consequences-could-go-beyond-184618.

[110] *Trinity*, 137 S. Ct. at 2025 (a church-affiliated preschool).

[111] *Id.* at 2017.

[112] *Id.*

[Church] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand."[113]

Then, in *Espinoza*, the Justices reversed an order of the Supreme Court of Montana that invalidated a tax credit program for contributions to student scholarship organizations under the state constitutional prohibition of public aid to "sectarian" schools.[114] Upholding the program, the Supreme Court found that because such aid was permissible under the Establishment Clause, the no-aid provision in Montana's constitution discriminated based on religious status.[115] The Justices decided that while the state constitution sought to separate church and state more stringently than its federal counterpart, it did not satisfy strict scrutiny because it lacked a compelling interest.[116]

During the 2021 Term, the Supreme Court continued to dismantle the Wall, replacing it with a "Chain Link Fence" in *Carson* v. Makin ("*Carson*").[117] In *Carson*, the First Circuit bypassed *Trinity Lutheran* and *Espinoza*, upholding a statutory tuition assistance program from Maine that limited choices to nonsectarian private and public schools, explicitly refusing to permit students to participate by attending faith-based schools.[118] The First Circuit distinguished *Carson* from *Espinoza* and *Trinity Lutheran*, arguing that the statute at issue did not display "hostility toward religion when it imposes a use-based 'nonsectarian' restriction on the public funds that it makes available for the purpose of providing a substitute for the public educational instruction that is not otherwise offered."[119]

Carson stands in stark contrast to *A.H. ex rel. Hester v. French* which invalidated the actions of Vermont officials who rejected the application of a student from a Roman Catholic high school who sought to participate in the state's dual-enrollment program.[120] The student hoped to take two college classes at public expense under the state's "tuitioning" program, which

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[113] *Id.* at 2025.
[114] *Espinoza*, 140 S. Ct. at 2263.
[115] *Id.* at 2262–63.
[116] *Id.* at 2260.
[117] *See* 973 F.3d 21 (1st Cir. 2020). For a brief commentary on this case, see Charles J. Russo & James LaPolla, *State Aid to Students in Faith-Based Schools: Controversy Continues*, SCH. BUS. AFFAIRS, Apr. 2021, at 33–35; *see also* Charles J. Russo & William E. Thro, *Born of Bigotry, Died in Religious Liberty: The Supreme Court Ends the Blaine Amendments in Empowering Parental Choice*, EMORY UNIV., CANOPY FORUM INTERACTIONS L. REL. (July 14, 2020), https://canopyforum.org/2020/07/14/born-of-bigotry-died-in-religious-liberty/.
[118] *Carson*, 973 F.3d at 49.
[119] *Id.* at 43–44.
[120] 999 F.3d 98, 100, 108 (2d Cir. 2021). For a brief commentary on this case, see Charles J. Russo, *Disputes Continue over State Aid to Faith-Based Schools*, SCH. BUS. AFFAIRS, June 2021, at 39–42.

assisted small school systems that did not operate secondary schools.[121] The Second Circuit reversed, in favor of the student, because officials violated her rights under the Free Exercise Clause of the First Amendment, which essentially created a split between the federal circuits that the Supreme Court has agreed to resolve.[122]

On further review in *Makin*, the Supreme Court reversed in favor of the plaintiffs.[123] Following the trend it initiated in *Trinity Lutheran* and reiterated in *Espinoza*, in *Carson*, the Supreme Court reasoned that the "nonsectarian" requirement in Maine's statute that denied access to a family for otherwise generally available tuition assistance payments violated the Free Exercise Clause.[124]

IV. THE FUNDAMENTAL FLAWS OF *LEMON*

A half-century after *Lemon*, the test is fundamentally flawed. First, the *Lemon* test is contrary to the original public meaning of the Establishment Clause. Second, as evidenced by the lack of judicial agreement on its meaning, the test is simply unworkable as a jurisprudential test. Third, rather than uniting Americans into what John Inazu calls a "Confident Pluralism," the *Lemon* test encourages division.[125] Each of these flaws warrants further discussion as follows.

A. Contrary to Original Public Meaning

As reviewed above, *Lemon*, like *Everson* before it, assumes the Establishment Clause erects a Wall of Separation.[126] This assumption is simply wrong. In 1791, when the First Amendment was ratified, the original public meaning of the Establishment Clause was not separation of church and state but the freedom from the establishment of religion.[127]

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[121] *French*, 999 F.3d at 100; Mark Walsh, *Court Backs Religious-School Student's Participation in Vermont Dual-Enrollment Program*, EDUC. WEEKLY (Jan. 15, 2021), https://www.edweek.org/policy-politics/court-backs-religious-school-students-participation-in-vermont-dual-enrollment-program/2021/01.

[122] *French*, 999 F.3d at 108. *See, e.g.*, Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021) (affirming a district court decision that the city's cessation of foster referrals to certain religious organizations due to their discriminatory sexual orientation policies did not violate the Free Exercise Clause). In its reversal, the Supreme Court found that the city's interest of equal treatment of prospective foster parents was not compelling enough to discriminate against religious beliefs and could not survive strict scrutiny analysis. Fulton v. City of Phila., 141 S. Ct. 1868, 1881–82 (2021).

[123] Carson v. Makin, 2022 WL 2203333, — U.S. — (2022).

[124] *Id.* at *10–*11.

[125] JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 6–7 (2016).

[126] *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[127] JOHN S. BAKER, JR. & DANIEL DREISBACH, *Establishment Clause, in* THE HERITAGE GUIDE TO THE CONSTITUTION 394 (Daniel F. Forte & Matthew Spalding eds., 2d. ed. 2014).

There is a "distinction between the separation of church and state and the constitutional freedom from a religious establishment."[128] The idea of separation of church and state suggests "a distance, segregation, or absence of contact between church and state. Rather than simply forbid civil laws respecting an establishment of religion, [the use of the Wall metaphor] has [been used] more ambitiously . . . to prohibit contact between religious and civil institutions."[129] Conversely, the freedom from a religious establishment means there is no "promotion and inculcation of a common set of beliefs through governmental authority."[130] There will be no "exclusive legal preference for one church or religion over all others" nor any "arrangement where the civil government imposed articles of faith and forms of worship on all those under its authority."[131]

The Framing Generation's views focused on freedom from religious establishment such as the Church of England rather than a separation of church and state.[132] "None of the Framers believed that a public role for religion was an evil in itself. Rather, many opposed an established church like the established Anglican Church in England because they believed that it was a threat to the free exercise of religion."[133] Instead, "most Framers supported religion, not for credal purposes, but because it promoted civic virtue among the people, which they thought was a necessary element for the maintenance of republican self-government."[134]

This freedom from a religious establishment was understood to be a rejection of coercion, a mandate of neutrality toward competing sects, and a prohibition on governmental interference with religious organizations.[135] As Judge Michael McConnell noted, freedom from religious establishment "can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[136] While the *Lemon* test certainly would prevent the government from engaging in any of those six categories,

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[128] HAMBURGER, *supra* note 2, at 479–80.
[129] *Id.* at 3.
[130] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003).
[131] BAKER & DREISBACH, *supra* note 125, at 394.
[132] *Id.*
[133] *Id.* at 393–94.
[134] *Id.* at 395.
[135] *Id.* at 396.
[136] McConnell, *supra* note 128, at 2131; *see also* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146 (1986).

it has gone far beyond these items. If the Court wishes to be true to the original public meaning, then it must abandon *Lemon*.

B. Unworkable Jurisprudentially

Lemon is simply unworkable jurisprudentially. More specifically, since the Supreme Court first applied the Establishment Clause to the States in *Everson*, it addressed six distinct categories of cases.[137] First, it reviewed "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies . . . ."[138] Second, it considered "religious accommodations and exemptions from generally applicable laws . . . ."[139] Third, it examined "subsidies and tax exemptions . . . ."[140] Fourth, it resolved disputes about "religious expression in public [K-12] schools . . . ."[141] Fifth, it addressed "regulation of private religious speech . . . ."[142] Sixth, it sat in judgment on cases dealing with disagreements over "state interference with internal church affairs . . . ."[143] Of course, other cases do not fit into the categories, such as cases concerning Sunday closing laws and church involvement in governmental decision-making.[144]

As Justice Kavanaugh observed, "The *Lemon* test does not explain the Court's decisions in any of those . . . categories."[145] First, "the Court has relied on history and tradition and upheld various religious symbols on government property and religious speech at government events . . . . *Lemon* does not account for the results in these cases."[146] Second, the "Court has allowed legislative accommodations for religious activity and upheld legislatively granted religious exemptions from generally applicable laws. . . . *Lemon*, fairly applied, does not justify those decisions."[147] Third, "the Court

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[137] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct 2067, 2081 n.16 (2019).

[138] *Id.* (citing Lynch v. Donnelly, 465 U.S. 668 (1984); Van Orden v. Perry, 545 U.S. 677 (2005)).

[139] *Id.* (citing Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the section of the Religious Land Use and Institutionalized Persons Act increasing level of protection for the religious rights of prisoners' and others who are incarcerated did not violate the Establishment Clause); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding the constitutionality of the ministerial exception)).

[140] *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664 (1970); Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

[141] *Id.* (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992)).

[142] *Id.* (citing Capitol Square Rev. v. Pinette, 515 U.S. 753 (1995) (affirming that Ohio did not violate the Establishment Clause by permitting a private party to display an unattended cross on the grounds of the state capitol)).

[143] *Id.* (citing Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012) (upholding the right of religious leaders to determine who qualifies as a minister)).

[144] *Id.* (citing McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closure laws as constitutional as long as they were enacted with valid secular purposes in mind); Larkin v. Grendel's Den, 459 U.S. 116 (1982) (invalidating a law granting the governing bodies of churches and schools the power to effectively veto applications for liquor licenses within a 500-foot radius of their locations as violating the Establishment Clause); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994)).

[145] *Id.* at 2092 (Kavanaugh, J., concurring).

[146] *Id.*

[147] *Id.*

likewise has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion. Those outcomes are not easily reconciled with *Lemon*."[148]

Fourth, the Supreme Court "proscribed government-sponsored prayer in public schools. The Court has done so not because of *Lemon*, but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students. . . . *Lemon* was not necessary to the Court's decisions holding government-sponsored school prayers unconstitutional."[149] Fifth, "the Court has allowed private religious speech in public forums on an equal basis with secular speech. . . . *Lemon* does not explain those cases."[150] Sixth, the Supreme Court's cases involving government interference with church affairs, such as *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, have never mentioned *Lemon*.[151]

In the twenty-two cases in which the Supreme Court relied on the *Lemon* test, it handed down eighteen majority opinions, of which only one was unanimous in a K-12 school case, thirty-six separate concurrences, forty separate dissents, three pluralities, and one per curiam order, an average of 4.45 opinions per case.[152] Additionally, the Justices avoided *Lemon* in

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[148] *Id.* at 2092–93 (citations omitted).

[149] *Id.* at 2093.

[150] *Id.*

[151] 565 U.S. 171 (2012).

[152] Note: in the preceding and following footnotes only cases not already cited or discussed include explanatory squibs. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (8–1 decision) (White, J., dissenting) (affirming the unconstitutionality of a statute allowing reimbursements to non-public schools for expenses incurred administering and reporting test results plus other records as having the primary effect of advancing religion because absent restrictions on the use of the funds, teacher-prepared tests on religious subject matter may have been reimbursable); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (6–3 decision) (Rehnquist J., dissenting in part at 805) (striking down a law granting parents of children who attended faith-based schools state income tax deductions); Sloan v. Lemon, 413 U.S. 825 (1973) (Lemon II) (6–3 decision) (Burger, C.J., dissenting at 93 S. Ct. at 2988) (White, J., dissenting at 2993) (opinions not in U.S.) (vitiating a program that provided reimbursements to parents whose children attended faith-based schools); New York v. Cathedral Acad., 434 U.S. 125 (1977) (6–3 decision) (White, J., dissenting at 134) (relying on Lemon II to strike down a law providing reimbursements to religious schools for record keeping and testing); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (5–4 decision) (Blackmun, J. with Brennan, and Marshall, JJ., dissenting at 662) (Stevens, J., dissenting at 671) (upholding the revised statute from *Nyqusit* created no excessive entanglement because the state put safeguards in place); Mueller v. Allen, 463 U.S. 388 (1983) (5–4 decision) (Marshall, J. with Brennan, Blackmun, and Stevens, JJ., dissenting at 404); Lynch v. Donnelly, 465 U.S. 668 (1984) (5–4 decision) (O'Connor, J., concurring at 687) (Brennan, J., dissenting at 694) (Blackmun, J., dissenting at 726); Wallace v. Jaffree, 472 U.S. 38 (1985) (6–3 decision) (Powell, J., concurring at 62) (O'Connor, J., concurring at 67) (Burger, C.J., dissenting at 84) (White, J., dissenting at 90) (Rehnquist, J., dissenting at 91); Aguilar v. Felton, 473 U.S. 402 (1985) (6–3 decision) (Powell, J., concurring at 414) (Burger, C.J., dissenting at 419)(Rehnquist, J., dissenting at 420) (O'Connor J. with Rehnquist, J. (to Parts II & III), dissenting at 421); Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (5–4 decision) (Burger, C.J., concurring in part and dissenting in part at 398) (O'Connor, J., concurring in part and dissenting in part at 398) (Rehnquist, J., dissenting

at least seven cases, perhaps signaling the end of its usefulness.[153] *Lemon* may have outlived its usefulness because insofar as the Supreme Court Justices cannot agree on the meaning of this tortious test, it is unclear how they expect lower courts, lawyers, educators, and students to come to grips with its meaning to avoid litigation and ensure smooth operations of their activities.

Writing for the Court in *American Legion*, Justice Alito pointed out that "[i]n many cases this Court has either expressly declined to apply the

at 400) (White, J., dissenting at 105 S. Ct. at 3248 (opinion not included in U.S.); Edwards v. Aguillard, 482 U.S. 578 (1987) (7–2 decision) (Powell, J., concurring at 597) (White, J., concurring in the judgment at 608) (Scalia, J. with Rehnquist, C.J., dissenting at 610) (affirming the unconstitutionality of a law banning the teaching of "evolution-science" in public schools unless accompanied by instruction on "creation-science"); Bd. of Educ. Of Westside Cmty. Schs. V. Mergens, 496 U.S. 226 (1990) (8–1 decision) (Kennedy, J., concurring in part and in the judgment, with Scalia, J., at 258) (Marshall, J., concurring in the judgment, with Brennan, J., at 262) (Stevens, J., dissenting at 271) (upholding the constitutionality of the Equal Access Act which allows student organized prayer and Bible study clubs to meet in public secondary schools if other groups can gather during non-instructional time); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 US 687 (1994) (6–3 decision) (Blackmun, J., concurring at 710) (Stevens, J. with Blackmun & Ginsburg, JJ., concurring at 711) (O'Connor, J., concurring in part and in judgment at 712) (Kennedy, J., concurring at 722) (Scalia, J. with Rehnquist, C.J. & Thomas, J., dissenting at 732) (affirming the unconstitutionality of a law creating a public school district with boundaries contiguous to those of a religious community); Agostini v. Felton, 521 U.S. 203 (1997) (5–4 decision) (Souter, J. with Stevens, Ginsburg, & Breyer, JJ. (to Part II), dissenting at 240) (Ginsburg, J., dissenting at 255); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (6–3 decision) (citing *Agostini's* modification of *Lemon*) (O'Connor, J., concurring at 663) (Thomas, J., concurring at 676) (Stevens, J., dissenting at 684) (Souter, J. with Stevens, Ginsburg, & Breyer, JJ., dissenting at 686) (Breyer, J. with Stevens & Souter, JJ., dissenting at 717); McCreary Cnty., Ky. v. Am. C.L. Union of Ky., 545 U.S. 844 (2005) (5–4 decision) (O'Connor, J., concurring at 881) (Scalia, J. with Rehnquist, C.J., Thomas & Kennedy (to Parts II & III), JJ., dissenting at 885) (affirming that a display at a county court house including the Ten Commandments violated the Establishment Clause because there was no secular purpose); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (9–0 decision) (Kennedy, J., concurring in part and in the judgment at 397) (Scalia, J. with Thomas, J., concurring at 397) (granting a religious group's request to use public school facilities where denying it would have been a form of viewpoint discrimination because non-faith-based groups could do the same); *see also* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986) (9–0 decision) (White, J., concurring at 490) (Powell, J. with Burger, C.J., and Rehnquist, J., concurring at 490) (O'Connor, J., concurring in part and in the judgment at 493) (upholding aid to a student under the state's vocational rehabilitation program to finance his education at the Christian college as he prepared for the ministry because it did not advance religion in a manner inconsistent with the Establishment Clause); Meek v. Pittenger, 421 U.S. 349 (1975) (6–3 decision) (Brennan, J., concurring in part and dissenting in part at 373) (Burger, C.J., concurring in the judgment in part and dissenting in part at 385) (Rehnquist, J., concurring in the judgment in part and dissenting in part at 387); Wolman v. Walter, 433 U.S. 229 (1977) (7–2 decision) (Burger, C.J., dissenting in part at 255) (Brennan, J., dissenting in part and concurring in part at 255) (Marshall, J., concurring in part and dissenting in part at 256) (Powell, J., concurring in part and dissenting in part at 262) (Stevens, J., concurring in part and dissenting in part at 264); Mitchell v. Helms, 530 U.S. 793 (2000) (6–3 decision) (Thomas, J., announced the plurality judgment in which Rehnquist, C.J., Scalia, J., and Kennedy, J. joined) (O'Connor, J. with Breyer, J., concurring at 836, Souter, J. with Stevens & Ginsburg, JJ., dissenting at 867); Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (5–4 decision) (Rehnquist, C.J. with Blackmun, J., dissenting at 43) (Stewart, J., dissenting with no written statement at 43) (affirming the unconstitutionality of posting the Ten Commandments in public schools).

[153] *See* Lee v. Weisman, 505 U.S. 577 (1992); Van Orden v. Perry, 545 U.S. 677 (2005) (affirming in a plurality decision that a display of the Ten Commandments among seventeen monuments and twenty-one historical markers commemorating the state's history spread out over the twenty-two acres of the Texas State Capitol was constitutional); Elk Grove Sch. Dist. v. Newdow, 542 U.S. 1 (2004), *reh'g denied*, 542 U.S. 961 (2004) (rejecting a challenge to the constitutionality of the words "under God" in the Pledge of Allegiance because the non-custodial father-plaintiff lacked standing); Town of Greece v. Galloway, 572 U.S. 565 (2014); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Mont. Dep't of Rev.,140 S. Ct. 2246 (2020); Carson v. Makin, 2022 WL 2203333, ── U.S. ── (2022).

[*Lemon*] test or has simply ignored it."[154] He added that as "cases involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them."[155] Justice Thomas, calling for the complete repudiation of *Lemon*, emphasized that (1) it has no basis in the original meaning of the Constitution; (2) it is easily manipulated to achieve whatever result the judges wish; (3) it causes enormous confusion in both state and federal courts.[156] Justice Kavanaugh asserted the Court "no longer applies" *Lemon*.[157] Justice Gorsuch, joined by Justice Thomas, described "*Lemon* [as] a misadventure. It sought a 'grand unified theory' of the Establishment Clause but left us only a mess."[158]

C. Divides Americans

A half-century after *Lemon*, our American Republic lacks "agreement about the purpose of our country, the nature of the common good, and the meaning of human flourishing."[159] Unfortunately, "there is not a single important cultural, religious, political, or social force that is pulling Americans together more than it is pushing us apart."[160] We have forgotten "[f]reedom flows from the tireless efforts of those who proclaim and pursue protection of the equal human dignity of all."[161] At the same time, many are intolerant of Americans "with a deep faith that requires them to do things passing legislative majorities might find unseemly or uncouth . . . ."[162]

If our Union "conceived in liberty, and dedicated to the proposition that all . . . are created equal" is to "long endure," then we must develop a "confident pluralism that conduces to civil peace and advances democratic consensus-building."[163] Because every American is "seeking a home where he himself is free," our Nation must find a way "to be steadfast in our personal

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[154] *Am. Legion*, 139 S. Ct. at 2080.

[155] *Id.*

[156] *Id.* at 2097 (Thomas, J., concurring). Further, in *Espinoza*, Justice Thomas expressed his disregard for *Lemon* by referring to it as "this Court's infamous test." *Espinoza*, 140 S. Ct. at 2265.

[157] *Id.* at 2092 (Kavanaugh, J., concurring).

[158] *Id.* at 2101 (Gorsuch, J. with Thomas, J., concurring).

[159] TIM KELLER & JOHN INAZU, UNCOMMON GROUND: LIVING FAITHFULLY IN A WORLD OF DIFFERENCE xv (2020).

[160] DAVID FRENCH, DIVIDED WE FALL: AMERICA'S SECESSION THREAT AND HOW TO RESTORE OUR NATION 1 (2020).

[161] Danielle Allen, *The Flawed Genius of the Constitution*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2020/10/danielle-allen-constitution/615481/ (Oct. 5, 2020, 11:50 AM).

[162] Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring).

[163] ABRAHAM LINCOLN, *Address at Gettysburg, Pennsylvania*, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, at 536 (Don E. Fehrenbacher ed., 1989); Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 734 (2010) (Alito, J. with Roberts, C.J., Scalia & Thomas, JJ., dissenting) (quoting Brief for Gays and Lesbians for Individual Liberty as *Amicus Curiae* 35) (affirming that officials in a public law school could implement a policy requiring an on-campus religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of becoming a recognized student organization).

convictions, while also making room for the cacophony that may ensue when others disagree with us."[164] Acknowledging "nobility and dignity [of] all persons, without regard to their station in life" also requires permitting views we may find "deeply unacceptable" or "blasphemously, disastrously, obscenely wrong."[165] We can, and must, learn to "live with . . . those we regard as damned."[166]

The American Nation has room for "both for you and 'a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours.'"[167] Just as America was "wide enough" for Hamilton and Burr, it is "wide enough" for red states and blue states, urban and rural, the secular and the sacred, the new immigrant and the Tribal Nations, the descendent of slaves and of pilgrims, people of faith and people of no faith, those who remember Pearl Harbor and those who do not remember 9/11, the critical race theorist and the constitutional originalist, the gay and the straight, those who accept their biological sex and those who think gender is fluid.[168]

Yet, by perpetuating the idea of a Wall of Separation of Church and State, *Lemon* encourages, if not engenders, division. For example, university administrators erroneously interpreted the Establishment Clause as requiring them to exclude student religious groups from accessing campus facilities and obtaining funding from institutional activity fees, positions the Supreme Court clearly rejected.[169] Similarly, although the COVID-19 virus does not distinguish between the atheist and the believer, the courts have

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[164] Langston Hughes, *Let America Be America Again*, *in* LET AMERICA BE AMERICA AGAIN 30 (1938); INAZU, *supra* note 123, at 8.

[165] Obergefell v. Hodges, 576 U.S. 644, 656 (2015); Bernard Williams, *Toleration: An Impossible Virtue*, *in* TOLERATION: AN ELUSIVE VIRTUE 18, 18 (David Heyd ed., 1996); *see also* INAZU, *supra* note 123, at 87 (quoting the same passage from Williams to make a similar point).

[166] INAZU, *supra* note 123, at 5 (quoting French philosopher Jean-Jacques Rousseau).

[167] Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 548 (W.D. Ky. 2020) (quoting THE AMERICAN PRESIDENT (Columbia Pictures 1995)) (granting a wedding photographer's request to enjoin enforcement of a law forbidding business owners from denying services to individuals based on their sexual orientation because doing so was contrary to her religious beliefs where she was likely to succeed that it violated her First Amendment right to free speech insofar photography is a form of speech).

[168] Lin-Manuel Miranda & Jeremy McCarter, *The World Was Wide Enough*, *in* HAMILTON THE REVOLUTION 272–75 (2016). In the song, Aaron Burr realizes his mistake in shooting Alexander Hamilton in a duel. *Id.* Burr then laments he should have "known [t]he world was wide enough for both Hamilton and [him]." *Id.* at 275.

[169] Widmar v. Vincent, 454 U.S. 263 (1981) (affirming that a university policy of denying a Christian group access to an open forum on the campus of a public university violated the Establishment Clause as a content-based exclusion); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (rejecting the denial of funding to a Christian publication as a form of viewpoint discrimination). For representative commentary on this case, see Robert L. Kilroy, *Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of* Rosenberger v. Rector *& Visitors of the University of Virginia*, 6 CORNELL J.L. PUB. POL'Y 701 (1997).

rejected the efforts of some governors to impose greater restrictions on religious services than on secular events.[170]

When governmental officials, whether at the state level or in public colleges, universities, or schools, enact policies establishing a Wall against people of faith, they send the unmistakable message that believers are unwelcome. Given its history and Justice Black's animus in introducing it in *Everson*, there is a distinct relationship between the acceptance of a Wall of Separation and the acceptance of anti-religious bigotry.[171]

In a related matter, an underlying issue associated with divisiveness that must be brought to the fore is the role of Justice Black in *Everson* and its impact in the eventual emergence of the *Lemon* test.[172] Put another way, while Justice Black's opinion in *Everson* upheld the statute's permitting transportation for children in faith-based schools, given his antipathy for Roman Catholics, his position represented what can best be described as a Trojan Horse. Such an assessment is apt particularly because Justice "Black reportedly told friends that he made the approval of the aid 'as tight' as possible to render it a 'pyrrhic victory' for aid proponents."[173]

Reliance on the Wall metaphor, as incorporated by Justice Black in *Everson*, should be viewed with suspicion because in later cases, as described throughout, and until recently, when the Supreme Court applied it in its fullest expression in *Lemon* to disputes involving faith-based schools, most of which were affiliated with the Roman Catholic Church, the outcomes were often consistent with his antipathy for it and its followers.[174] Because Justice Black

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[170] Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 67, 69 (2020); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021). For a brief commentary on this issue, see Charles J. Russo, *"Even in a pandemic, the Constitution cannot be put away and forgotten:" Banning Communal Worship Poses Continuing Threats to Religious Freedom,* CANOPY FORUM (Apr. 2, 2021), https://canopyforum.org/2021/04/02/even-in-a-pandemic-the-constitution-cannot-be-put-away-and-forgotten/, and see also Paul T. Babie & Charles J. Russo, *If Beer and Wrestling are "Essential," So Is Easter: COVID-19, Freedom of Religion or Belief, and Public Health in Australia and the United States—Why Rights Matter*, 55 NEW ENG. L. REV. 45 (2020).

[171] HAMBURGER, *supra* note 2, at 480–81.

[172] *Id*. at 474.

[173] Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHIC. L.J. 121, 127–28 (2001) (citing ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 363–64 (1994) (quoting Black's remarks to Truman Hobbs and Louis Oberdorfer)).

[174] *See, e.g.*, Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 274 (2014) ("Leaping from Jefferson's 1802 letter to Hugo Black's Everson opinion in 1947, the modern myth of separation omits any discussion of nativist sentiment in America and, above all, omits any mention of the Ku Klux Klan." (quoting HAMBURGER, *supra* note 2, at 399)). Before joining the Court in 1937, Hugo Black was not just an ordinary member, but rather held a leadership position in the Invisible Empire of the Ku Klux Klan. HAMBURGER, *supra* note 2, at 423, 426. Indeed, as Kladd of his Klan Klavern, the soon-to-be-Justice Black was charged with leading new members of the KKK in their recitation of the Klansman's oath of allegiance which included allegiance to "free public schools . . . separation of church and state . . . [and] white supremacy . . . ." *Id*. at 409, 426 (citations omitted). "Justice Black's Anti-Catholic views have been well-established, and as Professor Hamburger puts it, 'holding such views . . . Black in 1947 led the Court to declare itself in

openly admitted his distrust of the Roman Catholic Church, his introduction of the Wall must be viewed with the utmost suspicion.[175] In short, because the Wall metaphor divides Americans and was "born of bigotry, [it] should be buried now."[176]

V. MOVING FORWARD: TEAR DOWN THIS WALL AND RESTORE ORIGINAL PUBLIC MEANING

"Tear Down This Wall."

—Ronald Reagan[177]

Based on its recent decisions, it appears that the Supreme Court will take up President Reagan's challenge concerning the Berlin Wall and tear down the *Lemon* Wall of Separation and replace it with a Chain Link Fence. In so doing, the Court will recognize the essential role of religion in the American life of people of faith while fully protecting the autonomy of religious organizations. In the near future, *Lemon*, like the Soviet Union, is very likely to be relegated to the dust bin of history.

Yet, the seemingly imminent demise of *Lemon* raises the question of what will replace it. As Justice Breyer, joined by Justice Kagan, observed, "[T]here is no single formula for resolving Establishment Clause challenges. The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve."[178] Justice Kavanaugh has suggested Establishment Clause cases are principled on:

> If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to

favor of the 'separation of church and state.'" Duncan, *supra*, at 275 (quoting HAMBURGER, *supra* note 2, at 463); *id.* at 275 n.90 ("noting that this 'virulently anti-Catholic' animus of strict separation 'served as a cohesive political and cultural agent for an increasingly fragmented Protestant majority'"); *see also* Elizabeth D. Katz, *"Racial and Religious Democracy": Identity and Equality in Midcentury Courts*, 72 STAN. L. REV. 1467, 1499 (2020) ("[A]t a meeting of the Catholic Club of the City of New York, . . . the group unanimously adopted a resolution demanding that recently appointed Supreme Court Justice Hugo Black resign or be impeached because of his membership in the Ku Klux Klan, which was anti-Catholic in addition to being anti-black and anti-Jewish.").

[175] *See* Berg, *supra* note 171, at 129 ("Hugo Black Jr.'s memoirs state that his father, the justice, . . . [had] one sentiment he did share with the Ku Klux Klan (of which Justice Black had once, famously, been a member) was a distrust of the Catholic Church.").

[176] Mitchell v. Helms, 530 U.S. 793, 829 (2000); Helms v. Picard, 229 F.3d 467 (5th Cir. 2000) (expanding the boundaries of aid to faith-based schools by upholding the constitutionality of Chapter 2 of Title I, then Title VI, of the Elementary and Secondary Education Act, 20 U.S.C. §§ 7301–73, which allows loans of instructional materials such as library books, computers, television sets, tape recorders, and maps to non-public schools).

[177] President Reagan uttered his now famous words at the Brandenburg Gate in Berlin on June 12, 1987. For coverage of this historic speech, see, for example, Walter V. Robinson, *Reagan Dares Soviets in Berlin*, BOS. GLOBE, June 13, 1987, at 1; Saul Friedman, *"Tear Down This Wall": Reagan, In West Berlin, Issues Challenge to Soviets*, NEWSDAY, June 13, 1987, at 5.

[178] Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2090–91 (2019) (Breyer, J. with Kagan, J., concurring) (citations omitted).

> comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law . . . .[179]

Justice Kavanaugh's overarching set of principles explains existing Establishment Clause jurisprudence and may well represent a concise future approach to the resolution of disputes arising under it. As such, his overarching principles suggest three significant inquiries.

First, instead of *Lemon*'s secular purpose inquiry, the Supreme Court should simply ask whether a statute or regulation is facially neutral. In other words, as written, does the statute or regulation favor or disfavor a particular faith? Such an inquiry is consistent with the dominant view of the original public meaning of the Establishment Clause.[180]

Second, rather than rely on *Lemon*'s examination of the principal or primary effect of advancing or inhibiting religion, the Supreme Court ought to inquire whether a benefit is generally available to all, as in *Zelman*, *Trinity Lutheran*, and *Espinoza*.[181] Engaging in this kind of inquiry would also include asking whether all groups have equal access to facilities if a dispute involves prayer or religious activities. Justice Kavanaugh raised a similar point in *American Legion* about treating groups equally.[182]

Third, instead of *Lemon*'s excessive entanglement analysis, the Supreme Court should focus on history and tradition to determine whether a disputed practice objectively endorses religion. For example, in *Town of Greece v. Galloway*, the Court focused on history and tradition in upholding the practice of allowing prayers to be recited at monthly meetings of the town board, even if they were explicitly religious, as long as all who wished to participate were able to do so.[183] In other words, if a practice has long-standing history and tradition, it cannot be viewed as endorsing religion.

Formally repudiating the *Lemon* test, rather than simply ignoring it as the Roberts Court has done, would herald a return to the original public meaning of the Establishment Clause by prohibiting governmental coercion, banning discrimination against particular faiths, and reaffirming both

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[179] *Id.* at 2093 (Kavanaugh, J., concurring).

[180] For a rejection of the idea that the Founders supported the non-preferential treatment of religion, see Douglas Laycock, *Religion and the State: Article: The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 875 (1986).

[181] *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017); Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246 (2020).

[182] *Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

[183] *See generally* 572 U.S. 565 (2014).

the historical and contemporary role of religion in American life, recognizing its role and significance as the United States' "first freedom."[184] Should the Supreme Court finally retire the worn-out *Lemon* test, the upshot would be that all Americans would be free to choose to believe or not believe; every religious faith would be treated the same, and long-standing traditions and cultural norms respecting religion in the public marketplace would be respected.[185]

VI. CONCLUSION

Calling on the Supreme Court to replace the outdated, unworkable, and historically troubled metaphor of the Wall of Separation with a Chain Link Fence is intended to restore the original public meaning of the Establishment Clause; thereby ensuring the significant place of faith-based institutions, their staff members, and students by ensuring greater protections for religious freedom. In so doing, one hopes the Court will safeguard a continuing flow of aid to students under the Child Benefit Test and afford religious voices their rightful places to speak out in the marketplace of ideas.[186] Concomitantly, a change of this nature would reaffirm a foundational purpose of early American colonization and, most significantly, a way to achieve a "Confident Pluralism."[187]

In adopting a new approach to its First Amendment jurisprudence by finally repudiating the now sour *Lemon* test, the Supreme Court would help to prevent the increasing relegation of believers and their religious institutions, essentially reducing them to second-class citizens based on their religious beliefs, a practice Chief Justice Roberts aptly defined as "odious to our Constitution . . . ."[188] Precisely!

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[184] For commentary of religious liberty as America's "first freedom," see, for example, WILLIAM LEE MILLER, THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM (1986); James Wood, FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS (1990); Michael W. McConnell, *Religion and Constitutional Rights: Why is Religious Liberty the "First Freedom?"*, 21 CARDOZO L. REV. 1243 (2000).

[185] *See* Shurtleff v. City of Boston, 928 F.3d 166, 169 (1st Cir. 2019), *cert. granted*, 142 S. Ct. 55 (Sept. 30, 2021) (seeking equal treatment of religion where the plaintiffs sought to enjoin officials from denying them the opportunity to hang a flag including religious symbols outside of city hall while permitting other organizations to do so); *see also U.S. Supreme Court Takes Christian Flag Case*, LIBERTY COUNSEL (Sept. 30, 2021), https://www.lc.org/newsroom/details/093021-us-supreme-court-takes-christian-flag-case-1.

[186] *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (invalidating statutes and regulations making membership in specified organizations prima facie evidence of disqualification for employment in public colleges and universities because "[t]he classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.") (internal quotations omitted). This concept is widely applied to the free exchange of ideas more broadly.

[187] *See* INAZU, *supra* note 123, at 6–8.

[188] Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2025 (2017).

POSTSCRIPT

On June 27, 2022, as this Article was being finalized for publication, the Supreme Court handed down a significant ruling in *Kennedy v. Bremerton School District*, a dispute from Washinton state, signaling a dramatic shift in its First Amendment jurisprudence.[189] For the first time, in a six-to-three judgment, with the opinion authored by Justice Gorsuch, the Court reversed earlier rulings.[190] The Court concluded that school officials violated the religious rights of a football coach after they suspended him and chose not to renew his contract because he knelt in silent prayer at the fifty-yard line at the end of games.[191]

Writing for the Supreme Court, Justice Gorsuch acknowledged that "this Court long ago abandoned Lemon and its endorsement test offshoot" as it required that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[192] In her dissent, Justice Sotomayor, joined by Justices Kagan and Breyer, acknowledged that "[t]he Court now goes much further, overruling Lemon entirely and in all contexts."[193] Stay tuned!

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[189] — U.S. —, — S. Ct. — , 2022 WL 2295034 (2022). For a brief commentary on this opinion, see Charle J. Russo, *Why the Supreme Court's football decision is a game-changer on school prayer*, CONVERSATION (June 27, 2022, 6:26 PM), https://theconversation.com/why-the-supreme-courts-football-decision-is-a-game-changer-on-school-prayer-184619.

[190] 2022 WL 2295034.

[191] *Id.* Justice Gorsuch delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Alito, and Barrett, joined, and in which Justice Kavanaugh, joined, except as to Part III–B. Justices Thomas and Alito filed concurring opinions. Justice Sotomayor filed a dissenting opinion, in which Justices Breyer and Kagan.

[192] *Id.* at *13, *14 (internal citations omitted).

[193] *Id.* at *30 (Sotomayor, J., dissenting).