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Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence

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COMMENT

ESTABLISHING A PATTERN: AN ANALYSIS OF THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment to the United States Constitution reads in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] These two phrases are known as the Establishment Clause and the Free Exercise Clause, respectively, and each plays a distinct part in determining the role and status of religion in American society. The Free Exercise Clause guarantees freedom of religious expression to the individual, while the Establishment Clause prohibits the government from involving itself in religious affairs and prevents religious officials from exerting improper influence over the government.

The extent to which the Establishment Clause applies to certain situations has been a great source of conflict in the United States. It seems that each individual has his own idea of what is proper in the realm of separation of church and state. This is true for individuals who bring suit for violations of the Establishment Clause and even more so for the justices of the Supreme Court of the United States who construe the clause itself. The Establishment Clause has been greatly litigated, with more than seventy cases decided by the United States Supreme Court since the 1940s, yet the Court has been unable to agree for any amount of time on a standard method for determining if the Establishment Clause has been violated.

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1. U.S. CONST. amend. I.

This article explores the Establishment Clause jurisprudence of the Supreme Court, focusing mainly on cases involving public schools and public religious displays. Part I of the article summarizes methods employed by the Court in determining whether or not there was a violation of the Establishment Clause prior to 1971 and documents the formation of the *Lemon* test[2] as a means for assessing violations by looking at the cases which have applied the test and the results the Court has reached using the test. Part II explains the Court's adoption and ultimate rejection of the *Lemon* test as unworkable.

Part III of the article focuses on the individual justices currently sitting on the Supreme Court. It analyzes the major tests that have developed since *Lemon*, either as replacements or supplements to that test. Also, it examines the elements of those tests, the cases in which they have been applied, and the justices who choose to apply them. This section begins with Justice O'Connor's announcement of her endorsement test and Justice Stevens's agreement with and application of her endorsement principles. Next it looks at Justice Souter's partial adoption of O'Connor's endorsement test, coupled with his requirement of absolute neutrality. The section then explores Justice Kennedy's coercion test and Justice Scalia's strict version of a coercion test and his adoption of a per se rule to be used in public forum cases. This section also documents Chief Justice Rehnquist's opinions, his failure to adopt any particular formula for finding violations, and his voting pattern. Finally, this section touches on the opinions of Justices Thomas, Breyer, and Ginsburg and attempts to predict, based on cases in which they have participated, how the newer justices will vote in future cases implicating the Establishment Clause.

The article concludes with an analysis of what these tests and patterns mean for the future of Establishment Clause jurisprudence, as well as a brief summary of how the Court is likely to divide when future controversies arise.

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2. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

I. HISTORY OF THE ESTABLISHMENT CLAUSE

According to Thomas Jefferson, author of the First Amendment, the Establishment Clause was intended to erect a "wall of separation between church and state."[3] This approach was adopted by Justice Hugo Black in *Everson v. Board of Education*.[4] Upholding New Jersey's practice of reimbursing parents for bus transportation to private religious schools, Justice Black wrote the following: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[5] The aid in question in this case went to students attending public schools as well as to those attending private religious schools, and served the secular purpose of promoting the safety of children on their way to school.[6]

For a number of years, a majority of the Court backed this separationist theory of the Establishment Clause and applied it in several public school cases. The wall of separation metaphor, however, was never fully formulated into a clear test. Thus, it often produced unpredictable results.[7] Using the wall metaphor, the Supreme Court struck down an Illinois optional released time program under which religion was taught in public schools.[8] Four years later, the Court upheld a New York program allowing students to leave school to obtain religious instruction off-campus.[9] Finally, the Court struck down the use of state composed, nondenominational prayers in public schools.[10] These decisions lacked uniformity because different justices interpreting "the wall" had no single framework under which to operate.[11]

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3. Reynolds v. United States, 98 U.S. 145, 164 (1878) (citation omitted).
4. 330 U.S. 1 (1947).
5. *Id.* at 18.
6. *See id.*
7. *Compare* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948) (striking down state aid to religion through religious education in public schools), *and* Engel v. Vitale, 370 U.S. 421, 425 (1962) (striking down school prayer), *with* Zorach v. Clauson, 343 U.S. 306, 314-315 (1952) (upholding state program aiding religion by allowing students to leave school to attend religious instruction during the school day).
8. *See McCollum*, 333 U.S. at 212.
9. *See Zorach*, 343 U.S. at 314-15.
10. *See Engel*, 370 U.S. at 425.
11. *See generally* James M. Lewis & Michael L. Vild, Note, *A Controversial Twist*

In 1963, the Court adopted such a framework in *Abington Township School District v. Schempp*.[12] Justice Clark announced a two-part test which required that the government action in question have both "a secular legislative purpose," and "a primary effect that neither advances nor inhibits religion."[13] This test provided the structure that was needed for analysis under the Court's prevailing separationist view of the Establishment Clause.

The Court added a third prong to this test in 1970, making it even more difficult for government practices to survive scrutiny; "excessive government entanglement" could also be considered an establishment of religion.[14] A year later in *Lemon v. Kurtzman*,[15] Justice Burger, writing for the majority, announced a three-prong test for Establishment Clause cases. For government action to be upheld, it must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not involve an excessive entanglement with religion.[16] The so-called *Lemon* test has yet to be officially overruled, but most members of the Court have abandoned it as unworkable.

II. ADOPTION AND REJECTION OF THE *LEMON* TEST

A strict application of the *Lemon* test frequently leads to a holding that the challenged government program violates the Establishment Clause.[17] Because of this hostility toward religion and the failure of many justices to apply the test even-handedly, the *Lemon* test has been severely criticized and is no longer favored by many members of the Court.[18]

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of Lemon: The Endorsement Test as The Establishment Clause Standard, 65 NOTRE DAME L. REV. 671, 672-673 (1990) (discussing the historical development of the Supreme Court's Establishment Clause jurisprudence).

12. 374 U.S. 203 (1963).

13. *Id.* at 222.

14. Walz v. Tax Commission, 397 U.S. 664, 667 (1970).

15. 403 U.S. 602 (1971).

16. *See id.* at 612-13 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) and *Walz*, 397 U.S. at 674).

17. *See* Timothy C. Caress, Note, *Is Justice Kennedy the Supreme Court's Lone Advocate for the Coercion Element in Establishment Clause Jurisprudence? An Analysis of* Lee v. Weisman, 27 IND. L. REV. 475, 478 (1993).

18. *See id.*

This rejection of the *Lemon* test began only two years after its announcement. In 1973, the Supreme Court, upholding state aid to a Baptist college for use in nonsectarian projects, refused to strictly apply the test because its guidelines were "no more than helpful signposts."[19] In 1983, the Court upheld prayer in the Nebraska State Legislature without even applying the *Lemon* test.[20]

In 1984, the Court's decision in *Lynch v. Donnelly*[21] signaled the beginning of the end for the *Lemon* test. The Court was deeply divided in this 5-4 decision, upholding a state-sponsored Christmas display that included everything from Santa Claus and reindeer to a creche.[22] Writing for the majority, Justice Burger applied the *Lemon* test, but stated that the Court would not be bound by its strict separationist views because the Constitution does not require the "complete separation of church and state."[23] In her concurring opinion, Justice O'Connor suggested a "clarification" of the Court's Establishment Clause jurisprudence.[24] Justice O'Connor revised the purpose and effect prongs of the *Lemon* test, creating what has since become known as the endorsement test.[25] The four dissenters also approved of Justice O'Connor's new test, making *Lynch* the first case with a majority of the Court abandoning *Lemon* in favor of a new standard.[26]

This trend continued with the Court's decision in *Wallace v. Jaffree*,[27] striking down an Alabama statute providing for a moment of silence for meditation or prayer in school. Writing for the majority, Justice Stevens purported to apply the *Lemon* test but substituted Justice O'Connor's endorsement test from *Lynch* for the secular purpose prong of *Lemon* asking "whether the government's actual purpose is to endorse or disapprove of religion."[28] Justice O'Connor concurred with the judgment of

19. Hunt v. McNair, 413 U.S. 734, 741 (1973).

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

21. 465 U.S. 668 (1984).

22. *See id.* at 671, 687.

23. *Id.* at 673 (citing Zorach v. Clauson, 343 U.S. 306, 314-315 (1952) and McCollum v. Board of Educ., 333 U.S. 203, 211 (1988)).

24. *See id.* at 687 (O'Connor, J., concurring).

25. *See id.* at 687-89 (O'Connor, J., concurring).

26. *See id.* at 696 (Brennan, J., dissenting).

27. 472 U.S. 38 (1985).

28. *Id.* at 56 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J.,

the Court but wrote a separate opinion.[29] Dissenting, Chief Justice Rehnquist suggested that the *Lemon* test be abandoned entirely, even though he found no violation in this case.[30] Once again, a majority of the justices believed the *Lemon* test was not the appropriate test for Establishment Clause analysis, regardless of whether they found a violation.

III. ALTERNATIVE TESTS

If the *Lemon* test is no longer good law, what test should be used to analyze Establishment Clause questions? The Supreme Court was split in the mid-1980s when it announced the decisions in *Lynch* and *Wallace*, and although the composition of the Court has changed, the disagreement among its members continues. Of the nine justices currently sitting on the Supreme Court, Justices O'Connor, Kennedy, Scalia, Stevens, and Souter have formulated distinct theories as to how these cases should be analyzed. Some of these tests are similar, but due to fundamental disagreements, a stable consensus is unlikely to arise in the near future.

A. *Justice O'Connor's Endorsement Test*

Justice O'Connor has made substantial revisions to the *Lemon* test in formulating her endorsement test. She first articulated this test in her concurrence in *Lynch v. Donnelly*.[31] According to Justice O'Connor:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community . . . . Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[32]

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concurring)).

29. *See id.* at 67 (O'Connor, J., concurring).

30. *See id.* at 112-14 (Rehnquist, C.J., dissenting).

31. 465 U.S. 668 (1984).

32. *Id.* at 687-88 (O'Connor, J., concurring).

Justice O'Connor's endorsement test stays within the framework of *Lemon* while refocusing certain aspects of the inquiry. Instead of asking what is the primary purpose of the government action and whether the effects of the action advance or inhibit religion, Justice O'Connor combines the two prongs into one query: whether the government action has the effect of "communicating a message of government endorsement or disapproval of religion."[33] Although it is proper to inquire into the government's intent, it is only practices having the above effect that are a violation.[34] Justice O'Connor explains that it is not necessary to invalidate a "government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion."[35] In this way, Justice O'Connor's endorsement test shifts the focus of the inquiry from the government actions to the perceptions of the community. The third prong of the *Lemon* test requires that there not be "excessive entanglement" between church and state, and Justice O'Connor has not changed that portion of the test.[36]

In her concurring opinion in *Wallace v. Jaffree*, Justice O'Connor explained that her test was based on "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the government practice] as a state endorsement" of religion.[37] Thus, the test is based on an informed and reasonable observer's perception of the practice. Furthermore, the endorsement test may require an analysis from the point of view of the reasonable nonadherent because it inquires as to whether a message is sent to nonadherents that they are "outsiders."[38]

As a result, the endorsement test could find Establishment Clause violations where the *Lemon* test would not. The government may pass a statute with a purpose other than the endorsement or disapproval of religion, but if a reasonable observ-

33. *Id.* at 692 (O'Connor, J., concurring).
34. *See id.* (O'Connor, J., concurring).
35. *Id.* at 691-92 (O'Connor, J., concurring).
36. *See id.* at 689 (O'Connor, J., concurring).
37. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).
38. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

er could mistakenly believe that endorsement or disapproval was the purpose, the statute would violate Justice O'Connor's endorsement test.[39] Similarly, a statute may not endorse or disapprove of religion in reality, but if a reasonable observer could mistakenly believe that it affects the public's view, the statute would also fail under the endorsement test.[40]

The endorsement test has been used by a majority of the Court in a number of cases, beginning with *Wallace v. Jaffree*. Using endorsement language, the majority in *Wallace* held unconstitutional an Alabama statute that provided for a moment of silence for prayer or meditation.[41] The majority relied on Justice O'Connor's concurrence in *Lynch*, and although she did not join the majority, Justice O'Connor concurred in its result, writing separately to clarify her test.[42]

Justice O'Connor's endorsement test was used again in *School District of Grand Rapids v. Ball*[43] to decide the constitutionality of public school teachers teaching remedial and enrichment courses at parochial schools. Justice Brennan, writing for the majority, focused on the effect of these programs. Finding a violation of the Establishment Clause, he cited Justice O'Connor's concurrence in *Lynch*.[44] According to Brennan, the state action in this case was a "powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day."[45] Ironically, Justice O'Connor did not join the majority opinion. She wrote her own opinion again, concurring in part and dissenting in part. In that opinion, she never referred to endorsement.[46]

In 1988, the endorsement test was again used in *Texas Monthly, Inc. v. Bullock*.[47] Writing for the plurality, Justice Brennan found that Texas's practice of exempting religious peri-

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39. *See* Elliot M. Berman, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 COLUM. J.L. & SOC. PROBS. 1, 9 (1990).
40. *See id.*
41. *See Wallace*, 472 U.S. at 61.
42. *See id.* at 67 (O'Connor, J., concurring).
43. 473 U.S. 373 (1985).
44. *See id.* at 389.
45. *Id.* at 392.
46. *See id.* at 399 (O'Connor, J., concurring in part and dissenting in part).
47. 489 U.S. 1 (1989).

odicals from a sales tax was a violation of the Establishment Clause.[48] He again relied on Justice O'Connor's concurrence in *Lynch*, stating that when government directly subsidizes religious groups to the exclusion of other groups, "it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community."[49] Justice O'Connor joined Justice Blackmun's concurrence but did not use the endorsement test. They agreed that this was an Establishment Clause violation because the exemption was limited to "the sale of religious literature by a religious organization."[50]

Finally, Justice O'Connor's endorsement test was used in *County of Allegheny v. American Civil Liberties Union*.[51] Justice Blackmun announced the plurality opinion in which he reaffirmed the *Lemon* test but only as it had been revised in Justice O'Connor's concurring opinion in *Lynch*:

> Since *Lynch*, the Court has made it clear that when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."[52]

Using this endorsement inquiry, the plurality found no violation in a public display containing a Christmas tree, a Menorah, and a sign that read "salute to liberty" but found that the public display of a creche that contained a traditional nativity scene was a violation of the Establishment Clause.[53] Although she agreed with Justice Blackmun, Justice O'Connor again wrote her own concurrence to clarify the endorsement analysis.[54]

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48. *See id.* at 25.

49. *Id.* at 15 (1989) (quoting Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment)).

50. *Id.* at 28.

51. 492 U.S. 573 (1989).

52. *Id.* at 597 (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

53. *See id.* at 573.

54. *See id.* at 623 (O'Connor, J., concurring).

Although many of the justices that originally adopted Justice O'Connor's test have retired from the bench, the endorsement test still enjoys some support from the current justices. While they do not agree with every aspect of O'Connor's endorsement test, both Justice Stevens and Justice Souter are likely to agree with the use of the test in Establishment Clause cases.

B. *Justice Stevens's Endorsement Test*

Justice Stevens advocates the use of the endorsement test, but his application of the test differs slightly from Justice O'Connor's. Justice Stevens would still apply the *Lemon* test in most instances. For the first prong of that test, however, he would ask the slightly different question, "whether [the] government's actual purpose is to endorse or disapprove of religion."[55] In Justice Stevens's view, the answer to this initial inquiry may decide the issue without having to continue on to the second prong: whether the government action in question has the effect of advancing or inhibiting religion.[56] A major difference between Justice Stevens's and Justice O'Connor's application of the endorsement test is Justice O'Connor's use of the contextual inquiry in cases involving religious displays. For example, in his concurring and dissenting opinion in *County of Allegheny v. ACLU*,[57] Justice Stevens opposed the use of context as a decisive factor in Establishment Clause cases.[58]

Under Justice O'Connor's endorsement analysis, the context of the disputed symbol is normally important in determining whether the message is one of endorsement. In contrast, Justice Stevens would not focus on the context of the symbols but would instead "create a strong presumption against the displays of religious symbols on public property."[59] This presumption

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55. Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

56. *See generally* Lewis & Vild, *supra* note 11, at 675-76 (discussing Justice Stevens's majority opinion in *Wallace v. Jaffree*, in which he concluded that the answer to the first prong of *Lemon* precluded the need for further inquiry).

57. 492 U.S. 573 (1989).

58. *See generally* Lewis & Vild, *supra* note 11, at 686 (discussing Justice Stevens's preference for a presumption against religious symbols on public property, rather than a subjective inquiry into the context of the display).

59. *County of Allegheny*, 492 U.S. at 650.

would allow certain displays, avoiding the hostility of an outright ban, yet would still "give[] due regard to religious and nonreligious members of the society."[60] Thus, Justice Stevens's analysis, while different in its particulars, gives effect to the main purpose of the endorsement test: adequate consideration for the religious beliefs of minorities in society.

Justice Stevens's test as a whole has not yet made its way into a majority opinion. Justice Stevens, however, wrote the majority opinion in *Wallace v. Jaffree*, the first majority opinion to use endorsement language.[61] In that opinion, Justice Stevens applied the *Lemon* test; however, he framed it in terms of endorsement, asking whether the government intended to "endorse or disapprove religion."[62] He found that the statute did in fact endorse religion and, therefore, violated the Establishment Clause.[63]

While Justice Stevens's idea of what constitutes endorsement of religion varies slightly from that of Justice O'Connor, both agree that endorsement is the proper concept to use in determining Establishment Clause violations. Their differing opinions on how to apply the endorsement test has sometimes led to discrepancies in their voting patterns, but it is likely that they will continue to analyze Establishment Clause cases similarly, using the endorsement test.

C. *Justice Souter's Favoritism Test*

Appointed to the Supreme Court in 1990, Justice Souter was not on the bench when *Lynch* and the other cases that formulated the endorsement test were decided; therefore, it is impossible to determine how he would have voted on those particular cases. Some of his recent opinions in Establishment Clause cases, however, have shed light on his views. Justice Souter is an advocate of the endorsement test introduced by Justice O'Connor, but he makes a few modifications to her basic test.

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60. *Id.* at 653.

61. *See Wallace*, 472 U.S. at 38.

62. *Id.* at 56 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

63. *See id.* at 60-61.

For Justice Souter, the basic test of the Establishment Clause is whether the government "fail[s] to exercise . . . authority in a religiously neutral way" by "prefer[ring] one religion to another, or religion to irreligion."[64] Justice Souter would apply the endorsement test, but rather than focusing on endorsement or disapproval alone, he would go further and require complete neutrality by the government.[65] He presumes that government officials, unless restrained by the courts, are likely to "'manipulate[]' the public forum" in such a way that religious speech will be favored.[66] This would allow the "government to encourage what it cannot do on its own."[67] Because he requires government practices to be neutral between religion and atheism, Justice Souter's test is more strict than Justice O'Connor's.

In 1994, Justice Souter wrote the majority opinion in *Board of Education v. Grumet*.[68] In this case, Justice Souter struck down a New York statute making the village of Kiryas Joel a separate school district.[69] He found that the creation of a separate school district for the purpose of separating Satmars from non-Satmars "aids a particular religious community" and is therefore unconstitutional.[70]

In 1992, Justice Souter wrote a concurring opinion in which he stated that government sponsorship of religion violates the Establishment Clause even if it does not favor one religion over another.[71] Justice Souter agreed with the majority that a graduation ceremony prayer violated the Establishment Clause because it constituted a state sponsored religious exercise in a public school.[72] Justice Souter stated that "the state may not favor or endorse either religion generally over nonreligion or one religion over others. . . . This principle against favoritism and endorsement has become the foundation of Establishment

64. Board of Educ. v. Grumet, 512 U.S. 687, 703 (1994).
65. *See* Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring)
66. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 791 (1995) (Souter, J., concurring in part and concurring in the judgment).
67. *Id.* at 792 (Souter, J., concurring in part and concurring in the judgment).
68. 512 U.S. 687 (1994).
69. *See id.* at 709-10.
70. *Id.* at 708.
71. *See* Lee v. Weisman, 505 U.S. 577, 629 (1992) (Souter, J., concurring).
72. *See id.* at 611 (Souter, J., concurring).

Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community."[73]

In his concurring opinion in *Capitol Square Review and Advisory Board v. Pinette*, Justice Souter specifically recognized that the Court should have applied the endorsement test and that failure to do so created an exception that was "out of square with our precedents."[74] He went on to say that he would apply the endorsement test even if "precedent and practice were otherwise."[75] Finally, he acknowledged the danger that a reasonable observer could mistake "private, unattended religious displays in a public forum for government speech endorsing religion,"[76] an issue that the endorsement test addresses.

From these opinions, as well as others he has joined, it is clear Justice Souter is likely to apply the endorsement test in future Establishment Clause cases, although he would add his own "neutrality" element to the test.

D. *Justice Kennedy's Coercion Test*

Like most of the current members of the Supreme Court, Justice Kennedy no longer supports the *Lemon* test. However, instead of substituting the endorsement test in *Lemon's* place, Justice Kennedy advocates an entirely different test. Still operating within the original framework of *Lemon*, Justice Kennedy's test focuses on government coercion in place of the effects prong of *Lemon*.[77] According to Justice Kennedy:

> [G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith. . . ."[78]

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73. *Id.* at 627 (Souter, J., concurring).

74. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 784 (1995) (Souter, J., concurring in part and concurring in the judgment).

75. *Id.* at 791 (Souter, J., concurring in part and concurring in the judgment).

76. *Id.* at 785 (Souter, J., concurring in part and concurring in the judgment).

77. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).

78. County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

Without this element of coercion there is no Establishment Clause violation. Justice Kennedy agrees with Justice Souter that neutrality is the goal of the Establishment Clause; however, Justice Kennedy believes that this neutrality does not require the government to "avoid all assistance to religion."[79]

Coercion, under Justice Kennedy's test, is not limited to direct coercion; indirect or more subtle coercion can also violate the Establishment Clause.[80] If the symbolic recognition of religion is passive, however, there is no violation.[81] "Noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[82]

Justice Kennedy has criticized the use of the endorsement test, saying that it does not follow prior Establishment Clause precedent.[83] He believes that consistent use of Justice O'Connor's test will strike down many of the nation's historical and traditional practices. Accordingly, Justice Kennedy has called it a "recent, and . . . most unwelcome addition to our tangled Establishment Clause jurisprudence."[84] Justice Kennedy's coercion test would permit a state's endorsement of religion, but would prohibit the state from furthering the interests of religion by using the government's coercive powers.[85] As a result, Justice Kennedy's test focuses not on the perceptions of society but, instead, on the actual effects of a government practice.[86]

Justice Kennedy's concurring and dissenting opinion in *County of Allegheny v. ACLU*[87] and his majority opinion in *Lee v.*

79. *Id.* at 658 (Kennedy, J., concurring in part and dissenting in part).
80. *See id.* at 661 (Kennedy, J., concurring in part and dissenting in part).
81. *See id.* at 662 (Kennedy, J., concurring in part and dissenting in part).
82. *Id.* at 662-63 (Kennedy, J., concurring in part and dissenting in part).
83. *See id.* at 668 (Kennedy, J., concurring in part and dissenting in part).
84. *Id.* at 668 (Kennedy, J., concurring in part and dissenting in part).
85. *See* Caress, *supra* note 17, at 480.
86. *See id.*
87. 492 U.S. 573, 655-79 (1989).

Weisman[88] exemplify his approach to the Establishment Clause. In these cases, Justice Kennedy argues for the adoption of a coercion standard in place of the endorsement test.

In *Allegheny*, Justice Kennedy concurred with the majority's holding that the menorah displayed outside a city building was not a violation of the Establishment Clause, but he dissented from the holding that a creche displayed on the grand staircase of the courthouse was a violation.[89] Writing his own opinion, Justice Kennedy urged that neither the *Lemon* test nor the endorsement test should be used to analyze these cases. Rather, the test should determine if the government action actually coerced religious participation.[90] Justice Kennedy found no violation here because "[n]o one was compelled to observe or participate in any religious ceremony or activity."[91]

In *Lee v. Weisman*, Justice Kennedy wrote for the majority holding that the Providence school district's practice of inviting members of the clergy to say prayers at middle school and high school graduations was a violation of the Establishment Clause.[92] He explained his holding in terms of coercion, stating that "prayer exercises in public schools carry a particular risk of indirect coercion."[93] "Finding no violation under these circumstances would place objectors in the dilemma of participating . . . or protesting."[94] Justice Kennedy then called attention to psychological studies finding that teens are susceptible to peer pressure and stated that government use of social pressure was not acceptable.[95]

Although Justice Kennedy wrote the majority opinion, not a single member of the Court expressly joined him. Justices Blackmun, Stevens, O'Connor, and Souter all wrote or joined in concurring opinions in which they distanced themselves from his use of the coercion standard. The dissenters, Justices Scalia,

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88. 505 U.S. 577 (1992).

89. *See County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in part and dissenting in part).

90. *See id.* at 659-61 (Kennedy, J., concurring in part and dissenting in part).

91. *Id.* at 664 (Kennedy, J., concurring in part and dissenting in part).

92. *See Lee*, 505 U.S. at 577.

93. *Id.* at 592.

94. *Id.* at 593.

95. *See id.* at 593-94.

Rehnquist, Thomas, and White disagreed with Justice Kennedy's use of psychological coercion and would have found no violation.[96]

In *Allegheny*, Justice Kennedy obtained some support from Justices Rehnquist, Scalia, and White. In his concurring/dissenting opinion, Justice Kennedy spoke of coercion but not of the psychological kind. It seems that Chief Justice Rehnquist and Justice Scalia are open to the use of a coercion standard as long as it is applied narrowly and in a manner that is not hostile to religion.[97]

E. *Justice Scalia's Tests: The Per Se Rule and Strict Coercion*

As one of the most outspoken members of the Court, Justice Scalia has frequently made his views about the Establishment Clause known. Because his views tend to be somewhat extreme, however, Justice Scalia has had little opportunity to write for the majority. His dissents leave us with an idea of the standard he would use to judge violations of the Establishment Clause, and from these dissents one thing is certain: Justice Scalia is among the members of the Court who would refuse to apply the *Lemon* test. Justice Scalia stated:

> Our Religion Clause jurisprudence has become bedeviled . . . by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test . . . which has received well-earned criticism from many Members of this Court.[98]

Justice Scalia went on to celebrate what he interpreted as the "interment" of the *Lemon* test.[99]

Justice Scalia's single plurality opinion involving the Establishment Clause was in *Capitol Square Review and Advisory*

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96. *See id.* at 631-46 (Scalia, J., dissenting).

97. *See* County of Allegheny v. ACLU, 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in part and dissenting in part).

98. *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) (citations omitted).

99. *See id.* (Scalia, J., dissenting).

Bd. v. Pinette.[100] In this case, Justice Scalia held that issuing a permit to display a large Ku Klux Klan cross on a public forum next to the Ohio Statehouse did not violate the Establishment Clause.[101] In reaching this decision, Justice Scalia constructed a new standard for public forum Establishment Clause cases.

Under Justice Scalia's "per se rule,"[102] allowing a private speaker access to a public forum for religious speech would never violate the Establishment Clause, regardless of the appearance of endorsement to the public. He believes that "religious expression cannot violate the Establishment Clause where it is (1) purely private and (2) occurs in a traditional or designated public forum, publicly announced, and open to all on equal terms."[103] This test would not allow for an examination of the totality of the circumstances. Because there are no subjective elements to this test, Justice Scalia believes it would bring uniformity and predictability to the Court's decisions.[104]

In Establishment Clause cases not involving private speech in public fora, Justice Scalia would use a form of the Coercion Test. According to his dissent in *Lee v. Weisman*, he would apply the test much more strictly than Justice Kennedy.[105] Justice Scalia believes that because prayer at public ceremonies has been an American tradition for hundreds of years, "the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.'"[106]

More importantly, Justice Scalia would not extend the definition of coercion to include indirect pressure such as "'peer

100. 515 U.S. 753 (1995).

101. *See id.* at 763-70.

102. *See* David Goldberger, Capitol Square Review and Advisory Board v. Pinette: *Beware of Justice Scalia's Per Se Rule*, 6 GEO. MASON L. REV. 1, 2 (1997).

103. *Pinette*, 515 U.S. at 770.

104. *See* Goldberger, *supra* note 102, at 4, 31 (discussing Justice Scalia's rejection of existing tests for Establishment Clause cases and his reasons for advocating the adoption of a new standard).

105. *See Lee*, 505 U.S. at 640-44 (Scalia, J., dissenting).

106. *Id.* at 631 (Scalia, J., dissenting) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part)).

pressure' coercion."[107] "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[108] This was not the type of coercion present in *Lee*, and Justice Scalia would not recognize a violation for anything short of it.

F. *Chief Justice Rehnquist*

Although he has been on the Court since late 1971, the year that *Lemon* was decided, there is surprisingly little evidence of the standard the Chief Justice would use to decide Establishment Clause cases. Like so many of the other justices, it is clear that he would not use the *Lemon* test. Chief Justice Rehnquist has severely criticized two of the three prongs of the test, saying that the first prong, which looks for a secular purpose, is useless because Congress could assert any purpose it chooses to avoid a violation.[109] Chief Justice Rehnquist finds the entanglement prong even more objectionable because it creates a "'Catch-22' . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement."[110]

Chief Justice Rehnquist disagrees with Jefferson's "wall of separation." He believes that the Establishment Clause does not require the government to be "strictly neutral between religion and irreligion."[111] Consequently, Chief Justice Rehnquist would not find a violation in cases where the government aids religion in a nondiscriminatory way, as long as it is "pursuing legitimate secular ends."[112]

While it is easy to discern which standards Chief Justice Rehnquist would refuse to apply, it is not so simple to determine what test he would apply. The majority of his Establishment Clause opinions have been dissents that he has either

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107. *Id.* at 640 (Scalia, J., dissenting).
108. *Id.* (Scalia, J., dissenting).
109. *See* Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).
110. Aguilar v. Felton, 473 U.S. 402, 420-21 (1985) (Rehnquist, J., dissenting) (citing Wallace v. Jaffree, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting)).
111. *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).
112. *Id.* (Rehnquist, J., dissenting).

written or joined. The few majority opinions he has authored have applied the *Lemon* test or no test at all. It seems that, generally, Chief Justice Rehnquist would allow a great deal of government aid to religion as long as that aid is given in a nondiscriminatory manner.[113] It is also likely that Chief Justice Rehnquist would agree with Justice Scalia on matters involving coercion. He would not find a violation of the Establishment Clause unless there had been direct coercion by the government.[114]

G. *The New Justices*

Because they are so new to the Court, it is difficult to trace and predict the voting patterns of Justices Thomas, Ginsburg, and Breyer. There have been, however, a few recent cases that give some indication of their Establishment Clause jurisprudence.

Although he has not yet written an opinion in an Establishment Clause case, Justice Thomas has participated in a number of these decisions. In 1992, Justice Thomas joined Justice Scalia's dissent in *Lee v. Weisman*.[115] The majority found a violation, but Justice Thomas would have held that the state's action in inviting a rabbi to say prayers at a graduation ceremony did not constitute a violation of the Establishment Clause.[116] In 1993, Justice Thomas joined Chief Justice Rehnquist's majority opinion, holding there was no violation when the state provided a sign-language interpreter for a student attending a private religious school.[117] In 1994, Justice Thomas again joined Justice Scalia in dissent when the majority found a violation in New York's creation of a school district in order to accommodate a religious group.[118] The dissenters would have held that this was a "permissible accommodation" of religion and, therefore, not a violation.[119] Finally, in 1997,

113. *See id.* (Rehnquist, J., dissenting).
114. *See* Lee v. Weisman, 505 U.S. 577, 640-42 (1992) (Scalia, J., dissenting).
115. *See id.* at 631 (Scalia, J., dissenting).
116. *See id.* at 631-32 (Scalia, J., dissenting).
117. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3, 14 (1993).
118. *See* Board of Educ. v. Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting).
119. *See id.* at 743 (Scalia, J., dissenting).

Justice Thomas joined the majority in holding that Title I aid to students attending private religious schools did not violate the Establishment Clause.[120]

In each of the cases cited above, Justice Thomas has voted with Chief Justice Rehnquist and Justice Scalia. More importantly, in each of these cases he has held with the side finding no violation of the Establishment Clause.

Justice Ginsburg and Justice Breyer were more recently appointed to the Court and have not participated in as many decisions as Justice Thomas; therefore, it is more difficult to characterize their views. Justice Ginsburg joined Justice Stevens's concurrence in *Grumet* finding an Establishment Clause violation and stating that by creating a segregated school district, the state "provided official support to cement the attachments of young adherents to a particular faith."[121] Both Justices Ginsburg and Breyer joined Justice Souter's dissent in *Agostini v. Felton* in 1997.[122] They would have found a violation in the use of Title I Federal Aid for the benefit of private religious schools.[123] Although there is very little evidence, it appears that Justices Ginsburg and Breyer have tended to vote in much the same way as Justices Souter and Stevens. Accordingly, they are much more likely to find Establishment Clause violations than Justice Thomas.

IV. CONCLUSION

It appears the Supreme Court has not progressed very far from where it was in 1984 when the *Lynch* decision was announced. The Court was divided then, and it is equally divided now. At one end of the spectrum, the Chief Justice, Justice Scalia, and Justice Thomas are unlikely to find a violation of the Establishment Clause in any case absent direct government coercion. Justice Kennedy is one step closer to the middle in that he would find a violation where there is indirect coercion, if the coercion is obvious and perhaps directed at school-aged

120. *See* Agostini v. Felton, 521 U.S. 203 (1997).
121. *Grumet*, 512 U.S. at 711 (Stevens, J., concurring).
122. *See Agostini*, 521 U.S. at 240 (Souter, J., dissenting).
123. *See id.* (Souter, J., dissenting).

children. At the other end of the spectrum is Justice Souter, who would find a violation in any case showing favoritism to a particular religion or to religion generally. In his opinion, anything short of complete neutrality is unacceptable. Justice Stevens is also likely to find Establishment Clause violations due to the presumption he would apply against the government in the cases of religious displays on public property. Justice Ginsburg and Justice Breyer seem to fit somewhere toward this side of the spectrum, although it is unclear exactly where they stand.

This leaves Justice O'Connor in the middle, a place that has become quite familiar to her. Justice O'Connor's application of the endorsement test seems to be the only test currently applied that is not more likely to go one way than the other when analyzing the Establishment Clause. As a result, Justice O'Connor's vote will most likely remain the swing vote, and no clear consensus will arise anytime soon among the members of the Court.

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