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IN THE WAKE OF *WEISMAN*: THE *LEMON* TEST IS STILL A LEMON, BUT THE PSYCHO-COERCION TEST IS MORE BITTER STILL

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On June 24, 1992 the Supreme Court announced its startling opinion in *Lee v. Weisman*.[1] Before this decision was handed down, many commentators on both sides of the church-state debate had expected the Supreme Court to uphold graduation prayer and to abandon the *Lemon* test.[2] Instead, the Supreme Court struck down as unconstitutional a time-honored tradition of graduation prayers at commencement ceremonies delivered by "state actors." In addition, Justice Kennedy, who wrote the majority opinion, stated that he would not address the issue of abandoning the *Lemon* test,[3] and Justices Blackmun, Stevens and O'Connor, in their concurrence, specifically indicated that they supported continued use of the *Lemon* test.[4]

Now, instead of *Lemon* being discarded and replaced with a more rational test, we appear to have a new psycho-coercion test as the standard of review in Establishment Clause cases with the *Lemon* test as a fall-back position. Under the new test, any state action that can be perceived as creating even indirect social or peer pressure can be declared unconstitutional.[5] In the wake

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1. 60 U.S.L.W. 4723 (U.S. June 24, 1992).
2. Lemon v. Kurtzman, 403 U.S. 602 (1971).
3. *Weisman*, 60 U.S.L.W. at 4725.
4. *Id.* at 4729 (Blackmun, J., concurring).
5. *Id.* at 4726-27.

of *Weisman* more confusion will set in. It is time to abandon both the pre-*Weisman Lemon* test and the new psycho-coercion test in favor of a more sane standard of jurisprudence applicable to church-state cases. Ironically, what we are advocating is a standard that until June 24, 1992 we would have said derived from the thinking of Justice Kennedy.

Now, more than ever, it is clear that there are three categories of speech which are significantly restricted in America today. The first, obscenity, is not given the status of "speech" under the First Amendment, and thus is not constitutionally protected at all.[6] The second, comprised of seditious and libelous expression, is restricted because of its inherent threat to individual and governmental rights.[7] The third category, almost unbe-

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6. *See* Roth v. United States, 354 U.S. 476, 483-85 (1957): "In light of this history [of the First Amendment], it is apparent that ... obscenity ... was outside the protection intended for speech and press .... We hold that obscenity is not within the area of constitutionally protected speech or press." *See also* Miller v. California, 413 U.S. 15, 23 (1973) ("obscene material is unprotected by the First Amendment."); Cohen v. California, 403 U.S. 15, 20 (1971) (holding that government has the "power ... to deal more comprehensively with certain forms of individual expression [such as obscenity] simply upon a showing that such a form was employed.").

7. Libelous speech has clearly been held to be beyond constitutional protection. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include ... libelous ... words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (footnotes omitted)).

Seditious speech has likewise been declared outside of constitutional protection. The Supreme Court held in Gitlow v. New York, 268 U.S. 652, 666-68 (1925) that:

> [i]t is a fundamental principle, long established, that the freedom of speech and of the Press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom ... [A] State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press ... does not deprive a State of the primary and essential right of self preservation ....

See also Whitney v. California, 274 U.S. 357, 371 (1927) ("that a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.") (citing *Gitlow*). This principle has been limited by Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), which held that "the constitutional

lievably, is religious speech. Despite the First Amendment's clear promise of freedom to exercise religion, religious speech has been restricted by means of the criteria set forth in *Lemon v. Kurtzman* and now by *Weisman's* psycho-coercion test. The "wall of separation" has become a wall of hostility to religious speech. *Weisman* is only the latest entry into the parade of poor precedents in this vital area.

In cases such as *Lynch v. Donnelly*,[8] *County of Allegheny v. ACLU*[9] and *Doe v. Small*,[10] courts have applied the three-part *Lemon* test[11] to speech by the government,[12] by private individuals within the seat of government,[13] and by private individuals on publicly owned property separate from the seat of government.[14] The *Lemon* test's purpose was to determine whether given speech violates the Establishment Clause. By its application, however, speech protected by both the Free Speech and Free Exercise Clauses of the First Amendment has been reduced

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guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (footnote omitted).

Thus the non-protection of both libel and sedition are based upon the existence of the threat of harm, the first to individual interests and the second to national interests.

8. 465 U.S. 668 (1984), in which the Court upheld the display of a creche maintained by the City of Pawtucket, Rhode Island, on a park owned by a non-profit organization in the center of the city.

9. 492 U.S. 573 (1989), in which the Court invalidated the display inside the Courthouse of a creche, donated by a private, non-profit organization, while at the same time upholding the display of a menorah, outside the City-County Building owned by a non-profit, private organization, but stored and set-up by the City of Pittsburgh.

10. 934 F.2d 743 (7th Cir. 1991), *rev'd*, 60 U.S.L.W. 2743 (7th Cir. May 15, 1992) (*en banc*), in which Circuit Judge Cummings, writing for the two-member majority, held that the City's practice in allowing a non-profit, private organization to erect pictures of the life of Christ at Christmas time in a public park, owned by the City, was a violation of the Establishment Clause. The Seventh Circuit, sitting *en banc*, faced the situation in which the City did not appeal but the private organization did. The majority ruled, therefore, that it did not need to address the Establishment Clause issues but only the nature of the remedy. However, several concurrences did discuss the endorsement prong of the *Lemon* test.

11. Lemon v. Kurtzman, 403 U.S. 602, 612-13, (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)." In addition, Justice O'Connor, concurring in Lynch v. Donnelly, 465 U.S. at 687-94, introduced an "endorsement" twist to the *Lemon* test.

12. *E.g.*, *Lynch*, 465 U.S. 668.

13. *E.g.*, *Allegheny*, 492 U.S. 573.

14. *E.g.*, *Small*, 934 F.2d 743, where the park in question was three blocks from City Hall.

by the courts to a second-rate freedom, to be expressed only if the value of its expression outweighs the perceived right of others not to be exposed to the content of that speech.

Despite its widespread use, the *Lemon* test has been subject to frequent, varied, and intense criticism on the part of commentators, judges, and Justices. Critics have called for action ranging from a complete overhaul of Establishment Clause analysis to a more moderate elimination of one or more prongs of the *Lemon* test.[15]

This article demonstrates that, while the proponents of the *Lemon* test have no doubt acted in good faith in order to balance the perceived needs of our modern society, they have done this nation a disservice. They have promoted a standard of Establishment Clause jurisprudence that is not grounded in history, reason, nor sound jurisprudence. The solution is not a simple rewriting of the test, but rather a resurrection of an older analysis, one grounded in the history of the Establishment Clause, congruent with the intent of its authors, and conducive to the fostering of a healthy diversity of speech.

Philosophically, the *Lemon* test hearkens back approximately forty years to *Everson v. Board of Education*, the first case in which the Supreme Court applied the "wall of separation" doctrine to the Establishment Clause. The Court stated, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[16] It is important to note the source of this quotation from Jefferson. It was lifted from a letter to the Danbury Baptist Association written fourteen years after the Bill of Rights was passed by Congress. In it he stated: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an

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15. *See Allegheny*, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) and cases cited; Wallace v. Jaffree, 472 U.S. 38, 106-12 (1985) (Rehnquist, J., dissenting) and cases cited.

16. Everson v. Board of Education, 330 U.S. 1, 16 (1947) (quoting Reynolds v. U.S. 98 U.S. 145, 164 (1879)). However, in his dissenting opinion in Wallace v. Jaffree, 472 U.S. 38, 92 n.1 (1985), Chief Justice Rehnquist has criticized the application of *Reynolds* to interpretation of the Establishment Clause; he writes, "*Reynolds* is truly inapt; it dealt with a Mormon's Free Exercise Clause challenge to a federal polygamy law." *See also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984), where the majority stated that "[t]he Court has sometimes described the Religion Clauses as erecting a 'wall' between Church and State. The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson." (citation and footnote omitted). *See also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982).

establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."[17]

The Court then proceeded to develop a test to protect that wall, all too often at the expense of free speech and free exercise rights. The three prongs of the test which were to be explicitly enunciated in *Lemon* began to be developed by the Supreme Court after *Everson*. In 1963, the Court stated in *Abington School Dist. v. Schempp* that "the test may be stated as follows: what are the purpose and the primary effect of the entanglement? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[18] Seven years later, the Court maintained that "[d]etermining that the legislative purpose ... is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[19]

Turning from its inception to its application, one finds that the *Lemon* test has been extensively utilized to analyze statutes, regulations, and ordinances to determine whether they should pass constitutional muster.[20] In these cases, the actions scruti-

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17. 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed., 1861).

18. 374 U.S. 203, 222 (1963).

19. Walz v. Tax Comm'n., 397 U.S. 664, 674 (1970). It is interesting to note the Court in *Walz* also stated that "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts ...." *Id.* at 670.

20. Salary supplements for non-public school teachers were struck down in *Lemon*, 403 U.S. 602. Financial aid for non-public elementary and secondary schools was upheld in part and struck down in part in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) [hereinafter *Nyquist*]. Textbook loans to non-public schools were upheld in Meek v. Pittenger, 421 U.S. 349 (1975). In the same case, the Court struck down loans of instructional materials such as maps, on the grounds that while the textbooks were given to the students, the instructional materials were given to the schools, and "[s]ubstantial aid to the educational function of such schools ... necessarily results in aid to the sectarian school enterprise as a whole .... For this reason ... direct aid to Pennsylvania's predominately church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in a direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion." *Id.* at 366 (citation and fottnote omitted). In Roemer v. Board of Public Works, 426 U.S. 736 (1976), the Court upheld a state subsidy to colleges, including sectarian colleges. While in Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973) [hereinafter *Levitt*], the Court had struck down a state subsidy for the cost of tests mandated by the state or prepared by teachers, the Court upheld state reimbursement of non-public schools for the administration of state-prepared tests in Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980) [hereinafter *Regan*]. In Aguilar v. Felton, 473 U.S. 402 (1985), the Court struck down a program for payment of teachers to teach

nized were always those of the state itself. There exists a second group of *Lemon* cases, however, in which the Court has sought to analyze *private* speech and actions in the contexts of governmental office,[21] publicly owned property,[22] and governmental permission to speak.[23] The standards for analysis in these cases have been the identity of the actor, the site of the action, and the surrounding facts and circumstances.

I. "A LEMON BY ANY OTHER NAME . . ."

The 1970's could be called "the decade of the lemon." In the early 1970's, Ford Motor Company introduced the Pinto. Evidence produced during complex products liability litigation demonstrated that, although Ford knew the Pinto to be a defective automobile, it reasoned that it could later correct the car's faults. Various design changes were proposed. Some were accepted and others rejected, but it seemed that no matter how much one tried to fix the lemon, it was still just that, a lemon.[24]

For the past twenty years, courts have sought to "sweeten" the *Lemon* test. The Supreme Court has added and deleted subprongs,[25] yet as a whole it has not squarely faced the truth: the

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remedial education classes at parochial schools. In Wallace v. Jaffree, 472 U.S. 38, the Court struck an Alabama "moment of silence" law, and in Edwards v. Aquillard, 482 U.S. 578 (1987), the Court struck down the Louisiana "Creationism Act."

21. *See, e.g.*, Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir., 1990), *aff'd*, 60 U.S.L.W. 4723 (U.S. June 24, 1992), in which the Court applied the *Lemon* analysis to a ceremonial invocation at a public high school by an agent of the School Board (i.e., someone sought out by the Board to deliver the invocation) and found the invocation to be an impermissible establishment of religion, in violation of the Constitution. An analysis of the fate of *Lemon* in this case at the Supreme Court follows *infra*.

22. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989), in which the Court invalidated the display of a privately sponsored creche, which would traditionally be interpreted as speech or communicative activity ("There is not doubt, of course, that the creche itself is capable of communicating a religious message" (*Id.* at 598) (per curiam), on the grounds that its display at the "seat of county government," *Id.* at 599, was an unconstitutional "endorsement" of religion. *Id.* at 573. *See also* Doe v. Small, 934 F.2d 743 (7th Cir. 1991), *rev'd*, 60 U.S.L.W. 2743 (7th Cir. May 15, 1992) (*en banc*), in which the District Court invalidated a display of private paintings on public property as an establishment of religion.

23. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981), in which the Court applied the Lemon analysis to determine whether it was constitutionally permissible for a school to allow students to partake in individual religious speech on school premises.

24. LEE P. STROBEL, RECKLESS HOMICIDE? FORD'S PINTO TRIAL (1980).

25. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687-94, where Justice O'Connor, concurring, added an "endorsement" twist to the Lemon test.

Lemon test, like the Pinto, is a lemon. The new addition of a psycho-coercion test in the wake of *Weisman* simply makes it even more acidic.

At various times, individual members of the Court have recognized the anomaly of the *Lemon* test. Justice White has stated, "I am quite unreconciled to the Court's decision in *Lemon v. Kurtzman*. I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and was contrary to the long-range interest of the country."[26] Chief Justice Rehnquist has noted the "difficulty we have encountered in making the *Lemon* test yield principled results."[27] The *Lemon* test has proved to be a confusing addition to constitutional jurisprudence, producing no discernible standard whereby both governmental and private actors and speakers might determine the constitutional appropriateness of their actions and speech. In fact, "in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified."[28] Chief Justice Burger complained, "I am unable to discern in the Court's analysis [using *Lemon*] ... any neutral principle to explain the result reached."[29]

While some have argued that through "the crucible of litigation"[30] the *Lemon* test would develop into a principled method whereby the rights of both the religious and the irreligious could be balanced in a "pluralistic society,"[31] others have asserted that "'the crucible of litigation' has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' [i.e., the wall of separation] described in

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26. *Nyquist, supra* note 20, at 820. (White, J., dissenting) (citation omitted). In a later case, the same Justice stated that "I am no more reconciled now to [the *Lemon* test] than I was when it was decided .... The threefold test of *Lemon I* imposes unnecessary, and, as I believe today's plurality opinion demonstrates, superfluous tests for establishing 'when the State's involvement with religion passes the peril point' for Amendment purposes." Roemer v. Bd. of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) (citation omitted).

27. Wallace v. Jaffree, 472 U.S. 38, 110 (Rehnquist, J., dissenting).

28. *Id.* at 107 (Rehnquist, J., dissenting).

29. *Nyquist, supra* note 20, at 804 (Burger, C.J., concurring in part and dissenting in part).

30. *Wallace*, 472 U.S. at 52 (Stevens, J., writing for the majority).

31. *See* County of Allegheny v. ACLU, 492 U.S. 668, 627 (1984) (Justice O'Connor, concurring): "We live in a pluralistic society." *See also* Justice Blackmun's assertion, writing for the majority, that the Lemon test springs from a "respect for religious pluralism," *Id.* at 610.

Lemon v. Kurtzman."[32] In fact, "the *Everson* 'wall' has proved all but useless as a guide to sound constitutional adjudication."[33]

Moreover, the Lemon test has proven to be a point of contention, as divergent camps of the Supreme Court have debated it back and forth, forming a "non-standard" of "embarrassing Establishment Clause jurisprudence,"[34] which serves more to confuse than to clarify. Justice Blackmun, dissenting from the Court's holding in *Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), notes that "the line between that which is constitutionally appropriate . . . and that which is not" is "not a straight one."[35] He illustrates this point by noting the apparently contradictory conclusions to which the Court has come when deciding questions of governmental assistance to private, sectarian schools. The Court has permitted a state to reimburse parents for expenses for transportation of children to private sectarian schools and to lend textbooks to students in such schools.[36] However, the Court has found impermissible state supplementation of the salaries of teachers in sectarian schools, reimbursement for the expenses of testing, grants for building maintenance, reimbursement for tuition costs, and tax relief for parents of non-public school students.[37] Such holdings demonstrate *Lemon's* inconsistent results.

As Chief Justice Burger has stated, the *Lemon* test simply is not premised on logic.[38] It is therefore not surprising that since its inception, the *Lemon* test has been the subject of intense and varied critiques from both conservative and liberal members of the Court.

Justice Stevens has stated that the *Lemon* test provides excessive accommodation to religion, thereby breaching the wall of separation. According to him, "[r]ather than continuing with

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32. *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting) (citing *Regan, supra* note 20, at 671 (Stevens, J., dissenting)) (first citation omitted).

33. *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting).

34. Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (footnote omitted).

35. *Regan, supra* note 20, at 663 (Blackmun, J., dissenting).

36. *Id.* at 663 (Blackmun, J., dissenting) (citing Everson v. Board of Educ., 330 U.S. 1 (1947) and Board of Educ. v. Allen, 392 U.S. 236 (1968)). For a noteworthy discussion of this dichotomy, see Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 315-17 (1986) and notes therein.

37. *Id.* (Blackmun, J., dissenting) (citing Lemon v. Kurtzman, 403 U.S. 602 (1971); Levitt v. Committee for Public Educ., 413 U.S. 472 (1973); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973)).

38. *Nyquist, supra* note 20, at 802 (Burger, C.J., concurring in part and dissenting in part).

the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*, I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment."[39] Interestingly enough, in *Weisman* Justice Stevens joined both the concurrence of Justice Blackmun,[40] which affirms the *Lemon* test, and the concurrence of Justice Souter which promotes a radical strict separationist approach.[41]

Although Justice Stevens' understanding of the intent of the "Framers of the First Amendment" is erroneous in light of history,[42] he stands with a majority of the current Supreme Court in recognizing the utter uselessness of the *Lemon* test. The Chief Justice along with three other Justices clearly say as much in the dissent in *Weisman*.[43] Justice Kennedy refused to state a position on the *Lemon* test, but totally ignored it and previously has written against it. That leaves Justice Souter who plainly would go beyond *Lemon* and Justices Stevens and O'Connor who, while joining with Blackmun and endorsing the *Lemon* test, also joined with Justice Souter in calling for a strict separationist approach.[44] Whether expressed as criticism of the entire test[45] or as pointed critiques of individual prongs,[46] a significant number of the current Supreme Court Justices have indicated a willingness to see a test implemented which is more amenable to religious liberty, more historically accurate, and more logically and jurisprudentially consistent.

Until *Weisman*, it was assumed that the new test would be that which was articulated by Justice Kennedy in *Allegheny* and which consisted of a classical establishment prong and a coercion prong. Much to the surprise of everyone concerned, however, in *Weisman*, Justice Kennedy did not announce a direct coercion test (such as this article advocates), but rather what Justice Scalia has called a psycho-coercion test.[47] In addition to examining

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39. *Regan, supra* note 20, at 671 (Stevens, J., dissenting) (citation omitted).

40. Lee v. Weisman, 60 U.S.L.W. 4723, 4728 (U.S. June 24, 1992) (Blackmun, J., concurring).

41. *Id.* at 4731 (Souter, J., concurring).

42. *See infra* part I. A.

43. *Weisman*, 60 U.S.L.W. at 4737 (Scalia, J., dissenting).

44. *Id.* at 4728, 4731.

45. This is best exemplified by Chief Justice Rehnquist's dissent in *Wallace*, cited extensively throughout this article.

46. *E.g., Allegheny*, 492 U.S. at 656-79 (Kennedy, J., concurring in the judgment in part and dissenting in part) (interacting with primary effect prong).

47. *Weisman*, 60 U.S.L.W. at 4738 (Scalia, J., dissenting).

the *Lemon* test, including certain interactions with it contained in the various opinions in *Weisman*, this article will separately critique this new psycho-coercion test.

A. Historically Insupportable

The *Lemon* test stands on a faulty foundation. Though apologists maintain that it is "premised ... on experience and history,"[48] the *Lemon* test truly "has no basis in the history of the [First Amendment]."[49]

Historically, the notion of "separation of Church and State" has not prohibited such practices as legislative chaplaincy, school prayer and Bible study, and other activities which would be considered at least arguable violations of the principle of separation of Church and State today. Even Jefferson, who penned the term, did not apply it as do the modern separationists. As U.S. Supreme Court Justice Reed pointed out:

Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed, and controlled by the State of Virginia ... set forth his views [on religious instruction in public schools] at some length. These suggestions of Mr. Jefferson were adopted and ... provided that:

"Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour."

Thus, the "wall of separation between church and State" that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.[50]

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48. *Nyquist, supra* note 20, at 802 (Burger, C.J., concurring in part and dissenting in part).

49. Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

50. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 245-46 (1948) (Reed, J., dissenting) (citing Acts of the Assembly of 1818-19 (1819) 15; Phillips v. The Rector & Visitors of the University of Virginia, 34 S.E. 66, (Va, 1899); 19 THE WRITINGS OF THOMAS JEFFERSON 408-09, 414-17, 449 (Memorial ed., 1904); 3 RANDALL, LIFE OF THOMAS JEFFERSON 471 (1858) (footnotes omitted)).

Those in the separationist camp hold that "the First Amendment has erected a wall between Church and State which must be kept high and impregnable."[51] However, this one historical insight alone shows that, whatever Jefferson meant by his expression, it was not this strict separationist doctrine.

In light of the foregoing discussion, Chief Justice Rehnquist's admonition becomes quite appropriate: "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results,"[52] it should be discarded. This should be the fate of the *Lemon* test, yet the Court continues to struggle with the "sisyphean task" of keeping the wall in place. Justice Rehnquist has stated, "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading [wall of separation] metaphor for nearly 40 years."[53] "[T]he greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights."[54]

Since it seems obvious that "the meaning of the Clause is to be determined by reference to historical practices and understandings,"[55] it is instructive to analyze the best enunciation of that history by a member of the Supreme Court. This is found in Chief Justice Rehnquist's dissent in *Wallace v. Jaffree*. The historical presentation that follows is based upon his narrative therein. We will also examine Justice Souter's objections to Chief Justice Rehnquist's reading of history,[56] and Justice Scalia's rebuttal of Justice Souter contained in *Weisman*.[57]

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51. *McCollum*, 333 U.S. at 212. *See also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) where the majority stated that "[t]he Court has sometimes described the Religion Clauses as erecting a 'wall' between church and state .... [T]he concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson." (footnote and citation omitted). *See also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123, (1982); *but see Wallace*, 472 U.S. at 106-110 (Rehnquist, C.J., dissenting) (denouncing the wall metaphor).

52. *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting).

53. *Id.* at 92 (Rehnquist, J., dissenting). The following section of this article draws heavily from the dissent of Chief Justice Rehnquist in *Wallace*, 472 U.S. 38, 91-114. Primary sources are cited directly.

54. *Id.* at 107.

55. County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

56. Lee v. Weisman, 60 U.S.L.W. 4732 (U.S. June 24, 1992) (Souter, J., concurring).

57. *Id.* at 4737 (Scalia, J., dissenting).

Thomas Jefferson was serving abroad as ambassador to France when the First Amendment and the rest of the Bill of Rights were added to the Constitution. Furthermore, the letter containing his "wall of separation" metaphor was not written to the Danbury Baptists until fourteen years after the passage of the First Amendment. Therefore, it appears that the importance of Jeffersonian thought in regard to understanding the intended effect of the Establishment Clause is necessarily severely limited.

James Madison, on the other hand, "undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights,"[58] was present at the Congress which enacted the Amendment and in fact proposed the original language for the Religion Clauses: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[59]

Madison's proposed language was referred to a committee on which he served; it recommended the following language: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."[60] Upon debate in the House on the meaning of the word "establish," Madison stated that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[61] Madison "saw the Amendment as designed to prohibit the Establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion."[62] The House, after further debate, voted to alter the language of the religion clauses to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[63]

The Senate, on the other hand, presented the following language to the House: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free

58. *Wallace*, 472 U.S. at 98-99 (Rehnquist, J., dissenting).
59. 1 ANNALS OF CONG. 434 (Joseph Gales, ed., 1789).
60. *Id.* at 729.
61. *Id.* at 730.
62. *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting).
63. 1 ANNALS OF CONG. 766 (Joseph Gales, ed., 1789).

exercise of religion."[64] At the Conference Committee, the House and Senate conferees agreed upon the language which comprises our First Amendment Religion Clauses: "Congress shall make no law respecting an Establishment of Religion, or prohibiting the free exercise thereof."[65] Thus, in each version proposed prior to the adoption of the final terminology of the Amendment, "establishment" referred to either the creation of a state religion or the imposition of religious belief or activity upon an unwilling populace. Therefore, this must have been the meaning ascribed to the clause "Congress shall make no law respecting an Establishment of Religion." There is no evidence that any other meaning was intended.[66] It follows, therefore, that only such state action is prohibited by the Establishment Clause. Furthermore, the terms are absolute. *No such action* is permitted. In light of this, the *Lemon* test is not necessary. If a law violates these straightforward requirements, it is unconstitutional. If not, it is permissible. This simple determination does not require a tripartite test.

There is further historical evidence to demonstrate that this was the intent of Congress. On the same day that James Madison first proposed the language of what became the Religion Clauses of the First Amendment, the First Congress also took up the issue of appropriations for schooling in the Northwest Territory. At this time, Congress mandated that "*[r]eligion*, morality, and knowledge, *being necessary to good government* and the happiness of mankind, schools and the means of education shall be forever encouraged."[67] This illustrates that Congress deemed it not only permissible, but desirable, to lend support to the furtherance of religious ends. Such action was evidently viewed as non-violative of Congress' establishment concerns, which were soon to be codified in the First Amendment.

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64. CHESTER ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT 130 (1964).

65. U.S. CONST. amend. I.

66. Chief Justice Rehnquist made note of this in *Wallace*, 472 U.S. at 99 (dissenting):

> None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned whether the government might aid all religions even handedly.

67. *Id.* at 100 (quoting the Northwest Ordinance, 1 *Stat.* 52, n. a (1787)) (emphasis added).

A further illustration of the intent of the First Congress is a resolution sponsored by Representative Elias Boudinoit. It asked President Washington to proclaim a national day of Thanksgiving. After debate, the House adopted this resolution and presented its request to the President. Within two weeks, George Washington complied, setting aside a day during which to recognize divine blessing. John Adams and James Madison also issued Thanksgiving proclamations during their presidential terms of office. This state action was not considered impermissible.

Justice Brennan in his dissent in *Marsh v. Chambers*,[68] relied upon the writings of Alexis de Tocqueville to express a view contrary to that held by Justice Rehnquist. In advocating the "separation of Church and State" he notes that Monsieur de Tocqueville believed that the key to the healthy religious atmosphere in the United States was a result of such strict separation.[69] The surrounding context, however, demonstrates that de Tocqueville was merely referring to the fact that American clergy were prohibited, by constitution or custom, from holding political office.[70] This lends little support to Brennan's position that the Establishment Clause incorporates the Jeffersonian wall.

In reality, Justice Brennan's dissent is an endorsement of that legal philosophy that holds that the Constitution consists of an evolving set of principles, rather than an enduring document imbued with unchanging tenets. Appealing to "[t]he inherent adaptability of the Constitution and its amendments,"[71] Justice Brennan seeks to displace the historical meaning of the First Amendment with an understanding more "adapted" to the heterogeneous religious society of our time.[72] This is not interpretation, but intentional evolution.

What Justice Brennan has done is to invoke the Founders in order to advance a viewpoint that they did not espouse. By stripping the words of their intended meaning, he has turned them on their heads. The meaning of the "separation of Church and State" as used by Alexis de Tocqueville and his contempo-

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68. Marsh v. Chambers, 463 U.S. 783 (1983).

69. *Id.* at 822 (Brennan, J., dissenting).

70. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295-96 (G. Lawerence, trans., J. MAYER, ed., 1969)(1835).

71. *Marsh*, 463 U.S. at 817 (Brennan, J., dissenting).

72. *Id.* at 791 (quoting the Brief of the Respondent, Chambers) "[W]e should not rely too heavily on the 'advice of the "Founding Fathers" because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers.'"

raries must be understood in the context of a pervasively Christian culture. Surely, the authors of the First Amendment did not intend that the Establishment Clause mandate an isolation of the state from religion. Rather, the historical record indicates that interaction between the two spheres was welcomed. This interaction has continued, as illustrated by the invocations regularly made before the Supreme Court and Congress and by presidential proclamations such as that which declared a "Year of the Bible."[73] Such practices are an inherent part of our nation's heritage, and are therefore not only legitimate,[74] but precious.

In response to Brennan's "inherent adaptability" argument, one might question whether those who invoke it are aware "that it is *a constitution* that we are expounding,"[75] the source of ultimate positive law. If law is to be more than the current pronouncement of the highest authority, whether legislative, executive, or judicial, then the document must be more than a collection of vacuous words for the majority to fill with its preferred meaning. Rather, the document must retain the meaning with which it was imbued by its authors. If new exigencies warrant a change in the document (to outlaw slavery, for example), then the amendment process should be utilized. An uncritical wholesale revision of the "supreme law of the land" by every new Supreme Court majority creates a government of men, not of laws. Such was surely not the intent of the Founders.

A distinction must be drawn between a positivistic rewriting of the Constitution with each passing jurisprudential fashion, and a return to the original meaning of the document. Both involve change, of course. In the former case, those who deal with the Constitution are acting outside the scope of their authority. In effect, they are acting "*ultra vires*."[76] It is the task of the Justices of the Supreme Court to uphold the Constitution, not to rewrite it.

On the other hand, it is incumbent upon the Supreme Court to return to the source of its authority. By distancing itself from the excesses of the past 40 years, the current Supreme Court

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73. *See* Official Transcript, Proceedings Before the Supreme Court of the United States at 5, 6, 13, 14, Lee v. Weisman, 60 U.S.L.W. 4723 (U.S. June 24, 1992).

74. *Id.* at 22-23.

75. M'Culloch v. Maryland, 17 U.S. (1 Wheat.) 316, 407 (1819).

76. The doctrine of *ultra vires* provides a useful analogy here. Just as a corporation is held to be acting *ultra vires* when acting beyond the authority of its charter, so the Supreme Court has acted beyond the authority of the Constitution by legislating from the bench, a clear usurpation of legislative authority.

could avail itself of an opportunity to place itself securely upon the footing designed for it by the Framers of the Constitution. *Stare decisis*, after all, does not completely foreclose the possibility of re-examining constitutional questions. While as a general principle a judge should follow precedent, his oath is to uphold the Constitution, not court holdings. Therefore, those who accuse the Rehnquist Court of being as positivist as the Warren Court have missed the mark entirely.[77] The former court intentionally set out to rewrite the Constitution in terms of the perceived cultural mandates of the day. The Justices of the Rehnquist Court, on the other hand, have, and indeed must, set out to rectify the results of such activity in order to restore the vitality of both the Constitution and the Court. The former was evolutionary, the latter restorative.[78]

While it is abundantly clear that the intent of the Founders was to prevent the establishment of a national church, and that the effect of incorporation through the Fourteenth Amendment was to extend the same prohibition to the states,[79] the effect of the *Lemon* test has been to censor and, in many cases, to prohibit religious speech to an unacceptable degree. For example, governmental speech which may be seen as an "endorsement" of religion is prohibited.[80] Speech by government officials and by their agents is closely scrutinized under the *Lemon* test in order to determine whether it presents the danger of endorsement or some other Establishment Clause violation.[81] Moreover, private citizens must demonstrate compliance with the strictures of the *Lemon* test in order to speak at government-controlled institutions.[82]

Consistent application of the *Lemon* test would result in elimination of all religious speech within the context of government. It would end everything from Thanksgiving holidays to

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77. *See, e.g.*, *The Loud Majority*, THE ECONOMIST, July 6, 1991, at 15.

78. However, there continues to be a tension between the evolutionists and restorationists on the current Court. *See, e.g.*, Planned Parenthood v. Casey, 60 U.S.L.W. 4795, 4799, 4891 (U.S. June 29, 1992), to compare the majority and dissenting opinion on substantive due process.

79. This article recognizes the *de facto* incorporation of the Establishment Clause through the Fourteenth Amendment, without granting its validity as a point of constitutional theory. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

80. Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

81. *See, e.g.*, Weisman v. Lee, 728 F. Supp 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, Lee v. Weisman 60 U.S.L.W. 4723 (U.S. June 24, 1992).

82. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

legislative chaplaincy[83] to the motto "In God We Trust" on our coins. The only means by which the Court has managed to preserve such historically validated practices is to carve out unprincipled exceptions[84] to the application of the test. This is neither jurisprudentially sound or logically consistent and is a telling indictment of the *Lemon* test.

In his concurrence in *Weisman*, Justice Souter directly challenges the Chief Justice's reading of the history of the First Amendment as enunciated in his *Wallace v. Jaffree* dissent (discussed above).[85] Justice Souter's reading of history leads to a strict separationist approach; he intimates that he would find military chaplains, legislative chaplains and presidential Thanksgiving proclamations unconstitutional.[86] He was specifically concerned with two issues in his concurrence: "whether the [Establishment] Clause applies to governmental practices that do not favor one religion or denomination over others, and whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation."[87]

He concludes his analysis by indicating that even non-preferential promotion of religion is unconstitutional,[88] and that something much less than coercion would be sufficient to constitute an endorsement in violation of the Establishment Clause.[89] This is a frightening step backwards for true civil and religious liberty.

It is in this setting that Judge Souter attacks Rehnquist's *Wallace v. Jaffree* dissent on both issues. Justice Souter relies on several major arguments to seek to establish his view of what the drafters intended the First Amendment to accomplish. One of his arguments is that Chief Justice Rehnquist has misread the debates contained in the Annals of Congress and that a proper reading shows that the Framers of the First Amendment in-

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83. The Court in Marsh v. Chambers, 463 U.S. 783 (1983), found legislative chaplaincy to be such a venerable practice as to contraindicate its invalidation under *Lemon*. Therefore, the majority refused to use the *Lemon* test. Justice Brennan, dissenting in that case, stated that "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800-01 (footnotes omitted).

84. *Nyquist, supra* note 20, at 804 (1973).

85. *Weisman*, at 4732-33.

86. *Id.* at 4734 (Souter, J., concurring).

87. *Id.* at 4731.

88. *Id.* at 4733 (Souter, J., concurring).

89. *Id.* at 4734-35 (Souter, J., concurring).

tended to prohibit non-preferential promotion of religion.[90] A second argument draws heavily upon the private and public writings of James Madison and Thomas Jefferson to show that these men were strict separationists.[91]

Both of these arguments may be readily disposed of. Justice Scalia directly addresses the latter line of reasoning in his dissent.[92] He shows that Justice Souter has made selective use of the ideas and theories of Jefferson and Madison by citing instances in which they both invoked God in public addresses.[93] In addition, he demonstrates that even their most radical ideas (and Justice Souter admits that he is drawing in part from ideas that Madison propounded long after leaving the presidency[94]), did not prevail during their own lifetimes.[95] Interestingly enough, Justice Souter admits that this was largely true,[96] although he manages to quickly dismiss the significance of this fact in a conclusory and non-convincing manner.

The former argument by Justice Souter, that Chief Justice Rehnquist has misread the First Annals of Congress, can only be reconciled by a thorough examination of the Annals themselves to ascertain which Justice has properly read that document. The evidence clearly indicates that it is the Chief Justice and not Justice Souter who has properly read the First Annals of Congress. Justice Souter seems to find great significance in the sequence of the transmittal of proposals between the House and the Senate and the action of the Joint Committee which finally hammered out the approved language. He also places great emphasis on the fact that the final religion clauses do not speak of "'*a national* religion,' '*one* religious sect' or a specific 'articles of faith.'"[97]

This truly represents a grasping at straws and ignores the plain language contained in the Annals which clearly demonstrates that non-preferential aid was not intended to be denied. Justice Souter ignores the fact that Chief Justice Rehnquist's description of the House debate is an exhaustive speaker-by-speaker summarization of that debate. He has left nothing out.[98]

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90. *Id.* at 4732-33 (Souter, J., concurring).
91. *Id.*
92. *Id.* at 4737-38 (Scalia, J., dissenting).
93. *Id.* at 4737 (Scalia, J., dissenting).
94. *Id.* at 4733-35, 37 (Souter, J., concurring).
95. *Id.* at 4739 (Scalia, J., dissenting).
96. *Id.* at 4732-35 (Souter, J., concurring).
97. *Id.* at 4732 (Souter, J., concurring) (emphasis added).
98. Wallace v. Jaffree, 472 U.S. 38, 93-97 (1985).

He also ignores the fact that the changing of the language of the clauses does not speak at all to the issue of whether or not non-preferential aid was to be allowed, but rather reflects the give and take of practical politics. Indeed, the language "a national religion" was dropped over concern that the word "national" was inappropriate to use since a truly national government had not been formed, but rather a federal government.[99] If Justice Souter had truly read and analyzed the Annals for himself this would be known to him.[100]

In conclusion, we may wholeheartedly assert that Chief Justice Rehnquist in his dissent in *Wallace v. Jaffree* and Justice Scalia in his dissent in *Weisman* accurately portray the true historical context of the religion clauses and that Justice Souter in his concurrence is absolutely incorrect both in asserting that the drafters of the Bill of Rights intended to eliminate non-preferential aid to religion and in asserting that classically understood coercion is not a valid test.

B. External Logical Inconsistencies

The *Lemon* test forces the Establishment Clause into inconsistency with its context in the First Amendment. The Free Exercise Clause requires at least accommodation of religious practices, if not actual encouragement. Chief Justice Burger wrote that "the Constitution [does not] require complete separation of church and state, it affirmatively mandates *accommodation*, not merely *toleration*, of all religions, and forbids hostility toward any."[101] Similarly, Justice William O. Douglas maintained that "[w]hen the state encourages religious instruction or cooperates with religious authorities . . . , it follows the best of our traditions."[102] The *Lemon* test, however, consistently applied, prohibits any governmental action to benefit religion.

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99. 1 ANNALS OF CONGRESS 731 (Joseph Gales, ed., 1789).

100. It is important to note that while Justice Souter's historical analysis makes some use of primary sources, it also relies very heavily on the writings of others. It is often instructive to examine the footnotes accompanying any work of scholarship, including legal scholarship such as Justice Souter's concurrence. It is particularly worth noting that in his footnotes 2, 3 and 4 (*Weisman* at 4732-34), Souter recognizes the weaknesses in his own historical arguments and does the best he can to anticipate the objections that will be leveled against them. However, he once again primarily relies on the historical interpretations of others rather than on evidence from the primary sources and is not successful in answering the objections he anticipates.

101. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (emphasis added).

102. Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

Taken to its logical extreme, [the *Lemon* test] ... would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage.[103]

There is thus an obvious "tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion."[104] Justice O'Connor has pointed out that the "neutrality" toward religion that the *Lemon* brand of jurisprudence demands cannot fully comport with the mandates of the Free Exercise Clause.[105] To exempt one from an obligation because of one's religious beliefs, for example, is not neutral.[106] Rather, it bestows a *benefit* upon that person because of his faith.[107] Permitting the free exercise of his religion therefore violates *Lemon's* neutrality mandate. Thus, *Lemon* runs counter to the Free Exercise Clause. It cannot be legitimate, since the Framers could not have intended that the Religion Clauses contradict one another. Rather, any test utilized must recognize the common ground between the two clauses. Justice Kennedy has stated well that:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly*, 465 U.S. 668 at 678; *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 at 669. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.[108]

In light of these previous pronouncements and others which will be utilized throughout this article, it is particularly difficult

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103. County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

104. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 347 (1987) [hereinafter *Amos*] (O'Connor, J., concurring in the judgment).

105. Wallace v. Jaffree, 472 U.S. 38, 82 (1985) (O'Connor, J., concurring in the judgment).

106. *Id.*

107. *Id.*

108. *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part.)

to understand how Justices O'Connor and Kennedy could have held as they did in *Weisman*. Perhaps the answer can be found in some of the equally surprising statements contained in *Planned Parenthood v. Casey*,[109] which was issued five days after *Weisman*. Just as Justice O'Connor has undergone an evolution of her views concerning *Roe v. Wade* (as pointed out by Justice Scalia[110]), so Justices O'Connor and Kennedy have clearly undergone a change of thinking with regard to the *Lemon* test. Justice O'Connor has moved from criticizing *Lemon* to endorsing it, and Justice Kennedy has moved from what appeared to be a direct coercion test to his new psycho-coercion test. Perhaps these shifts can be best explained by the desire for legitimacy expressed by the joint opinion in *Casey*. Justices O'Connor, Souter and Kennedy writing together expressed the following sentiments:

> [T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question .... The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete .... The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.[111]

The larger context from which these quotations are drawn seems to indicate that the new block of Justices is as much concerned with showing that they are not in the pocket of so-called "political conservatives" as with maintaining the legitimacy of the Court. Indeed, Justice Scalia in his dissent in *Casey* challenges both the motivation behind the legitimacy argument as well as its validity as a controlling principle of jurisprudence. Responding directly to the joint opinion's language concerning the subversion of the Court's legitimacy and other phrases used in the same context, Scalia writes as follows:

> The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speaks before all others for their constitutional ideals"—with the somewhat more modest role

109. 60 U.S.L.W. 4795 (U.S. June 29, 1992)
110. *Id.* at 4838 (Scalia, J., dissenting).
111. *Id.* at 4804-05 (citation omitted).

envisioned for these lawyers by the Founders.

. . . .

I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced — against overruling, no less — by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe* [which is in fact the reading of history contained in the joint opinion].

. . . .

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution has an evolving meaning; that the Ninth Amendment's reference to "other" rights is not a disclaimer, but a charter for action; and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change — to show how little they intimidate us.[112]

Would Justices O'Connor, Kennedy and Souter have felt so compelled to uphold the infamous Dred Scott decision? It too had been upheld in the name of the so-called "constancy" they now seem to cherish. Of course, it too, was wrong.[113]

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112. *Id.* at 4840-41 (Scalia, J., dissenting) (citations omitted).

113. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). *Cf. Casey*, at 4841 (Scalia, J., dissenting) (commenting on Dred Scott in the present context).

C. *Philosophically Problematic*

The philosophy of the *Lemon* test is well reflected in the opinion of the Court in *County of Allegheny*: "The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically."[114] The *Lemon* test, in its application as well as its terms, prefers secularism over other religions.

Secularism is itself a religion, a worldview by which one's duties, rights, and ethics are determined. While the court has stated that "[w]e agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe,'"[115] yet the precedents under *Lemon* "[reflect] an *unjustified hostility* toward religion, a hostility inconsistent with our history and our precedents."[116] Secularism is not neutrality, but hostility toward traditional religion; it is therefore not a legitimate constitutional doctrine.[117] The test by which the Supreme Court has sought to avoid the establishment of new religion has therefore not been effective. A new religion has in fact been established. In the wake of *Weisman* it may now be enforced by examining the psychological intent of its opponents. That presents a frightening specter on the horizon of Constitution jurisprudence.

As noted earlier, the jurisprudence of the *Lemon* test is clearly based on an evolutionary theory of law and justice.[118]

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114. County of Allegheny v. ACLU, 492 U.S. 573, 604 (1989).

115. Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

116. *County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part) (emphasis added). *See also* Justice Black's concurrence in Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

117. *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting Justice Goldberg, concurring in *Abington*, 374 U.S. at 306 (1963)). *See also Zorach*, 343 U.S. at 313-14; Aguilar v. Felton, 473 U.S. 402, 420 (1985) (Burger, C. J., dissenting) ("The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools."); *Abington*, 374 U.S., at 313 (Stewart, J., dissenting) ("[A] refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.").

118. *See also* Marsh v. Chambers 463 U.S. 783, 816-17 (1983) where Justice Brennan, dissenting, clearly bases his disagreement with the constitutionality of the legislative prayer on the idea that the Constitution should not be limited to the meaning which the Framers intended to give it.

Indeed, it appears that the *Lemon* test is based on the concept that the precepts of the Constitution are what judges say they are. The following illustrates this approach:

> At one time it was thought that this right [religious liberty] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[119]

To many of the advocates of the *Lemon* test, the intent and meaning of those who wrote the Constitution appear to be irrelevant.[120] The "underlying principle" has evolved from what its formulators *intended* it to mean into that which Justices have thought it *should* mean.

The *Lemon* test, which, as discussed, is a recent and most unwelcome analysis of the Establishment Clause that is not grounded in either history or the constitution, is thus a monument to a positivist notion of an evolving Constitution. This approach assumes that either the Framers failed to write an effective Constitution, that they intended that it evolve, or that the exigencies of current political necessity demand a fundamental change in the nature of the Constitution. Under any of these rationales the Court is justified, the argument goes, in taking great liberties with the meaning of the Constitution as the Framers envisioned it. The problem with these approaches is that they allow for an infinite number of *ad hoc* decisions in response to constitutional questions and thereby reduce our government to a government of men, not of laws. This is not the government which the Framers intended to erect, nor is this approach consonant with Western legal tradition.[121] Simply put, the *Lemon* test is based on a faulty jurisprudential philosophy.

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119. Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985) (footnotes omitted).

120. The incongruence of the results obtained in the "crucible of litigation" with the intent and meaning of the Framers is especially pronounced in light of the historical discussion presented earlier in this article.

121. The quintessential legal philosophical statement "a government of laws and not of men" comes from the MASS CONST. part I, art. XXX. This language was written by John Adams. See GARY T. AMOS, DEFENDING THE DECLARATION (1989) for a discussion of the Western legal tradition.

D. *Jurisprudential Inadequacy*

Current application of the Establishment Clause by means of *Lemon* is jurisprudentially inadequate. It does not produce a coherent body of law nor provide predictability in its application. First, as noted above, the *Lemon* test forces the Establishment Clause into direct conflict with the Free Exercise Clause, demanding that one take precedence over the other. Consistent application of the *Lemon* test further violates the Establishment Clause by forcing the religious belief of secular humanism upon the American people—a national example of psycho-coercion if there ever was one.

Second, the *Lemon* test creates a conflict between the Establishment Clause and the Free Speech Clause.[122] Under the *Lemon* analysis, government officials and those who speak in a governmental forum, such as students in schools or private speakers in a public park, are subject to a narrowing of their *constitutionally guaranteed* free speech rights.

It is interesting that all of the opinions in *Weisman* directly or indirectly indicate that the prohibition on graduation prayers extends only to state actors and not to students. The opinion of the Court stresses repeatedly that the record indicates that Rabbi Gutterman, who gave the invocation and benediction, was a state actor.[123] Justice Kennedy noted, "We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students."[124]

Similarly, for Justice Blackmun, with whom Stevens and O'Connor join in his concurrence, the key question is "whether the government has 'plac[ed] its official stamp of approval' on the prayer."[125] Justice Souter who is joined in his concurrence by Justices Stevens and O'Connor states that it was the state's solicitation of the prayers that caused "the State [to] cross[ ] the line from permissible accommodation to unconstitutional establishment."[126]

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122. *See, e.g.*, Doe v. Small, 934 F.2d 743 (7th Cir. 1991), *rev'd*, No. 89-3756, 1992 WL 102223 (7th Cir. May 15, 1992) (*en banc*). But see *supra* note 11 on the use of *Lemon* on rehearing.

123. *Lee v. Weisman*, 60 U.S.L.W. 4723, 4725-27 (U.S. June 24, 1992).

124. *Id.* at 4728.

125. *Id.* at 4729 (citation omitted).

126. *Id.* at 4736 (Souter, J., concurring).

Justice Souter also notes: "If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers" not a state actor "had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the state."[127] The dissent, of course, would allow invocations and benedictions to continue even by "state actors."[128] Efforts to increase the umbrella of the state have led those hostile to religious speech to attempt to include student speakers as "state actors." The majority opinion may lend credence to such strained student approaches.

Nonetheless, it is easy to see that much of the language which Kennedy employs could easily be ignored or twisted in later opinions. Of course, we have already noted how Kennedy himself currently seems to be capable of abandoning his previous thoughts with the result that he is moving towards a more restrictive attitude toward religious speech. This could certainly continue. In addition, the Justices participating in the concurrences simultaneously uphold both *Lemon* and a strict separationist approach. The likelihood of these Justices limiting student speech in later cases is even greater than the likelihood of Justice Kennedy doing so.

It is also clear from Kennedy's opinion that any student exemption from the proscription could not be in the context of an invocation or a benediction solicited by the state. All such prayers are now completely off limits. Therefore, student prayer would have to be "smuggled in" via valedictory or other speeches or remarks. No doubt the school would not be able to "subject" the graduating students to such religious speech if they knew about it ahead of time. Therefore, students would have to keep their intended speech a secret until they were ready to deliver their remarks.[129]

In addition, despite the principle that "state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful,"[130] the *Lemon* test provides no basis for predictable application of the laws. Note the following illustration of this point, referred to earlier:

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127. *Id.* at 4736 n.8 (Souter, J. concurring).

128. *Id.* at 4737-41 (Scalia, J., dissenting).

129. That has already been our experience in our public interest practice. The "thought police" have apparently been given new ammunition in the wake of *Weisman.*

130. Lemon v. Kurtzman, 411 U.S. 192, 209 (1973) (*Lemon II*).

> [T]he *Lemon* test has caused this Court to fracture into unworkable plurality opinions, ... depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.

For example, a State may lend to parochial school children geography textbooks[131] that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.[132] A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[133] A State may pay for bus transportation to religious schools[134] but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.[135] A State may pay for diagnostic services conducted in the parochial school, but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden,[136] but the State may conduct speech and hearing diagnostic testing inside the sectarian school.[137] Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school,[138] such as in a trailer parked down the street.[139] A State may give cash to a parochial school to pay for the administration of state-written test and state-ordered reporting services,[140] but it may not provide funds for teacher-prepared tests on secular subjects.[141] Religious instruction may not be given in public school,[142] but the public school may release students during the day for

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131. Board of Educ. v. Allen, 392 U.S. 236 (1968).

132. Meek v. Pittenger, 421 U.S. 349, 362-66 (1975). A science book is permissible, a science kit is not. *See* Wolman v. Walter, 433 U.S. 229, 249 (1977).

133. *See Meek*, 421 U.S. at 354-55 nn.3, 4, 362-66.

134. Everson v. Board of Education, 330 U.S. 1 (1947).

135. *Wolman*, 433 U.S. at 252-55.

136. *Meek v. Pittenger*, 421 U.S. 349, 367, 371 (1975).

137. *Wolman*, 433 U.S. at 241.

138. *Id.* at 245.

139. *Id.* at 241-248; *Meek*, 421 U.S. at 352 n.2, 367-73.

140. *Regan, supra* note 20, at 648, 657-59.

141. *Levitt, supra* note 20, at 479-82.

142. Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[143,144]

The *Lemon* test does not provide state and local government officials with a reliable principle whereby they may determine in advance whether their actions or speech are constitutionally permissible.

II. A RETURN TO THE HISTORICALLY VALIDATED ESTABLISHMENT CLAUSE TEST: COERCION AND CLASSICAL ESTABLISHMENT

There exists another test which should be utilized by the Court in its review of Establishment Clause cases that is more congruent with the meaning of the Clause as illuminated by its history. Unlike the *Lemon* test, it provides a legal standard capable of predictable application.

This test can be found in an opinion by Justice Kennedy, issued prior to his momentary lapse of lucidity in *Weisman*:

> The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not *coerce* anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, *give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so."* *Lynch v. Donnelly*, 465 U.S. at 678.[145]

The coercion, however, must be "institutional" coercion: "The inquiry with respect to coercion must be whether the *government imposes pressure* upon a student to participate in a religious activity."[146] This pressure must be more than peer pressure incidentally generated by simply allowing religious believers to freely express their beliefs. It must be more than the psycho-coercion unleashed upon the nation by *Weisman*. Rather, the

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143. Zorach v. Clauson, 343 U.S. 306 (1952).

144. Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, C.J., dissenting) (Footnotes 127-136 are from the original, but renumbered and modified to appropriate form).

145. County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

146. Board of Educ. v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring) (emphasis added).

coercion must be exerted by the government upon the citizen directly.

If any other standard is used, the government will be found to be "endorsing" religion simply by affirmatively setting up conditions which neutrally permit its free exercise, since some citizens will certainly claim to have been "coerced" into religious observance simply by the fact that it is acceptable in a community. This will result in mandatory governmental hostility toward religion which will in turn coerce or "endorse" secularism — another religion. Thus the government is placed on the horns of an artificial dilemma, much like the current situation under *Lemon,* which could be resolved simply by using the presence or absence of direct, institutional coercion as the test for Establishment Clause adjudication.

It is this crucial distinction that Justice Kennedy missed— or rather, that he considered and rejected. Instead, he has sought to establish a new standard of psycho-coercion in which peer pressure exercised by non-state actors, but in an environment which can be construed as being controlled by state actors, constitutes state coercion.[147] Under this new psycho-coercion analysis Justice Kennedy actually came to the conclusion that the state deliberately chose to "use social pressure [that is, peer pressure of school children one upon another] to enforce orthodoxy. . . ."[148] This conclusion is not supported by either the facts or the record of the court below.

Coercion requires the threat or exercise of force. It demands that one participate in or assent to a principle or practice to which one is opposed. It would include an attempt by government to proselytize, whether by deed or word. Merely hearing the Bible quoted or a prayer prayed at a government sponsored event, or simply being aware of the religious underpinnings of a governmental activity, is not coercion. In such situations, no one need demonstrate agreement with the principle nor take part in the practice. Yet in *Weisman,* Justice Kennedy argued for the opposite view: that the students attending a graduation ceremony, by merely being asked to stand during a prayer, were being asked to symbolically demonstrate their agreement and to take part in the practice. He believed that "school children" could not resist the peer pressure that would result if in fact they did not want to agree or participate. In other words, it would be too

147. Lee v. Weisman, 60 U.S.L.W. 4723, 4726-27 (U.S. June 24, 1992).
148. *Id.* at 4727.

difficult for them to find the courage to remain seated during the time when their peers were standing for the prayer. In addition, Justice Kennedy was concerned that any who chose to stand out of respect for the other students would be seen as participating when in fact they were not. He was also concerned that although both parties had stipulated that attendance at the graduation ceremony was voluntary and that the school district had argued that this situation was therefore distinguishable from the school prayer cases, graduation attendance was not in any real sense voluntary because the cost to the student declining to attend was too great. Those who chose not to attend would be excluded from a meaningful rite of passage in their social lives.[149]

These arguments, however, were easily answered by Justice Scalia. He used Justice Kennedy's own language to demonstrate that there is nothing in the allegedly coerced behavior which would even remotely resemble participation by any student. As a worse case scenario, any psychologically coerced behavior would only signify respectfulness for the views of those who felt that invocation and benedictions are appropriate. Justice Scalia very properly comments that there is nothing wrong with the government encouraging such respectfulness:

> [M]aintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate— so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenters' [that is, the students wishing not to participate] interests in avoiding *even the false appearance of participation* constitutionally trumps the government's interest in fostering respect for religion generally.[150]

He also addressed the second contention that the graduation was for all intents and purposes compulsory. He noted that there was no penalty or discipline for students who failed to participate. While it may be true that most of us would find it regrettable that a student would miss his or her high school graduation, it is also true that the price of abiding by one's convictions is often vastly more costly than voluntarily declining to attend a voluntary ceremony. Certainly, allowing a student the option of nonparticipation is not synonymous with making attendance obliga-

149. *Id.*
150. *Id.* at 4739 (Scalia, J., dissenting).

tory. As Justice Scalia points out we should contrast this with, for example, the facts of Barnette:

> Schoolchildren were required by law to recite the Pledge of Allegiance; failure to do so resulted in expulsion, threatened the expelled child with the prospect of being sent to a reformatory for criminally inclined juveniles, and subjected his parents to prosecution (and incarceration) for causing delinquency.[151]

In sum, the facts in *Weisman* revealed no direct government coercion whatsoever. Had Justice Kennedy followed this criterion instead of that of indirect psycho-coercion, this case would have been decided in the opposite manner — invocations and benedictions would have been declared constitutional.

The concept of direct coercion and the importance of distinguishing it from "psycho-coercion" finds its source in a foundational principle of our society. We are a government of the majority, but at the same time embrace constitutional safeguards to protect the rights of minorities. Indeed, the Establishment Clause itself was enacted in order to prevent the government from exerting force upon the consciences of Americans. We protect all citizens equally. The rights of the majority must not be limited by the scruples of a minority; the conscience of that minority must not be violated by the tyranny of the majority. This the Establishment Clause ensures; this the *Lemon* test perverts; this the psycho-coercion test guts. Our rights are now held captive to the varying concepts of human nature that judges throughout the land may hold.

Prayer at government functions is a good example of activity that has historically been permitted under the coercion test. The simple utterance of a prayer as a speech exercise does not in and of itself compel belief or observance.

As has been demonstrated, the *Lemon* test, which has recently displaced the historical and time-tested standard,[152] is fraught with difficulties.[153] The Supreme Court has at times

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151. *Id.* at 4740 (Scalia, J., dissenting) (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 629-30 (1943)).

152. The *Lemon* test is merely twenty years old, and therefore cannot be said to be validated by the test of history. Even if the test were old, bad law is not validated simply by great age.

153. The former Chief Justice of the United States Supreme Court, agreeing with a current Justice, has even gone so far as to remark that "I share Justice's White concern that the Court's obsession with the criteria identified in *Lemon v. Kurtzman* ... has led to results that are 'contrary to the long-range interests of the Country,'" Aguilar v. Felton, 473 U.S. 402, 419 (1985) (Burger, C.J., dissenting).

refused or been unable to use it.[154] Therefore, despite the fact that alternatives to the *Lemon* test have been decried as "entirely untenable and of value only as academic exercises,"[155] the historically validated coercion and classical establishment tests to which Justice Kennedy referred prior to *Weisman* should be seriously reconsidered. Furthermore, for the reasons discussed above, the coercion test must be one of direct coercion and not one of indirect psycho-coercion.

These two tests constitute the pre-*Everson* Establishment Clause standard. For the entire history of this country prior to that case, the courts routinely looked to the two prongs of coercion and classical establishment to determine whether the Constitution had been violated by state action.[156] Even in *Everson,* the Court used the language of classical establishment to explain its understanding of the mandate of the Establishment Clause:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*[157]

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154. *See* Wallace v. Jaffree, 472 U.S. 38, 112-13 (1985) (Rehnquist, J., dissenting).

155. Abington School Dist. v. Schempp, 374 U.S. 203, 217 (1963).

156. *See Weisman,* 60 U.S.L.W. 4723, 4728-29 nn.1-2 (U.S. June 24, 1992); Everson v. Bd. of Education, 330 U.S. 1, 13-16 (1947) and cases cited for a discussion of the limited pre-Everson Free Exercise cases and of related Establishment cases.

157. *Everson,* 330 U.S. at 15-16 (1947). The Court could not have meant its prescription for separation to be taken literally or applied rigorously. The Court in *Everson* proceeded to validate a program whereby tax monies were expended for the benefit of religious schools, at least incidentally. Simply permitting religious bodies to exist could be viewed as governmental favor. As has been noted many times, a too literal application of the test enunciated would generally force government to treat religion with disfavor, if not to actually inhibit its function. *See, e.g.,* Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970) ("[W]e fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different [from allowing incidental aid to the religious mission of church schools] for purposes of the Religion Clauses.").

The Supreme Court also applied the coercion and classical establishment tests in *Zorach v. Clauson.* After noting that the Constitution forbids governmental funding of religion as an "establishment" of religion, and that such funding had not occurred, the Court continued: "Government may not ... use secular institutions to force one or some religion on any person .... It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."[158]

Based on this analysis, the Court found that an off-campus released time program was permissible. The Court maintained that in so holding, it permitted

> the state ... [to] follow[] the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[159]

James Madison also understood coercion to be an essential element of a violation of the Establishment Clause. In the House debate over the meaning of what became the Establishment Clause, Madison stated that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[160] In the debates over the initial drafts of the Religion Clauses, his concern was that government not be permitted to "compel men to worship God in any manner contrary to their conscience."[161] Further, in the "Memorial and Remonstrance Against Religious Assessments" (1785), Madison wrote that the primary reason for denying the State authority to compel support for religion was to prevent the coercion of religious belief: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[162] Clearly, the author of the Clause intended it to pro-

158. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

159. *Id.* at 313-14.

160. 1 ANNALS OF CONG. 730 (Joseph Gales, ed., 1789).

161. *Id.*

162. James Madison, Memorial and Remonstrance, in SEPARATION OF CHURCH AND STATE 244 (Cord 1982).

scribe coercion and classical establishment and nothing else. There is thus no need for a subjective *Lemon* analysis nor for a subjective psycho-coercion test. The court need only determine whether religious beliefs or practice have been coerced by direct government action, or whether the government had so preferred a religion as to "establish" it in the classical sense.

We have already discussed Justice Souter's selective use of the public and private writings of Madison. While it is true that at various points in his life Madison resisted presidential thanksgiving proclamations and military and legislative chaplaincies, it is also true that at other periods he did declare national days of thanksgiving. Furthermore, even though Madison may have felt it inappropriate for the President to call the nation to prayer, he did not feel it was inappropriate for the President as an individual state actor to engage in prayer on occasions of state. As Justice Scalia points out, Madison engaged in prayer in his Inaugural Address.[163]

A further objection raised by Justice Souter must be answered. He complains that "a literal application of the coercion test would render the Establishment Clause a virtual nullity, as petitioners' counsel essentially conceded at oral argument."[164] While it may be true that petitioners' counsel did not extricate himself very well from the Justices' questioning, it is also true that one would expect Justice Souter to be familiar with the facts and cases outlined in the previous pages of this article and would therefore understand that the coercion and classical establishment test have historically been used together.

It is true, of course, that there is an element of coercion within classical establishment, but the test which may be called the coercion test is readily distinguishable from the classical establishment test. We have seen this distinction previously in the language of Justice Kennedy: "government may not coerce anyone to support or participate in any religion or its exercise; and it may not . . . give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion . . . .'"[165] Thus the Establishment Clause is certainly not a "nullity."

Justice Scalia discusses whether or not by 1790 the term "establishment" was technically used in the limited sense of tax-

163. Lee v. Weisman, 60 U.S.L.W. 4723, 4737-38 (U.S. June 24, 1992) (Scalia, J., dissenting).

164. *Id.* at 4734 (Souter, J., concurring) (citing Transcript of Oral Argument at 18).

165. County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J. concurring in part and dissenting in part) (alteration in original).

supported church financing or whether it was still used in the broader sense of state coercion of both financial support and religion orthodoxy. Church attendance and legal restriction upon who could perform church sacraments were at times held to be parts of the establishment of religion. Thus, in either event, one can see the close relationship between the Religion Clauses but one can also recognize that they are clearly distinguishable.[166] Justice Scalia's well taken point here is that under both the coercion and classical establishment tests, direct coercion is marked by the fact that it is "backed by the threat of a penalty—a brand of coercion that, happily, is readily discernable to those of us who have made a career of reading the disciples of Blackstone rather than of Freud."[167]

III. CONCLUSION

While the *Lemon* test may be an attempt to meet the diverse needs of a pluralistic society, it has not met the burden of providing a standard for constitutional adjudication. It has not produced predictable rules of law to regulate behavior, nor has it stood faithful to the intent and meaning of the Framers of the First Amendment.

Indeed the *Lemon* test could yet be abandoned. In *Weisman*, four Justices dissented. Although they were writing in direct opposition to Justice Kennedy's psycho-coercion test, their opinion contains language which directly challenges the *Lemon* test and in fact declares that it has already been eliminated.

> Our religion-clause jurisprudence has become bedeviled (so to speak) 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.[168]

The opinion then cites previous opinions by Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy. Justice Scalia continues: "The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it ... and the interment of that case may be the one happy byproduct of the Court's

166. *Weisman*, 60 U.S.L.W. at 4739 (Scalia, J., dissenting).
167. *Id.* at 4739-40 (Scalia, J., dissenting).
168. *Id.* at 4740 (Scalia, J., dissenting).

otherwise lamentable decision."[169] Furthermore, Justice Kennedy clearly stated that the issues involved in *Weisman* did not require the court to re-evaluate the *Lemon* test.[170] Nonetheless, Justice Kennedy's reliance upon the psycho-coercion test should indicate that when a case reaches the court which does require a reconsideration of *Lemon*, he would vote to abandon it. Certainly, his opinion in *Allegheny* would seem to lead to the same conclusion.

However, the fact that Justice Kennedy is out of synch with the other four justices who have called for the abandonment of the *Lemon* test could indicate that he would be loathe to join a majority that would eliminate *Lemon* when that would result in upholding practices as constitutional which he is now on record as finding unconstitutional. Furthermore, we have seen the evolution in both Justices O'Connor and Kennedy's thought. Justice O'Connor has now embraced *Lemon*, and Kennedy could soon follow.

It is indeed likely that a new case will reach the high court in the near future. Perhaps the most important reason for this is that the four dissenting justices have virtually called upon school boards across the United States to ignore the opinion in *Weisman*:

> Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.[171]

Should such a case be accepted by the High Court, a new test should be utilized—one which will produce coherent jurisprudence and predictable standards by which government officials may gauge their decisions. This new test, however, must

169. *Id.*
170. *Id.* at 4725.
171. *Id.* at 4740 (Scalia, J., dissenting).

not be Justice Kennedy's psycho-coercion test. It is more bitter than the *Lemon* it seeks to sweeten.

The psycho-coercion test could perhaps also be called the time machine test. Justice Blackmun, with Justices Stevens and O'Connor joining him, invoked Sigmund Freud in support of their reading of the Establishment Clause. They have apparently succumbed to the psychological theories of the age and now seek to inflict them upon the Constitution. Furthermore, they claim that James Madison embraced this same theory (despite the fact that the quotations from Freud and Madison which they cite do not stand for the same principle).[172] Apparently, the drafters of the First Amendment got in their time machine, travelled forward to the time of Freud, became thoroughly conversant in his ideas, re-entered their time machine, returned to the New York of 1789, and on June 8th had James Madison introduce Freud's ideas as part of his initial draft of the Bill of Rights. Perhaps, contrary to our discussion above, neither Justice Souter nor Chief Justice Rehnquist and Justice Scalia are reading the Annals of Congress correctly. Perhaps after all, the debate contained therein was a wrangling over who best understood Freud's theories and who would most faithfully incorporate them into the Bill of Rights.

Unless one is willing to seriously believe that the First Amendment incorporates Freud's ideas, or unless one is willing to ignore reality by believing that the *Lemon* test has served this nation well, a new standard must be employed the next time a church-state case is heard by the Supreme Court, one which will produce coherent jurisprudence and predictable standards by which government officials may gauge their decisions and through which the First Amendment can be protected for all citizens. That standard should be the historically validated, rationally applied test intended by the Framers of the Constitution. The two prongs of coercion and classical establishment will produce a constitutional jurisprudence which will restore the legitimacy of both Court and Constitution in the most sensitive of inquiries — the religion of the people and religious speech. By seeking to accommodate and even encourage religious pursuit, the government "respects the religious nature of our people and accommodates the public service to their spiritual needs."[173] Indeed as Justice Scalia has so eloquently written:

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172. *Id.* at 4730 n.10.

173. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

> Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate it and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.[174]

Those Justices who purport to be concerned with the legitimacy of the court would do well to heed the words of Justice Scalia when he wrote

> [t]he narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make.[175]

In the wake of *Weisman*, rather than finding a reform of the *Lemon* Test, we are faced with an even more confused Establishment Clause jurisprudence. What is at risk? Literally, the civil and religious liberty of all Americans, and the freedoms secured by the First Amendment. It is imperative that the damage done in *Weisman* be reversed. That can only be accomplished if practitioners who are sincerely committed to the Constitution come to the aid of the victims of a Supreme Court majority which has lost its grip on reality and history. The issues presented in the wake of *Weisman* must be revisited, the *Lemon* test *and* the psycho-coercion test must be abandoned, and a sound analysis returned to Establishment Clause jurisprudence — religious freedom depends on it.

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174. *Weisman*, 60 U.S.L.W. at 4740 (Scalia, J., dissenting).
175. *Id.* at 4740-41.