THE ESTABLISHMENT CLAUSE FORBIDS COERCION, NOT COOPERATION, BETWEEN CHURCH AND STATE: HOW THE DIRECT COERCION TEST SHOULD REPLACE THE LEMON TEST

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ABSTRACT

Establishment Clause jurisprudence is convoluted, unworkable, and inconsistent with the Framers' original intentions. Its core case is *Lemon v. Kurtzman*, which requires that government action: (1) have a secular purpose, (2) not inhibit or advance religion, and (3) not excessively entangle the government with religion. *Lemon* provides little definitive guidance to courts, who have created at least six other tests to compensate for its inadequacies. *Lemon* mistakenly demands governmental "neutrality" towards religion, manifested in a strict separation between church and state. This Article contends that this approach is incorrect in its origins and in its application; courts and commentators claim that the Framers intended the state to be divorced from religion. This is not so. Our Framers did not forbid cooperation between church and state, but intended to prevent government coercion that would permit their unification. The Constitution recognizes the difference between coercion and cooperation. It permits the latter. Furthermore, *Lemon* and almost all of its descendant tests are beyond repair. They rely too heavily on subjective analysis, or invalidate benign speech, or give tradition too much weight. The ideal remedy is the adoption of the direct coercion test, which only forbids government action that requires citizens to conform to a religious practice by force of law or threat of penalty. Such a test is preferable to *Lemon*, because it is a clear and predictable rule that judges can more easily apply to cases, and because it is consistent with the original understanding of the First Amendment.

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I. INTRODUCTION

The Founding Fathers did not anoint the state to reign as God. Nor did they elect it to rule as their Monarch. When they ratified the Religion Clauses of the First Amendment, they sought to avoid the events which, in the past and their present, occurred in England. There, the Crown "engaged in a systematic suppression of religious dissent and persecution of those whose beliefs differed from the established church."[1] After Henry VIII expelled the Catholic Church from England, the government pursued those who allegedly

1. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1142-43 (2004).

committed crimes against God as the King defined them- heresies.[2] Clothed with divine power, the Crown abused religious dissenters.[3] Henry VIII sent to the executioner's chopping block "[t]hose who continued to support the authority of the pope . . . [and] those who preached new doctrines he sent to the fires at Smithfield."[4] When Queen Mary I took the throne and returned Catholicism to England, she neglected the Christian virtue of forgiveness. She imposed a reign of vengeance against Protestants, burning hundreds of them at the stake.[5] In the name of the Prince of Peace, the Queen earned the nickname "Bloody Mary."[6] The British unification of church and state was not limited to punishment, either. Until 1576, clergy accused of felonies were tried in Church courts, thus saving them from the death penalty applied to all other convicted felons, even rapists and murderers.[7] Unification of church and state allowed such cruelty to foes and forgiveness for the Crown's favorites. In his *Letter Concerning Toleration*, John Locke, English political theorist and favorite of the revolutionary generation, described the situation:

> That any man should think fit to cause another man—whose salvation he heartily desires—to expire in torments, and that even in an unconverted state, [cannot] proceed from charity, love, or goodwill. [They should rather correct] their friends and familiar acquaintance for the manifest sins they commit against the precepts of the Gospel…[the] whoredom, fraud, malice, and such-like enormities, [which] predominate so much and abound amongst their flocks and people.[8]

The Framers intended to protect their new country from such suffering. So far, the Religion Clauses of the Constitution - their means for that protection - have accomplished the Framers' goal. The first of the two Religion Clauses is the Establishment Clause. It provides that the government cannot implement or mandate a religion, nor can it coerce its citizens into either supporting or participating in a faith.[9] This impermissible coercion requires "religious

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1142-43 (2004).
8. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 125-26 (Mark Goldie ed., Oxford Univ. Press 2016) (1689).
9. Lee v. Weisman, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'").

orthodoxy [or] financial support *by force of law and threat of penalty*."[10] Government can neither enforce participation in religious activity nor condition government office or benefits on the taking of religious oaths.[11] The second of the two Religion Clauses is the Free Exercise Clause, which prohibits the government from restricting any or all religious practices.[12] Thanks to these Clauses, no one is imprisoned in the White House because their faith opposes the President's religion.[13] Religious minorities cannot, for example, be tortured through thumbscrew to confess to crimes they did not commit. Furthermore, the Internal Revenue Service cannot enforce a tax upon citizens who refuse to pay tithes to congressionally approved religions.[14] Nor can the Department of Veteran Affairs, let's say, condition a veteran's benefits on whether he swore allegiance to the President's faith.[15] These practices violate the Establishment Clause because, like the English Crown, the government is using its power to force citizens to support its religious program.

However, we should not confuse Establishment Clause's prohibition of *unification* between church and state with a prohibition of their *cooperation*.[16] The First Amendment differentiates between the two, because the Free Exercise Clause allows the latter. The state may favor or accommodate religious practice without force, like "[t]he prayers that open legislative meetings, . . . certain references to . . . the Deity . . . [by] public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving."[17] To permit these activities requires a delicate balance between the First Amendment's protection of free exercise and free speech, and its prohibition of establishment.[18] On one hand, citizens can exercise their religious beliefs both in private and public without soliciting the state to force other citizens to

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10. *See id*. at 640 (Scalia, J., dissenting).

11. *See* Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring).

12. Hamilton, *supra* note 1, at 1148-1152.

13. THE FEDERALIST NO. 69 (Alexander Hamilton), (contrasting the despotic power of the King with the weaker American President, notes that "The [President] has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church!").

14. *Id*.

15. *Id*.

16. Hamilton, *supra* note 1, at 1142.

17. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080-81 (2019) (quoting Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)). This article refers to this case hereinafter as the Cross Case.

18. Carl H. Essbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 330-31 (2000) ("[T]he founders' desire for the separation of the institutions of church and state reflected a desire to respect not only religion but also the moral choice of citizens. It was not a provision to remove religion as such from public life. . . . [I]t was more a device for purifying the religious impact on politics than removing it.").

participate with them.[19] At the same time, religious minorities or non-believers cannot constitutionally ban cooperation between the state and religious organizations.[20] The Supreme Court explained why this is so in *Zorach v. Clauson*.[21] In upholding a statute that permitted students to leave school early for religious instruction or devotion, the Court famously observed that our constitutional and social values demanded that result:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[22]

But if religious minorities oppose such cooperation, they do have recourse. The First Amendment empowers them to freely express their dissent in the public square without governmental reprisal.[23] The success of this balancing act in interpreting the Establishment Clause is apparent from the relative lack of inter-religious conflict in the United States when compared to most of the world; religious conflict that has occurred in this country since the signing of the Constitution has occurred when the government has not taken an active role.[24] However, more recent Establishment Clause jurisprudence threatens this balance. At the heart of this harmful jurisprudence is *Lemon v. Kurtzman*.[25] There, the Court struck down statutes that allocated public funds to private schools affiliated with religious organizations. In so doing, it

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19. Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring).

20. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 699 (1970) ("Short of [governmentally established religion or governmental interference with religion], there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.").

21. 343 U.S. 306 (1952).

22. *Zorach*, 343 U.S. at 313-14.

23. Lee v. Weisman, 505 U.S. 577, 599 (1992).

24. Peter Henne, *How the U.S. Compares with the Rest of the World on Religious Restrictions*, PEW RES. CTR. (Mar. 25, 2015), https://www.pewresearch.org/fact-tank/2015/03/25/how-the-u-s-compares-with-the-rest-of-the-world-on-religious-restrictions/.

25. 403 US 602 (1971).

announced the infamous three-pronged *Lemon* test, which holds that a statute must (1) have a secular purpose, (2) not inhibit or advance religion, and (3) not excessively entangle the government with religion.[26]

The *Lemon* test is harmful in practice. It prevents the constitutional co-existence between free speech and religious liberty, because it creates a hyper-sensitive world, where benign displays, like a Ten Commandments display or a nativity scene, are turned into major constitutional law cases.[27] These are not matters that most devout people would begin wars over. And yet, Americans are told that government cannot be seen as endorsing religion, because that makes religious minorities feel like political outsiders in their communities.[28] However, *Lemon* insulates religious minorities from the marketplace of ideas. Offensive speech does not release groups from engaging in intense, even disrespectful, discussion on highly sensitive matters. In a free society, understanding arises from disagreement, exploding first as intense debate and then calms into constructive discussion.

Apart from being detrimental, *Lemon* is jurisprudentially confused. Justices, judges, and scholars alike have observed that its subjectivity provides little guidance.[29] This criticism has come from across the ideological spectrum. Justice Thomas argued that *Lemon's* "flexibility" rendered it "incapable of consistent application."[30] Justice Kennedy threw up his judicial hands and concluded that *Lemon* is "flawed in its fundamentals," has proven "unworkable in practice," and is "inconsistent with our history and our precedents."[31] Justice Gorsuch lamented the test, calling it a "misadventure."[32] Nor do liberal Justices refute *Lemon's* perceived doctrinal deficits. In the Court's latest Establishment Clause case, Justices Ginsburg and Sotomayor ignored

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26. *Lemon*, 403 US at 612-613.

27. *See* Van Orden v. Perry, 505 U.S. 677, 681 (2005); *See* Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 631 (1989).

28. *See Allegheny*, 492 U.S. at 625 (O'Connor, J, concurring) (explaining a nativity scene "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

29. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092-94 (2019) (Kavanaugh, J., concurring) (identifying five categories in which the Court does not employ Lemon); McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005) (Scalia, J. dissenting); Josh Blackman, *This Lemon Comes as a Lemon. The Lemon Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON C.R. L. J. 2010 (2009) (criticizing the secular purpose prong); Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499 (2002) (arguing that the Lemon test fails to reconcile the tension between the Free Exercise and Establishment clauses); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 Cardozo L. Rev. 1699 (1991); James M. Lewis & Michael L. Vild, *Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671 (1990).

30. *Van Orden*, 505 U.S. at 694 (Thomas, J., concurring).

31. *Allegheny*, 492 U.S. at 655, 669 (Kennedy, J., concurring).

32. *Am. Legion*, 139 S. Ct. at 2101(Gorsuch, J., concurring).

Lemon and argued against a challenged monument on neutrality grounds. *Lemon* is not given any serious consideration at all.[33]

The *Lemon* test's jurisprudential weakness has prompted the Supreme Court to clarify or amend it. In fact, Establishment Clause cases offer at least six other tests to compensate for *Lemon's* doctrinal deficiencies. The tests are as follows: (1) the endorsement or "reasonable observer" test, (2) the tradition test, (3) the specific tradition or *Van Orden-Cross* Case test, (4) the contextual approach as explained in Justice Breyer's concurring opinion in *Van Orden* (5) the indirect coercion test, and (6) the direct coercion test.[34] Making matters worse, the Court today decides cases either using or not using *Lemon* or its variants in an unpredictable way. Cases which arguably should fall under *Lemon*, and would likely find different results using that case, are instead subjected to different tests. In two 2005 cases, the Court flip-flopped on using *Lemon*. It used *Lemon* to invalidate a Ten Commandments display in a county courthouse in *McCreary County v. ACLU of Kentucky*.[35] And yet, in *Van Orden v. Perry*, the Court gave it the cold shoulder when analyzing another Ten Commandments display, opting for a historical approach instead.[36] This unpredictability is bad for observers and actors trying to comply with the law.

But unpredictability may be a better result than the one the Court seems to have reached. In *American Legion v. American Humanist Association*, or the Cross Case, the Court again chose not to follow *Lemon*.[37] Instead, it engaged in a specific historical inquiry, finding a ninety-four year old, forty-foot peace cross that stood near a major highway did not violate the Establishment Clause.[38] There, Justice Alito reasoned, much like the Ten Commandments display upheld in *Van Orden*, the "passage of time" revealed that the cross projected a secular message, one that had become "inextricably linked" to soldiers that died during World War I.[39] While I agree that tradition may be a part of the Establishment Clause analysis, tradition alone cannot

33. *Id*. at 2104 (Ginsburg, J., dissenting).

34. *Allegheny*, 492 U.S. at 631 (explaining that endorsement analysis is conducted through the lens of the reasonable observer); Marsh v. Nebraska, 463 U.S. 783, 792-93 (1983) (upheld legislative prayer under the tradition test); Van Orden v. Perry, 595 U.S. 677, 691-92 (2005) (upheld a Ten Commandments monument); *Am. Legion*, 139 S. Ct. at 2074 (upheld a cross monument); Lee v. Weisman, 505 U.S. 577, 588 (1992) (explaining that there are "subtle coercive pressures" to participate in a prayer at a high school graduation); *Lee*, 505 U.S. at 642 (Scalia, J., dissenting) (explaining direct coercion).

35. 545 U.S. 844 (2005).

36. *Van Orden*, 545 U.S. at 686 ("Whatever may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.").

37. *Am. Legion*, 139 U.S. at 2080-82.

38. *Id*. at 2074.

39. *Id*. at 2085.

answer the constitutional questions. A long-standing tradition can still be unconstitutional, like the Jim Crow Laws were. Racial segregation had been an embedded feature of the social, economic, and political life of the American South for generations. Nevertheless, the Supreme Court eventually reversed the separate but equal doctrine because state-mandated racial segregation violated the basic principle of equality enshrined in the Fourteenth Amendment.[40] Tradition alone, therefore, is not the answer. In fact, as I will explain, the specific-tradition test adopted in the *Van Orden-Cross Cases* are even more problematic than the pure tradition test. Those cases rested on analyses only fitted to the particular facts at hand. Therefore, like *Lemon*, they offer no concrete answers to future Establishment Clause problems. The *Cross Case*, therefore, should have instead revisited *Lemon*.

This Article argues that *Lemon* should be reversed. In its place, the Court should make the direct coercion test the law of the land in Establishment Clause cases. The direct coercion test maintains the delicate balance the Framers struck between free speech, free exercise, and establishment, and it offers clear, repeatable answers to controversies in this area. To that end, this Article explores the following. Part I lays out Establishment Clause jurisprudence, identifying seven tests employed in this area and concluding that the direct coercion test better serves stare decisis principles than any other tests in this area. Part II finds that while the Framers intended to forbid religious coercion, Jefferson's popularized strict "wall of separation" between church and state is not authoritative, but rather is often misinterpreted and contrary to our traditions. The Establishment Clause does not require strict government "neutrality" with respect towards religion. Part III proposes that the Court should return to the Framer's original meaning of the Clause for prudential reasons, because the direct coercion test, unlike *Lemon*, does not require arbitrary and subjective line-drawing based largely on a fictional "reasonable observer" with a strangely all-knowing insight into governmental purpose. Part III further refutes salient criticisms of a direct coercion approach.

II. ESTABLISHMENT CLAUSE JURISPRUDENCE: IN NEED OF A PRINCIPLE, IN SEARCH FOR A TEST

For decades, Justices have disagreed over a cohesive theory to understand the limits or scope of the Establishment Clause. An illustrative example of this confusion is the Court's varying treatments of government-sponsored

40. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

prayer. Does the Establishment Clause permit it under any circumstances? If so, does it matter that the audience is elementary school children or an august body of legislators? It stands to reason that we should be more concerned with the religious expressions of our legislators than of our children. And yet, the Court has behaved opposite to that reason. In 1963, in *School District of Abington Township v. Schempp*, the Court found that the First Amendment requires "*absolute equality* before the law" with respect to religion when it held that school-sponsored bible study was unconstitutional.[41] Five years later, in *Epperson v. Arkansas*, the Court declared that the "First Amendment mandates governmental *neutrality* between religion and religion, and between religion and nonreligion."[42] Unlike the Equal Protection Clause, however, the First Amendment does not speak in terms of "equality." Nor does it talk about "neutrality" at all.[43]

If the First Amendment required either "absolute equality" or "neutrality" with regard to religion, then any government sanctioned prayer, regardless of the audience, would be constitutionally intolerable. And yet, legislative prayer, not school prayer, is valid today. *Lee v. Weisman* invalidated prayer at a high school graduation.[44] But in *Town of Greece v. Galloway* and *Marsh v. Chambers*, the Court upheld opening prayers for legislative bodies: "The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths."[45] This is a constitutional oddity. One can argue that permitting legislators to engage in prayer during its legislative session offends "neutral" principles more so than doing so with powerless school children. These legislators enact laws that can penalize individual conduct for an entire population. School children simply read, write, and calculate arithmetic in classrooms. This illogical difference in behavior demonstrates the existing confusion and error in the enforcement of the Establishment Clause. Jurisprudential clarity demands a more rational theory, one that makes both constitutional and common sense.

Although the Court has found that the Establishment Clause (hereinafter "the Clause") requires government "neutrality" with respect to religion, it has

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41. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 215 (1963) (emphasis added).

42. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (emphasis added).

43. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

44. Lee v. Weisman, 505 U.S. 577, 598 (1992).

45. Town of Greece v. Galloway, 572 U.S. 565, 583 (2014); Marsh v. Chambers, 463 U.S. 783, 794-95 (1983).

struggled to determine the proper methods and interpretive tools for evaluating and enforcing "neutrality." The Clause commands that "Congress shall make no law respecting an establishment of religion . . . ."[46] *Walz* instructs that, at a minimum, anti-establishment principles forbid "[s]ponsorship, financial support, and active involvement of the sovereign in religious activity. [Unlike how] in England, and in some Colonies at the time of the separation in 1776, the Church of England was sponsored and supported by the Crown as a state, or established, church . . . ."[47] Since the sixteenth century, in fact, the British Monarch has held the position of "Defender of the Faith and Supreme Governor of the Church of England."[48] This is the sort of unification between church and state the Framers attempted to forbid as explained in *Walz*.[49] The Court has attempted to enforce this principle through several different tests.

A. LEMON TEST

Despite the First Amendment's clear command to forbid such religious establishment, the Court did not announce a unified approach to govern this area until *Lemon* in 1971. In *Lemon*, the Court found that Establishment Clause cases presented three different tests and announced "cumulative criteria" to identify violations of the Clause.[50] The now-infamous *Lemon* test asks whether challenged government action has (1) a "secular legislative purpose," (2) a "principal or primary effect" that "neither advances nor inhibits religion," and (3) does not foster "an excessive government entanglement with religion."[51] Should the reviewing court determine that the state failed any prong, then the statute is invalid.

In announcing this test, the Court in *Lemon* held that two state statutes that provided public assistance to private schools, including some affiliated with a religious organization (such as parochial schools), constituted an excessive entanglement between religion and the government.[52] The first statute, Rhode Island's 1969 Salary Supplement Act, "provide[d] for a 15% salary supplement to be paid to teachers in non-public schools at which the average per-pupil expenditure on secular education [was] below the average

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46. U.S. CONST. amend I.

47. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970).

48. *The Queen, the Church, and Other Faiths*, ROYAL HOUSEHOLD, https://www.royal.uk/queens-relationship-churches-england-and-scotland-and-other-faiths (last visited June 19, 2020).

49. *Walz,* 397 U.S. at 668.

50. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

51. *Id.* at 612-13.

52. *Id.* at 613-14.

in public schools."[53] The other statute, Pennsylvania's 1968 Nonpublic Elementary and Secondary Education Act, "authorize[d] the state Superintendent of Public Instruction to 'purchase' certain 'secular educational services' from nonpublic schools, [and to] directly [reimburse] those schools solely for teachers' salaries, textbooks, and instructional materials."[54] The Court in *Lemon* held that both statutes produced a relationship where government and religion were impermissibly entangled.[55]

First, the Court found entanglement in the Rhode Island statute because teachers in religious schools would be required to separate religion from secular activities, and the state would only be able to ensure this through extensive surveillance involving inspection of financial records and curriculum.[56] Similarly, the Court found entanglement in the Pennsylvania statute because it financially supported religious schools and, in doing so, it placed the schools' teaching and accounting methods under state regulation.[57] The *Lemon* test appears well-founded in its concerns. However, attempts to use it in later cases reveal crippling weaknesses.

In *Wallace v. Jaffree*,[58] the Court's reasoning suffered from its use of *Lemon*. In *Wallace*, the Court held that an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer" violated the Establishment Clause because the law lacked any secular purpose and endorsed religion; thus, failing the first and second prongs of the Lemon test.[59] Justice Stevens found the statute had only a religious purpose, in part, because the bill's sponsor inserted a statement in the legislative record stating that the legislation intended "to return voluntary prayer to the public schools," and that "he had no other purpose in mind."[60] Moreover, the statute conveyed an impermissible "message of state endorsement and promotion of prayer" since the law amended a pre-existing law and inserted the language "or voluntary prayer" to show "that the State intended to characterize prayer as a favored practice" during this moment of silence.[61]

Though the *Wallace v. Jaffree* application of *Lemon* appears straightforward, a closer read reveals its analytical limitations. First, the Court's secular purpose analysis was impoverished. It rested on one suspect statement

53. *Id.* at 602.
54. *Id.* at 609-10.
55. *Id.* at 613-14.
56. *Id.* at 616-17.
57. *Id.* at 620-21.
58. 472 U.S. 38 (1985).
59. *Wallace*, 472 U.S. at 58-61.
60. *Id.* at 43 (citation omitted).
61. *Id.* at 59-60.

from a single legislator in a body of over thirty members.[62] Apart from the questionable method of determining legislative intent from such evidence, the Court in *Wallace v. Jaffree*, then ignored the fact that the statute's secular purpose is shown in its text.[63] The statute did not mandate prayer during the one minute moment of silence but rather modified the term "prayer" with the word "voluntary."[64] The statute had the counterintuitive secular purpose of making prayer permissible. A legislator could despise prayer, and yet vote in favor of allowing students to pray because she thinks it is fit to allow them the choice of expression. Second, if prayer was an impermissible "favored practice," the legislature could have repealed "for meditation" and only enacted "voluntary prayer."[65] But the law gave the student the choice to either meditate or pray during this short moment. A student could have done anything in silence, ranging from praying to Allah to pondering whether to play football with the fellas during recess. The key here is that the reflection must be silent. In the absence of making noise that others can hear and then judge, it would be very difficult for teachers or peers to favor or disfavor one's thoughts. The *Lemon* test as used in *Wallace* is therefore highly limited by its under inclusive approach to legislative history, and an analysis of "favoritism" which forbids equality between similar forms of expression. But *Lemon* in *Wallace* is limited even more by its faulty assumption that every controversy will come with legislative history which courts can subject to a purpose analysis. This is not the case. Real-life situations which proved that assumption wrong prompted Justices to develop the endorsement test, which utilizes the reasonable person analysis to give more definition to *Lemon*.

B. ENDORSEMENT TEST

The endorsement test was born in *Lynch v. Donnelly*.[66] That Court held that the inclusion of a nativity scene in a public City Christmas display did not violate the Establishment Clause, because the City had a secular purpose

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62. As will be discussed later, legislative history is a suspect source of evidence. *See* Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J. concurring) ("It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.").

63. ALA. CODE § 16-12-0.1 (repealed 1998) ("At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for *meditation or voluntary prayer*, and during any such period no other activities shall be engaged in.") (emphasis added).

64. *Id.*

65. *Id.*

66. 465 U.S. 668 (1984).

in erecting the display and had not impermissibly advanced religion or created an excessive entanglement between religion and government.[67] In its decision, the Court applied *Lemon*.[68] However, Justice O'Connor wrote separately to suggest a clarification to the Court's Establishment Clause jurisprudence, noting the Court had never clearly explained how *Lemon* actually "relate[d] to the principles enshrined in the Establishment Clause."[69] At its core, she argued, the Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."[70] Therefore, the purpose and effect prongs of *Lemon* should be analyzed through an endorsement lens, asking if the government's purpose "[i]s to endorse or disapprove of religion. The effect prong asks whether . . . the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid."[71] Anti-establishment principles stem from enforcement because, as Justice O'Connor concluded, "[government endorsement of religion] sends a message to non-adherents that they are outsiders . . . and an accompanying message to adherents that they are insiders . . . ."[72] Justice O'Connor further explained her endorsement test in her concurring opinion in *Allegheny*.[73]

In *Allegheny*, the Court's two holdings invalidated a Nativity scene placed in a courthouse while upholding a Chanukah menorah displayed next to a Christmas tree with a sign saluting liberty.[74] Although *Allegheny* reaffirmed *Lemon*, it applied the test through the endorsement test lens, finding that "[s]ince *Lynch*, the Court has made clear that . . . [it] must ascertain whether '[a] challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices.'"[75] In her concurring opinion, Justice O'Connor further explained that endorsement is measured through the eyes of a reasonable observer; however, she warned that such an analysis is not self-defining, as it requires "case-specific

67. *Lynch*, 465 U.S. at 687.
68. *Id.* at 672.
69. *Id.* at 689 (O'Connor, J., concurring).
70. *Id.* at 687.
71. *Id.* at 690.
72. *Id.* at 688.
73. Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring).
74. *Id.* at 574-77.
75. *Id.* at 597 (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997)).

examinations."[76] This observer would examine whether challenged practices serve "a secular purpose rather than a sectarian one" and whether they would view the challenged action as a disapproval "of his or her particular religious choices."[77] This test allows for broad and improper invalidation of legitimate religious expression, and is dependent on the opinions, perhaps even the sectarian opinions, of a future court's bench of reasonable persons. The Court would attempt to rectify this mistake in later cases.

In 1993, the Ku Klux Klan applied for a permit to place an unattended cross in the Capitol Square in Columbus, Ohio.[78] Their request was declined by the Capitol Square Review & Advisory Board on the grounds that allowing of the cross would violate the Establishment Clause.[79] The Ku Klux Klan ("the KKK") filed suit.[80] The Court held the KKK's private, unattended display of a cross in a public forum was constitutional under the Establishment Clause.[81] Three factors affected the endorsement analysis. First, the Capitol Square was a traditional public forum.[82] Second, neutral government policies that unintentionally benefit religion are acceptable.[83] Third, the KKK's action was protected private speech.[84] The State argued that due to the forum's proximity to the seat of government, the placement of the cross would be seen as its endorsement of a particular religion, meaning the exclusion of the cross was justified.[85] The Court disagreed.

Justice Scalia found that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[86] In her concurring opinion, Justice O'Connor explained that "a reasonable, informed observer" would not see the state's acceptance of the KKK display as endorsing religion.[87] However, while Justice O'Connor agreed with much of the plurality's reasoning, she disagreed with its position that neutral laws should not be invalid if the "reasonable observer" may "confuse an incidental benefit to religion with State

76. *Id*. at 623 (O'Connor, J., concurring).
77. *Id*. at 631.
78. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 758 (1995).
79. *Id*. at 759.
80. *Id*.
81. *Id*. at 769-70.
82. *Id*. at 759.
83. *Id*. at 764 ("And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.").
84. *Id*. at 760.
85. *Id*. at 763.
86. *Id*. at 765 (citation omitted).
87. *Id*. at 772-73 (O'Connor, J., concurring).

endorsement."[88] Justice O'Connor argued that "[w]here the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, . . . the Establishment Clause is violated."[89] She concluded the endorsement test should not focus on the actual perception of individual observers, but rather the perception of an observer who personifies the "[c]ommunity ideal of reasonable behavior, determined by the [collective] social judgment."[90] This idea, of an outstanding observer, at first glance, appears doctrinally helpful, but a deeper look proves otherwise.

In Justice O'Connor's attempt to define this fictional person, she "made the doctrinal waters murkier."[91] This observer is so hyper-intelligent that their level of knowledge is omniscient, and they know everything about the challenged practice, including its text, legislative history (including every statement made by lawmakers) and how the law is implemented by government bureaucrats?[92] And yet, this observer is "ordinary" enough to embody the "community ideal of reasonable behavior."[93] Ironically, a standard designed by the Court to regulate governmental religious expression relies on a fictional character with characteristics of both God and Man. All the Court is missing now is the Holy Spirit. It is an unworkable standard.

The endorsement approach continues to drive toward a dead end as more questions are asked. If this ordinary person reflects the "community ideal," might they be a member of the dominant religion in the community? But if we are concerned about whether the challenged action makes non-adherents feel like political outsiders, then should the "ordinary person" be defined through the lens of the minority faith? Or, is this person purely objective, that is, agnostic when it comes to endorsement analysis?[94] *Lemon* and its endorsement-reasonable observer mini-tests are too flexible, not providing any concrete answers to these basic questions. Justice O'Connor herself admitted that her endorsement test requires case-by-case judgements. That said, if particular practices, like "In God We Trust" on coinage or legislative prayers were examined through an endorsement lens, then those practices would

88. *Id*. at 768 (O'Connor, J., concurring).
89. *Id*. at 777 (citation omitted).
90. *Id*. at 780 (citation omitted).
91. Charles Adside III, *Replay That Tune: Defending Bakke on Stare Decisis Grounds*, 64 CLEV. ST. L. REV. 519, 553 (2016).
92. McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 862 (2005).
93. *Pinette*, 515 U.S. at 779-80.
94. Adside, *supra* note 91, at 553-54.

likely be rendered invalid. But they continue to be lawful, as the following will show.

C. TRADITION TEST

While *Lemon* is the central test, it does not explain how certain practices are labeled historically tolerable under the Establishment Clause. As such, the Court has avoided an absolute or literal separation between Church and State because "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."[95] Thus, in certain cases, Justices have turned to history and tradition to resolve Establishment Clause questions. Take as an example, the Court's first legislative prayer case in *Marsh v. Chambers*.[96] There, the Nebraska Legislature began each session with a prayer offered by its paid chaplain.[97] Chief Justice Burger held that "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[98] He found that the Court does not "lightly cast aside" unbroken national practices and that "the practice of opening sessions with prayer has continued without interruption" for two centuries, noting that the First Congress had paid chaplains and most states, like Nebraska, adopted the practice as well.[99]

Still, while the tradition approach is closer to the reality in our country that there is no strict wall between Church and State, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees."[100] *Dred Scott v. Sanford*, the most notorious court decision in U.S. history, is a regrettable example.[101] There, Chief Justice Taney held that all blacks, slave or free, could not be United States citizens.[102] The Chief Justice supported his ruling in part by citing to slavery and other long-standing racially discriminatory practices, even though these embedded racial customs had nothing to do with the central issue at hand: the right to sue for one's freedom in federal court.[103] He used tradition as a club to beat the Constitution and torture human beings. But despite the tradition test's limitations, the

95. Lynch v. Donnelly, 465 U.S. 668, 674-76 (1984).
96. 463 U.S. 783 (1983).
97. *Marsh*, 463 U.S. at 783.
98. *Id*. at 786.
99. *Id*. at 788-90.
100. *Id*. at 790.
101. *See generally* Dred Scott v. Sanford, 60 U.S. 393 (1857).
102. *Id*. at 395-96.
103. *See id*. at 431-54.

Court has used this approach in modern cases; it is doctrinally in vogue.[104] In fact, the Court has found *Lemon* not useful in cases involving religious monuments or symbols.[105] In such cases, the Court has applied a form of the tradition test that poses the same analytical problems *Lemon* presents.

D. SPECIFIC-TRADITION TEST

In 2005, the Supreme Court decided two cases which involved displays of the Ten Commandments on government property: *Van Orden v. Perry*[106] and *McCreary County. v. ACLU of Kentucky*.[107] *Van Orden* examined a six-foot tall and three-foot wide Ten Commandments monument on the twenty-two acre grounds of the Texas state capitol building.[108] *McCreary* revolved around the display of framed copies of the Ten Commandments in two courthouses.[109] While *McCreary* invalidated an evolving Ten Commandments display under *Lemon*, the *Van Orden* plurality ignored *Lemon*, noting that its analysis was "driven both by the nature of the monument and by [America's] history," and not by the potential state endorsement of religion that the monument imposed.[110]

1. Van Orden v. Perry

The plurality's analysis in *Van Orden* did not focus on the historical traditions of, for example, state legislatures' use of religious monuments or the states' use of such monuments on capitol grounds. Rather, the analysis focused on the historical background of *the* Ten Commandments monument in question.[111] There, the Court concluded, the monument was "passive" because it was not exposed exclusively to school children but displayed to the general public, arousing no controversy for decades until plaintiff brought suit.[112] Further, the state placed the monument around non-religious markers and displays, which conveyed a "dual" message, one of both religious and secular tone.[113] However, it was not Chief Justice Rehnquist's plurality

104. The tradition test was used in *Van Orden*, *Town of Greece*, and the *Cross Case*- all of which were previously discussed.

105. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092-93 (2019), (Kavanaugh, J., concurring).

106. Van Orden v. Perry, 545 U.S. 677 (2005).

107. McCreary Cty v. ACLU of Ky., 545 U.S. 844 (2005).

108. *Van Orden*, 545 U.S. at 681.

109. *McCreary*, 545 U.S. at 850.

110. *Van Orden*, 545 U.S. at 686.

111. *Id*. at 682-87.

112. *Id*. at 691.

113. *Id*. at 691-92.

approach that was controlling, but rather Justice Breyer's concurring opinion. Justice Breyer's concurrence in *Van Orden* was controlling because it is "the narrowest ground upholding the majority."[114] He could have provided a test or standard when analyzing long-standing monuments. The Justice failed to do so. The concurrence stated plainly what he and the plurality did in this case: the Court did not adopt a "single mechanical formula."[115] Instead of relying on a particular test, Justice Breyer conducted a contextualized analysis, finding that the monument did not violate the "basic purposes" of the Religion Clauses for the following reasons: (1) the monument conveyed a "predominantly" non-religious message because it was placed with other markers on capitol grounds, (2) it was not placed before impressionable school children, and (3) the display did not incite divisiveness because the monument stood "uncontested for nearly two generations.[116] Unfortunately, both the plurality and Justice Breyer's approach provided historical analysis that only fitted the facts of this particular case. No overarching principle is provided for these types of symbols.

While the plurality considered the monument's historical tradition and Justice Breyer adopted a contextual one, both opinions acknowledged that the monument went uncontested for forty years was significant. Why should this matter to a monument's constitutionality? Could a recent display, similarly placed among non-religious markers, be permissible even if it invited a legal contest in a few years? *Van Orden* does not provide a clear answer. Lower courts would be forced to debate about "exactly what principles" to apply in such challenges.[117] Should *Lemon* apply? Should *Van Orden* apply?[118] The Justices in *American Legion v. American Humanist Association* could have offered more guidance in this area but they only repeated *Van Orden's* analytical shortcomings.

2. The Cross Case

In *American Legion*, the "Cross Case," the Court held that a thirty-two foot Latin cross near an intersection by a major highway did not violate the Establishment Clause because it had gained a secular meaning over its

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114. Marks v. United States, 430 U.S. 188, 193 (1977).

115. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

116. *Id.* at 702-04.

117. Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL., 93, 106 (2007).

118. *Id.* at 107; Christopher D. Tomlinson, *Changing the Rules of Establishment Clause Litigation: An Alternative to the Public Expression of Religion Act*, 61 VANDERBILT L. REV. 261, 273 (2008).

century long history.[119] The Court found that historically, the cross had become synonymous with fallen soldiers in World War I.[120] Like the Ten Commandments display in *Van Orden*, the ninety-four year old Latin Cross had lost its status as a purely Christian symbol over time: "The solemn image of endless rows of white crosses became inextricably linked with and symbolic of the ultimate price paid by 116,000 soldiers, and this relationship between the cross and the war undoubtedly influenced the design of the many war memorials that sprang up across the Nation."[121] The "passage of time" gave the Cross, which was a Christian symbol, a secular meaning associated with the war effort.[122] And as time passed, the Court further reasoned, "testimony from those actually involved in the decision-making process is generally unavailable, and attempting to uncover their motivations invites rampant speculation."[123] Since one could not engage in a secular purpose analysis, the Court found *Lemon* unhelpful.[124]

Then drawing from *Van Orden*, the Court found "[i]f the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it."[125] The Court concluded that the decision to "retai[n] monuments, symbols, and practices is quite different from erecting or adopting new ones."[126] This lent the Latin Cross the "strong presumption of constitutionality."[127] But the *Van Orden-Cross Case's* framework is quite limited to its facts, only applying to monuments that are decades old. It is not useful in considering more recent displays.

Imagine a three-foot-tall star and crescent monument displayed on the hypothetical city hall grounds of Mecca Lakes, Michigan. As an icon used by the Ottoman Empire and by Muslim Nations on state flags, the star and crescent is widely considered as an Islamic symbol.[128] It is placed around five other markers and monuments, like Hammurabi's Code and the Magna Carta, in a display entitled "The Development of Communal Standards." The city

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119. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019).
120. *Id*. at 2085.
121. *Id*.
122. *Id*. at 2070.
123. *Id*.
124. *Id*. at 2080.
125. *Id*.
126. *Id*.
127. *Id*. at 2082.
128. Whitney Smith, *Flag of Turkey*, ENCYC. BRITANNICA (2018), https://www.britannica.com/topic/flag-of-Turkey.

erected the monument only two years ago, but it has already triggered a legal dispute from a group of disgruntled citizens, who resent what they feel is the imposition of Islam on the public. This three-foot monument is "far more passive" than the imposing six-foot Ten Commandments monument in *Van Orden* or the jaw-dropping thirty-two-foot Latin Cross in the *Cross Case*. Much like the *Van Orden* monument, the star and crescent are also placed among other markers, projecting a secular message focused on communal, not religious, standards. These case analogies should make the monument's validity assured, but they do not. Unlike the Ten Commandments monument and the Latin Cross, the star and crescent are not a "long-standing" monument because it is only two years old. Testimony from those involved in the monument's placement may be available. Since courts can then explore the government of Mecca Lakes' motives behind the display, their action is not granted any "presumption of constitutionality" under the *Van Orden-Cross Cases*.[129] If testimony did show certain religious motives, the monument would be removed—burdened simply by its newness that this test poorly disfavors.

This is dangerous. By only giving the "presumption of constitutionality" to long-standing religious displays, the Court gives a dead-hand control over what religious displays may be permissible to the majority religion of the past; the faith which had the political power at the time. Again, imagine a religiously homogenous community with some adherents who are willing to enact violence against those who oppose the government placing religious monuments honoring the dominant faith. But seventy-five years later, the demographics of that community changed so that members of a different religion, or no religion, constitute the local governing coalition. Under the *Van Orden-Cross Cases*, they may be forbidden to remove those monuments because doing so would show government disfavor of a certain religion. At the same time, however, they would be forbidden to create their own religious monuments under the Establishment Clause. These cases implicitly say that the only religions which can find support from the government in their expression are the majority religions of the past. That religion is then effectively locked into place as the only one that the government may endorse; that endorsement is made *permanent* through the presumption of constitutionality!

The *Van Orden-Cross Cases* may have unintended social and political consequences. As this country undergoes significant demographic change, observers of Establishment Clause jurisprudence should be concerned that

129. *Am. Legion*, 139 S. Ct. at 2082.

the *Van Orden-Cross* cases are part of a growing movement to prevent that demographic change from shifting the political balance of power in the United States. This movement includes state legislative efforts to disenfranchise minority voters, the proposed end to birthright citizenship, and Presidential attempts to alter the Census to favor representation of certain groups.[130] The full impact of these cases on the political system should be researched further as these actions are anti-democratic and will only lead to conflict.

E. COERCION TEST

The next test, the coercion test, allows for justices to determine constitutionality based on if law forces, or coerces, an individual into a religious belief or action against their will. This test, and its faults, can be examined in two ways: indirect and direct.

1. Indirect

As previously explained, Justice O'Connor attempted to clarify the *Lemon* test in *Allegheny*. In *Allegheny*, the Court held that a crèche display endorsed Christianity; however, a menorah display did not violate the Establishment Clause.[131] Although *Allegheny* made Justice O'Connor's endorsement test a formidable modification to *Lemon*, the Court was not in agreement about the proper interpretation and analysis of the Establishment Clause. In a separate opinion, Justice Kennedy introduced "coercion" as a more practical test for this area.[132]

Justice Kennedy argued that the Court's view of the Establishment Clause in *Allegheny* "reflect[ed] an unjustified hostility toward religion" that was inconsistent with its history and precedents.[133] Therefore, he determined that the display of the crèche was constitutional and rejected the endorsement test as "flawed in its fundamentals and unworkable in practice."[134] He offered the coercion test to take its place, which states "the government 'may not coerce anyone to support or participate in any religion or its exercise.'"[135]

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130. Shelby Cty. v. Holder, 570 U.S. 529 (2013); Patrick J. Lyons, *Trump Wants to Abolish Birthright Citizenship. Can He Do That?*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/22/us/birthright-citizenship-14th-amendment-trump.html; Adam Serwer, *A White Man's Republic, If They Can Keep It*, ATLANTIC (June, 4, 2019), https://www.theatlantic.com/ideas/archive/2019/06/census-case-about-white-mans-government/590977/.

131. Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 621 (1989).

132. *Id.* at 655 (Kennedy, J., concurring).

133. *Id.*

134. *Id.* at 669 (Kennedy, J., concurring).

135. *Id.* at 659.

Justice Kennedy argued that the government should be "free to 'recognize and accommodate religion,' particularly when the 'act of recognition or accommodation is passive and symbolic.'"[136]

The adoption of the coercion test as the standard of analysis for Establishment Clause jurisprudence would drastically change the amount of state action that would be deemed permissible, as it would allow passive acts by the state. In this sense, the government would have more freedom to support or accommodate religion. This could make the cases the Court hears more profound, since only especially egregious violations would run afoul of the coercion test. Although the coercion test remained on the back burner for several years, its debut as a potential modification to existing Establishment Clause jurisprudence came in 1992.

In *Lee v. Weisman*, principals of public middle and high schools invited clergymen to their schools' graduation ceremonies to give invocations and benedictions.[137] A disgruntled parent sought a permanent injunction barring the school officials from inviting clergy to future graduation ceremonies.[138] The Court held that the inclusion of "clergy who offer prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause," as it constitutes government coercion of participation in religion.[139] Although the lower courts applied *Lemon* in this case, the Court in *Lee* struck down the practice on coercion grounds.[140] In the majority opinion, Justice Kennedy held that the Court could "decide [*Lee*] without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured."[141] He also noted that the government's accommodation of free exercise does not supersede the fundamental limitations imposed by the Establishment Clause.[142] "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ."[143] The Court pointed to the subtle coercion that the prayer imposed: public and peer pressure for students to participate, "[t]o stand as a group, or at least, maintain respectful silence" for the duration of the prayer."[144]

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136. VINCENT PHILLIP MUNOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT: THE ESSENTIAL CASES AND DOCUMENTS 350 (2013).

137. Lee v. Weisman, 505 U.S. 577, 580 (1992).

138. *Id.* at 584.

139. *Id.* at 577.

140. *Id.* at 597-98.

141. *Id.* at 587.

142. *Id.* at 598-99.

143. *Id.* at 587.

144. *Id.* at 593.

Justice Kennedy reasoned the "subtle" or "indirect" pressure is tantamount to "overt compulsion" because to many the "act of standing or remaining silent was an expression of participation in . . . the prayer."[145] And this indirect coercion is particularly real for "the dissenter of high school age" since psychological research "supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[146] The Court applied this same logic to *Santa Fe Independent School District v. Doe*.[147]

Santa Fe involved a prayer invoked by Santa Fe High School's student council chaplain, which was said over the public-address system before each home varsity football game.[148] Two families filed suit, challenging the high school's use of "overtly Christian" prayers under the Establishment Clause.[149] The Court decided that the school district's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause because it constituted state coercion of participation in religion and established "an improper majoritarian election on religion,"[150] Similar to *Lee*, the Court focused on the subtle coercion imposed on the students by the practice of reciting prayer before home football games.[151] The Court also pointed to potential sources of more direct coercion. The school district argued that attendance at the commencement ceremonies at issue in *Lee* was drastically different than attendance at high school football games, which it "contend[ed] '[were] of no more than passing interest to many students' and [were] 'decidedly extracurricular.'"[152] The Court disagreed for two reasons.

First, the Court found that certain individuals, such as cheerleaders and band members, were required to attend the football games.[153] Second, the Court pointed to the immense pressure, or desire, a student may feel to be involved in the extracurricular activity, that is, the varsity football game.[154] Thus, "the State cannot require one of its citizens to forfeit his or her rights and benefits," the Court found, "as the price of resisting conformance to state-

145. *Id*.
146. *Id*.
147. 530 U.S. 290 (2000).
148. *Santa Fe Indep. Sch. Dist*., 530 U.S. at 294.
149. *Id*.
150. *Id*. at 317.
151. *Id*. at 314; *Id*. at 312 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").
152. *Id*. at 311.
153. *Id*.
154. *Id*. at 311-12.

sponsored religious practice."[155] The prayer created a subtly coercive quality, as students who wish to attend the game or are pressured to attend the game must listen to the prayer before the game. While I agree that coercion is the correct framework for these cases, indirect coercion, like other tests in this area, tends to only fit the facts of the particular case and does not provide concrete guidance for similar cases. Like *Lemon*, indirect coercion raises unanswered questions, as well.

Does it only apply to prayer cases? If so, does it only apply to the elementary or secondary school context? What about college students who are only a couple years older than the high school graduates in *Lee* and *Santa Fe*? It is confusing that Justice Kennedy pointed to psychological research showing "adolescents" are vulnerable to peer pressure in *Lee* when the high school graduates discussed in that case were not "adolescents," but rather young adults about to enter the "real world," soon attaining responsibilities like seeking employment, paying bills, or studying college courses.[156] But if *Lee* or *Santa Fe* were concerned about indirect peer pressure, then the Court's decisions should reach the subtle coercions felt by adults all the time.

For instance, a government official might feel indirect coercion by "groupthink," that is, pressure to blindly accept a group ideology in order to be socially accepted when his or her supervisor and fellow colleagues conduct prayer and bible study during an extended lunch break at the office.[157] In other words, the interpreter is not told how to define or measure "subtle" or "indirect" coercion. Other questions come to mind. Does coercion only arise from group settings, like graduations or football games? Or, can "subtle" coercion arise from, for example, a thirty-two-foot religious display near a public highway? Should it be removed if a dissenting individual feels "subtly" coerced to view the imposing monument as he or she drives by? Justice Scalia's direct coercion test, however, avoids all these questions, providing concrete answers in this confusing area.

2. Direct

Direct coercion is a bright-line rule that judges can apply objectively in a consistent, workable manner. This is critical to constitutional adjudication: "Workability is a central principle in the doctrine of stare decisis; it is a bulwark against arbitrary judicial decision-making because it requires courts to

155. *Id.* at. 312.
156. *Id.*
157. Adside, *supra* note 91, at 564.

craft rules that yield predictable outcomes in similarly situated cases."[158] Under this test, government action violates the Establishment Clause when it either: (1) requires "religious orthodoxy" or (2) requires "financial support by *force of law and threat of penalty*."[159] The direct coercion test avoids several analytical pitfalls. Notably, direct coercion avoids the problem with drawing the line between "passive" versus "active" monuments, like the Ten Commandment displays in *Van Orden* and *McCreary*. Nor must the interpreter engage in the foolish adventure of discerning legislative intent as *Lemon* requires. I have documented the methodological problems with attempting to construct a single intent from a multi-member body elsewhere.[160] Moreover, the test also avoids the analytical problems with identifying "indirect" or "subtle" coercion in a group setting. If legislative intent is difficult to discover, then the ability to discern the perceptions of a graduating crowd (which can range from "what will I do with my life now?" to "what are we eating after the ceremony?") may be far more elusive. Lastly, the direct coercion test does not underestimate the effect of silent protest.

As explained before, Justice Kennedy found indirect coercion when a dissenting graduate remains silent during a collective prayer because there will be the perception, as the argument goes, that remaining silent is participation or approval. This is not necessarily true. Justice Kennedy's analysis ignores the power of silent protest, which can convey a message of strong disapproval. For example, there are many "silent protests." One example of this took place on the campus at the University of Michigan in 2017. Dana Greene, Jr., an African-American graduate student, kneeled for twenty four hours in a highly populated and historic location on campus.[161] He said he was inspired by the kneeling of professional football players, and his presence was meant to express his opinion that "We are not and have never lived by the idea of our founding that all men are created equal."[162] Today, there is not the same connotation of acquiescence when someone remains silent as there might have been at Justice Kennedy's first writing in 1992. Silence sometimes can speak louder than words.

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158. Charles Adside, III., *Undue Schizophrenia: Split Decisions, Confused Scholars, and Reversing Unworkable Abortion Precedent*, 54 WILLAMETTE L. REV. 219, 243 (2018).

159. Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

160. Charles Adside III, *It's a Blowhorn, Not a Dog-Whistle: How President Trump's Travel Ban Orders, Not His Statements, Are Enough to Establish a Violation under the Religion Clauses*, 47 HASTINGS CONST. L. Q. 267, 283-85 (2020).

161. *Inspired by National Anthem Protest, UM Student Kneels*, DETROIT NEWS (Sept. 25, 2017), http://detroitnews.com/story/news/local/michigan/2017/09/25/um-student-kneels-diag-protest/106001320/.

162. *Id.*

So, the direct coercion test is instead concerned if there is an objective requirement to follow a religious practice either through some threat of force or penalty. Take *Lee* and *Santa Fe* as examples. In those cases, enforcement of religious activity would occur if during a graduation ceremony or invocation at a football game a student could not receive their diploma unless they agreed to participate in the function or if the faculty advisor rejected an applicant for the cheer team if he or she refused to participate in the prayer. These penalties are the real injustices that the Establishment Clause was created to prevent, rather than the wholesale muzzling of benevolent community religion. Direct coercion is not only prudentially correct, but is consistent with the First Amendment's original understanding.

III. THE ESTABLISHMENT CLAUSE FORBIDS COERCION

A conception of the Establishment Clause that emphasizes the prevention of coercion, rather than governmental neutrality towards religion, better captures the Framers' true intentions for the Establishment Clause and is reflected in primary documents of both Madison and Jefferson.

A. COERCION IS CONSISTENT WITH THE FRAMERS' ORIGINAL INTENT

The Framers, students of European history, sought to avoid the religious wars which had ravaged that continent, such as the Thirty Years War, a conflict between Catholics and Protestants.[163] Moreover, many of North America's early colonizers were refugees fleeing religious oppression in Europe.[164] Still, these refugees experienced persecution in the colonies, too. For example, Britain imposed taxes on adherents to religions disfavored by the English Crown and used the revenue to support the activities of the state-approved Anglican Church.[165]

This is the context in which the Framers considered and constructed the Establishment Clause. Seeking to avoid such religious persecution through government power, they ratified the Clause in response to these coercive practices. It aimed to prohibit "forceful measures [that] cause an individual to subscribe to a particular belief . . . without ability to object or abstain."[166]

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163. *Thirty Years War*, HISTORY (Nov. 9, 2009), www.history.com/topics/reformation/thirty-years-war.

164. Lisa M. Kahle, *Making "Lemon-Aid" from the Supreme Court's Lemon: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 392-93 (2005).

165. Raymond C. Pierce, *The First Amendment "Undergod": Reviewing the Coercion Test in Establishment of Religion Claims*, 35 HAMLINE L. REV. 183, 194 (2012).

166. *Id.* at 197.

In particular, the Framers sought to prevent the government from establishing a preeminent religious sect, or "national religion," that could impose particular spiritual beliefs onto dissenting groups. This conception of the Establishment Clause — centered on preventing *coercion* — is well reflected in the Clause's legislative history. While the Framers debated a variety of different formulations of the Clause, all versions prohibited the formation of a "national religion" and protected individual spiritual freedom from the state's coercive power.[167]

While this formulation prevents the government from attaching material consequences to particular forms of spiritual exercise, it does not completely insulate the state from religion as some interpreters have contended.[168] In fact, the Framers maintained some type of relationship between church and state. They freely and routinely invoked the presence of one God while conducting official government business, and called for a day of "public thanksgiving and prayer" on which the "single favors of Almighty God" should be acknowledged.[169] It seems unlikely that Congress would make such statements while simultaneously designing a Clause to prohibit them.

In addition to referencing God for rhetorical purposes, the early American government engaged with religious institutions. For instance, Congress used government funds to hire chaplains who "opened daily [legislative] sessions with prayer" and "conducted Sunday services in the hall of the House of Representatives."[170] Around the same time, Congress earmarked funds to build churches and to employ priests on Native American tribal lands.[171]

Because this historical understanding is so critical to Religion Clause jurisprudence, the Framers' intent cannot be quickly dismissed by those who advocate for an evolving view. Such appeals are contrary to decades of judicial decision-making in this area. One scholar, Mark David Hall, notes that "Justices have appealed to the history surrounding the writing of the First Amendment," including appealing to "the Founders generally, and [to]

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167. Ralph W. Johnson, III., *Lee v. Weisman: Easy Cases Can Make Bad Law Too - The "Direct Coercion" Test Is the Appropriate Establishment Clause Standard*, 2 GEO. MASON L. REV. 123, 181-82, 187-88 (1993).

168. *Id*. at 188.

169. *Id*. at 183.

170. *Id*. at 185.

171. *Id* at 186, 188-89. Advocates of more absolutist Establishment Clause readings have made much use of Thomas Jefferson's assertion that the Establishment Clause's purpose is to create a "wall of separation between church and state." Justice Black, for one, concluded as much in *Everson v. Board of Education*. But read in proper context, Jefferson's quote does more to reaffirm the notion that coercion is the operative component of the Establishment Clause than it does to advocate for strict separation of church and state. Jefferson envisioned a 'wall' protecting individual religious agency from the state's coercive powers, not an impenetrable barrier footnote blocking all interaction between religion and the state.

specific Founders to shine light upon the meaning of the Establishment and Free Exercise Clauses."[172] In fact, Hall's study found that "Justices appealed to Madison 189 times, Jefferson 112 times, Washington 21 times, and Mason 6 times."[173] Interestingly, Hall further noted that the Court's opinions often referred to specific documents, like Jefferson's Letter to the Danbury Baptists. There, Jefferson wrote the famous "separation of Church and state," reference.[174] That reference has often guided popular understanding of Religion Clause principles, with some believing that it signifies the Founders' wish that Church and state remain unconditionally separate in all cases. I will argue, however, that this understanding is misguided and contrary to the principles that the Founders believed should govern the relationship between church and state.

B. THE FRAMERS DID NOT BELIEVE IN A STRICT SEPARATION BETWEEN CHURCH AND STATE

In *Reynolds v. United States* (1878), the Court upheld the conviction of George Reynolds, a member of the Mormon Church, under federal bigamy laws. Reynolds argued that his religion obliged him to practice polygamy, and that the law preventing this violated his First Amendment right to free exercise of religion.[175] The Court rejected Reynolds' argument, declaring that while Congress could not criminalize religious beliefs, it could outlaw religious practices.[176] In its reasoning, the Court pointed to Thomas Jefferson's opinions regarding the line between church and state, evident in his letter to the Danbury Baptist Church.[177] There, he wrote:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting

172. Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV 563, 567 (2006).

173. *Id.*

174. *Jefferson's Letter to the Danbury Baptists*, 57 LIBR. CONG. INFO. BULL. 6, (June 1998), www.loc.gov/loc/lcib/9806/danpre.html.

175. Reynolds v. United States, 98 U.S. 145, 162 (1878).

176. *Id.*

177. *Id.*

> the free exercise thereof, thus building a wall of separation between Church & State.[178]

Jefferson wrote that the Constitution forbids individual "actions," not "opinions."[179] So while the government may not tell the plaintiff what he can believe, it may tell him what he can and cannot do. The Court also relied upon Madison's "Memorial and Remonstrance" in which Madison stated "that religion, or the duty we owe the creator, was not within the cognizance of civil government."[180] In the time since *Reynolds*, courts have continued to rely on Madison's and Jefferson's words to determine the proper interpretation of the Religion Clauses.[181] But one such reference by the Court veered far away from what Jefferson and Madison actually meant.

In *Everson v. Board of Education*,[182] the Court applied the First Amendment to the states through the incorporation doctrine; in so holding, Justice Black relied heavily on history and evoked the writings of both Madison and Jefferson.[183] In doing so, Justice Black advanced a strict separation between church and state affairs: "[The] First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[184] Justice Black's erred in this description because it misconstrues the Founders' statements into a declaration that church and state must never cooperate.

Of course, Jefferson argued for the wall of separation. Madison, like Jefferson, was concerned about compulsive laws. In 1784, he wrote Memorial and Remonstrance Against Religious Assessments, arguing against a bill in the Virginia Legislature that would have levied a tax to pay "teachers of the Christian Religion"[185] Proposed by Patrick Henry, the bill had the support of many influential Virginians, including George Washington, John Marshall, and Richard Henry Lee.[186] Nevertheless, Henry succeeded in having the vote on the bill postponed for several months by agreeing to support a bill

178. Jefferson, *supra* note 174.

179. *Id*.

180. *Reynolds*, 98 U.S. at 163-64.

181. Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV 563, 567 (2006).

182. 330 U.S. 1 (1947).

183. *Everson*, 330 U.S. at 12-14.

184. *Id*. at 18.

185. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *in* 2 THE WRITINGS OF JAMES MADISON (Gaillard Hunt, ed., 1902), https://oll.libertyfund.org/titles/madison-the-writings-vol-2-1783-1787#Madison_1356-02_602.

186. *Id*.

incorporating the Protestant Episcopal Church."[187] Jefferson and Madison further wrote letters against laws designed to compel support for state-sponsored religion.[188] Thus, these Framers were concerned primarily with religious coercion, not neutrality.

Plainly, the strict separatism Justice Black spoke of was never practiced then or today. Similar to the legislative prayer upheld in *Marsh*, the Court in *Town of Greece v. Galloway* held that the invocations at monthly town board meetings were compatible with the Establishment Clause because of the practice's "historical foundation" since the founding.[189] Plaintiffs maintained that the invocations were invalid as they did not contain "sectarian language or themes" that *Marsh* required.[190] However, the Court found that an insistence on non-sectarian prayers is inconsistent with our traditions because the Framers "would have been accustomed to invocations containing explicitly religious themes of the sort [plaintiffs] find objectionable."[191] There are other practices that permit religious endorsement because they also do not impose coercion. United States currency, for example, expressly advances a deity, stating "In God We Trust" on coinage. The Eighth Circuit held, like at least five other Circuits, "that placing 'In God We Trust' on U.S. coins and currency does not violate the Establishment Clause."[192] The Eighth Circuit found that plaintiffs were not required to carry cash, and the government was not impermissibly "attempting to force citizens to express trust in God with every monetary transaction."[193] Practices like legislative prayer and the utterance of God on coinage are justified, but not simply because they are traditions. They are justified because, in keeping with the oldest ideals of the American political system, those traditions do not force or require citizens to observe or support the divine.

IV. WHY THE COERCION TEST SHOULD REPLACE *LEMON*

This section argues that *Lemon* is unworkable for courts to apply to cases with logical consistency and that the direct coercion test is the best remedy to *Lemon's* shortcomings. It entertains salient criticisms to the direct coercion test and rebuts them all.

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187. Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. 3, 8 (1951).

188. *Id.* at 11.

189. Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).

190. *Id.* at 577.

191. *Id.* at 578.

192. Doe v. United States, 901 F.3d. 1015, 1019 (8th Cir. 2018).

193. *Id.* at 1024.

A. COERCION IS WORKABLE AND *LEMON* IS NOT

Lemon is unworkable for three reasons. First, *Lemon's* fixation with secular purpose makes it difficult for the government to take actions designed to protect religious minorities. For example, faithful adherence to *Lemon's* secular purpose prong would invalidate laws that protect the right of religious conscientious objectors or minorities to avoid neutral selective service laws or grant exemptions to certain religious sects from mandatory education standards.[194] Second, *Lemon's* effect prong, which holds that a statute's primary effect may not be to "advance nor inhibit" religious exercise, creates similar problems. It could invalidate any state action designed to ensure free exercise, like government benefits and tax exemptions to religious groups, on the grounds it had "the 'primary effect' of 'advancing' [religious] interests."[195] In an effort to resolve these contradictions in the First Amendment, Justices and Judges must make "ad-hoc judgements incapable of being reconciled on any principled basis."[196]

Third, *Lemon's* secular purpose analysis has methodological problems as the quest for legislative purpose is untenable. Statutory purpose is often derived via legislative history, which is an "unreliable extrinsic" source.[197] Lawmakers, special interest lobbyists, and other stakeholders manipulate legislative history to make it appear as if a law's purpose is one favorable to their personal interests, and wish judges will cite to it to justify favorable rulings.[198] Even absent intentional manipulations, the idea that a law produced by a group of legislators with diverse interests and motivations can be reduced to a single "purpose" is dubious.[199] Such as an elusive and malleable creature should not be the basis for deciding Establishment Clause challenges. Direct coercion avoids these problems.

The direct coercion test is the better alternative for two reasons. First, direct coercion requires objective analysis, asking whether a government action attaches an "element of reprisal or penalty" to a form of religious exercise.[200] This standard is clear, unlike *Lemon*, because it turns on the "actual effects of governmental power and not on mere appearances."[201] It is far easier for Justices to identify the material consequences that flow from

194. Choper, *supra* note 29, at 501.
195. *Id*. at 502.
196. *Id*. at 503.
197. Blackman, *supra* note 29, at 388.
198. *Id*. at 375.
199. Adside, *supra* note 91, at 553.
200. Pierce, *supra* note 165, at 197.
201. Johnson III, *supra* note 167, at 178-79.

government than to divine the purpose of a multi-member legislative body. Second, the test reconciles the jurisprudential conflict caused by *Lemon*. Direct coercion permits ample space for the government to interact with institutions of faith and thus fosters a hospitable environment for religious exercise.[202] Accordingly, Justices do not have to carve out exceptions on an ad-hoc basis, as they have under *Lemon*.[203] In conclusion, the direct coercion test is clear, predictable, and appropriately defers to the nation's religious traditions. For these reasons, it should be adopted as the controlling standard in Establishment Clause challenges. Let me now devote some words to some salient criticisms on direct coercion.

B. SALIENT CRITICISMS AND REBUTTALS

Lemon, warts and all, is protected by the doctrine of stare decisis. Decided five decades ago, the Court has reaffirmed this decision repeatedly in several seminal cases.[204] A decision, which has been reaffirmed so often and long ago, should have created widespread reliance interest by now and thus be immune from reversal. Because the *Lemon* test is unworkable, the Court does not rely on it to instruct legislators, city board members, or society on the area. In fact, Justice Kavanaugh recently identified five categories where the Court does not use *Lemon* at all: (1) religious symbols on government property and religious speech at government events, (2) religious exemptions from neutral laws, (3) government benefits and tax exemptions for religious organizations, (4) religious expression in public schools, and (5) regulation of private religious speech in public forums.[205] This led him to state plainly that "*Lemon* is not good law."[206] Accordingly, reversing *Lemon* would advance, not disrespect, the doctrine of stare decisis.

Another reason why some might say *Lemon* should be respected is because the direct coercion test is too majoritarian; while the test does not reduce religious strife, the *Lemon* test builds a fence around establishment by invalidating practices seen to increase divisiveness. As explained before, Santa Fe high school allowed student elections to decide "whether there should be an invocation before high school football games, and second, which student should deliver that invocation during the course of one football

202. Kahle, *supra* note 164, at 396.

203. Choper, *supra* note 29, at 501-02.

204. Stone v. Graham, 449 U.S. 39 (1980); Wallace v. Jaffee, 472 U.S. 38 (1985); McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005).

205. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092-93 (2019).

206. *Id*.

season."[207] The *Santa Fe* Court found that "the majoritarian process implemented by the district, guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[208] But this approach trivializes both the Establishment and Free Speech Clauses.

Lemon turns a social offense into a constitutional violation and thus gives a plaintiff standing to sue in court based upon a "'generalized grievances' about the conduct of Government."[209] Justice Gorsuch explained that Establishment Clause challenges come from "offended observers" who experience psychological consequences arising from conduct with whom they disagree.[210] As Justice Thomas explained in *Van Orden*,

> [t]he only injury to [the plaintiff] is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life.[211]

This is not the ill the Framers wished to prevent. And it is a far cry from Article III standing: "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."[212] But the "offended observer" is not without recourse.

The freedom of speech is his or her recourse. The offended observer can protest, lobby their representatives, or persuade others to vote certain elected officials out from office and replace them with officials who will either amend or remove the offensive monument, display, or practice. These are the democratic options afforded to, for instance, racial minorities when they are confronted with hate speech. As mentioned earlier, *Capitol Square Review* upheld the KKK's actions in placing a cross in a town square because it was a private expression in a public forum open to all; in this situation, offended minority groups would be able to erect their own display in the plaza, such as one promoting cultural tolerance, to retort the KKK's offensive message.[213] Similarly, in *Virginia v. Black*,[214] the Court again struck down government action that could censor racially charged speech.[215] There, it

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207. Matthew A. Peterson, *The Supreme Court's Coercion Test: Insufficient Constitutional Protection for America's Religious Minorities*, 11 CORNELL J. L. & PUB. POL'Y 245, 249 (2001).
208. *Id.*
209. *Am. Legion*, 139 S. Ct. at 2100 (Gorsuch, J., concurring).
210. *Id.*
211. Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).
212. Diamond v. Charles, 476 U.S. 54, 62 (1986).
213. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 758 (1995).
214. 538 U.S. 343 (2003).
215. *Black*, 538 U.S. at 364.

invalidated a statute that made cross burning prima facie evidence for intent to intimidate.[216] The Court found that the statute broadly reached protected speech by possibly regulating cross burning intended to make an artistic or even an offensive political message.[217] Both cases offer a clear principle that can inform Establishment Clause cases, one which can ensure that free speech and religion cases are analyzed in tandem: offense alone is not sufficient reason to trigger a constitutionally recognized injury under the First Amendment.[218] The public forum affords religious minorities, like racial groups, with the opportunity to become community healers. In an open society, the minority needs to teach, guide, and even reprimand the majority through the robust exchange of ideas as permitted by the First Amendment. In this way, the freedoms of religion and speech compliment the other.

V. CONCLUSION

Lemon is unworkable. First, it infuses subjective judicial making, which turns hurt feelings into major constitutional law cases involving benign symbolism. Second, the Court's focus on secular purpose and neutrality has created a hodgepodge of ad-hoc decisions with contradictory reasoning. Third, it disturbs the balance between freedom of speech and religious freedom.

The direct coercion test solves these problems. As a clear standard, it avoids the methodological problems of *Lemon* and produces objective and consistent results. The other alternatives to *Lemon*, though, come with serious issues that do not solve the problems *Lemon* presents. The endorsement test incorrectly suggests that benign religious expressions like legislative prayer are unconstitutional, a belief arising from a misunderstanding of the Framer's intent. The Framers meant to prevent conflict, not to make the state an atheist. Furthermore, its reliance on "reasonable person" analysis makes the endorsement test no law at all: it opens the door to uncontrolled judicial discretion. The tradition, specific-tradition, and contextual tests do allow for the benign religious expression the Framers intended to continue to exist. But the rationale – that longstanding practice makes law good – constitutes a permanent religious gerrymander in favor of old majority religions. This reasoning forbids future generations their choice of faiths, which are new to these shores.

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216. *Id*.

217. *Id*.

218. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring).

Establishment Clause jurisprudence, then, has demonstrated two broad approaches to the First Amendment's balancing act between free speech and free exercise, in government and out. First, some attempts to enforce the Clause, like *Lemon* and the endorsement test, lean too far in the direction of preventing Establishment. In trying to keep our country free of religious power in government, they incorrectly prevent benign free speech. Second, other attempts, like the tradition variants, go too far in favor of allowing certain types of governmental exercise of religion, without considering the effects of permitting certain forms of faith and not others. The direct coercion test sits between these two extremes; it strikes the balance between what the First Amendment's requires; it forbids what is wrong about government in religion, while allowing what can be right: religious tolerance.

Our Constitution has a commitment to religious tolerance. This tolerance has transformed once persecuted religious minorities into powerful constituencies in the body politic.[219] Through debate and compromise, the direct coercion test will not subvert the continued trajectory towards religious tolerance. To borrow from one religious tradition, you have heard it said that the two greatest commandments are to love God and to love one's neighbor.[220] Our Constitution protects that divine law by making sure that following the former never means breaking the latter.

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219. President John F. Kennedy remains a powerful counterexample to arguments against direct coercion. As a Roman Catholic, then Democratic Candidate Kennedy, faced intense religious prejudice in the 1960 Presidential Election. Many believed that a Catholic President would remain loyal not to the United States, but instead be a puppet of the Pope in Rome. Candidate Kennedy did not ignore this prejudice. He faced it bravely in the public forum. In his address on religious liberty to a group of Protestant ministers, he appealed to American traditions to religious inclusion and tolerance: "I believe in an America where religious intolerance will someday end, where all men and all churches are treated as equals, where every man has the same right to attend or not attend the church of his choice, where there is no Catholic vote, no anti-Catholic vote, no bloc voting of any kind, and where Catholics, Protestants and Jews, at both the lay and pastoral level, will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood." Senator John F. Kennedy, Address at the Rice Hotel, Houston, Texas (Sept. 12, 1960). American Catholics, like President Kennedy, have successfully fought for inclusion and tolerance in the marketplace of ideas. Today, over thirty percent of the Congress and six out of nine Supreme Court Justices are Catholic. *Faith on the Hill: The Religious Composition of the 116th Congress*, PEW RES. CTR. (Jan. 3, 2019), https://www.pewforum.org/2019/01/03/faith-on-the-hill-116/; Sarah McCammon & Domenico Montanaro, *Religion, The Supreme Court and Why It Matters*, NPR (July, 7, 2018), https://www.npr.org/2018/07/07/626711777/religion-the-supreme-court-and-why-it-matters. They represent a success of the American ideals surrounding religious freedom and exercise. And with the direct coercion test at the helm of Establishment Clause jurisprudence, there is no doubt that such successes will continue to be the norm.

220. *Matthew* 22:36-40.