

Comment

No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*

I. INTRODUCTION

Adherence to the imperatives of the Establishment Clause¹ contributes significantly to the First Amendment's quintessential purpose of promoting the democratic ideal of a vigorous public discourse on all issues of public concern in the belief that in this way a cohesive political community can be forged from a culture of dissidence. Governmental abstention from endorsement of religion is essential to ensure that no one is ostracized from this political community by virtue of his religious

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1. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion" *Id.*

belief (or lack thereof), or more pointedly, that no one is forced to choose between inclusion in the polity and adherence to conscience.

The Establishment Clause is emblematic of this harmonizing endeavor as it seeks to ensure both the autonomy of religion from governmental interference² and that a person's religious beliefs (or lack thereof) will in no way affect his full inclusion within the political community.³ In pursuing these dual ideals, the Establishment Clause (in conjunction with the Free Exercise Clause⁴) strives to reconcile the individual's desire for moral autonomy with the collective's desire for socio-political cohesiveness. Perceived in this light, the Establishment Clause possesses the potential to safeguard our pluralistic society by enshrining both freedom of conscience in religious matters as an inviolable constitutional right and religious tolerance as an indispensable constitutional imperative. Therefore, courts applying the Establishment Clause should endeavor to promote both religious tolerance and freedom of conscience by forbidding the government from endorsing any one religion or religion generally versus nonreligion.⁵

Currently, the Supreme Court's Establishment Clause jurisprudence is in a state of flux. To date, the Court has articulated no fewer than

2. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). Depicting the First Amendment as instituting the mutual autonomy of both church and state, the Court opined, "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." *Id.* (quoting *Watson v. Jones*, 80 U.S. (13 Wal.) 679, 730 (1871)).

3. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). In now famous language, Justice O'Connor articulated what she styled a "clarification" of the Court's Establishment Clause jurisprudence:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition [by] . . . endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id.

4. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* (emphasis added).

5. See *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

Government in our democracy, state and national, must be *neutral* in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. *The First Amendment mandates governmental neutrality between religion and . . . non-religion.*

Id. (emphasis added).

three separate and distinct tests⁶ for use in Establishment Clause challenges to governmental actions that allegedly “[bring] government and religion into that proximity which the Establishment Clause forbids.”⁷ This Comment argues that the flux in the Court’s Establishment Clause jurisprudence can be attributed to the Court’s subtle departure from the “separationist” model⁸ in favor of the “accommodation-

6. The three current Establishment Clause tests are: 1) the “*Lemon* test,” *Lemon v. Kurtzman*, 403 U.S. 602 (1971); 2) the “endorsement test,” *Lynch*, 465 U.S. 668; *Allegheny County v. ACLU*, 492 U.S. 573 (1989); and 3) the “coercion test,” *Lee v. Weisman*, 505 U.S. 577 (1992).

7. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 263 (1963) (Brennan, J., concurring).

8. The “separationist” model, generally speaking, advocates the mutual autonomy of the secular and religious realms of society. The precise origin of the separationist model is a matter of some dispute. While conventional wisdom generally assumes that the onset of the Protestant Reformation created the ideological impetus and political inertia for the modern surge towards the separation between church and state in western civilization, evidence exists that the emergence of the separationist principle actually originated in the ecclesiastical realm. Gerard V. Bradley, *The Enduring Revolution: Law and Theology in the Secular State*, 39 EMORY L.J. 217 (1990). Bradley attests that,

The uniquely Western notion of two jurisdictions, including an autonomous temporal order of civil regulation, was produced entirely by Christian theological reflection. Eleventh-century ecclesiastical reformers, who inhabited an undifferentiated realm of sacralized kingship and worldly prelates, sought a more authentic Christianity by separating church from empire. Medieval history, frequently depicted as beset by theocratic regimes, was instead one long struggle by the church to free itself of royal domination.

Id. (footnote omitted).

In another common misconception, credit for the construction of the separationist model in the context of American society is usually attributed to Thomas Jefferson’s famous metaphor that the First Amendment “erects a wall of separation between church and state.” THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 307 (Adriene Koch & William Peden eds., 1998). This statement is not entirely accurate, however, as Jefferson was merely the earliest conspicuous American proponent of separation primarily for the benefit of secular society. (In truth, Jefferson’s sentiments on this score were merely reflective of the earlier writings of John Locke in A LETTER ON TOLERATION, wherein Locke argued that religious toleration should be extended to all sects which do not threaten the peace of civil society.) Moreover, the original American agitator championing the institutional separation of sacred and secular was in fact Roger Williams, a seventeenth century Protestant dissident, who advocated for separatism as a measure to preserve the religious realm from temporal pollution because “worldly, corruptions . . . might consume the churches if sturdy fences against the wilderness [are] not maintained.” See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158-60 (2d ed. 1988).

Nonetheless, strictly historically speaking, it is evident that the accommodationist model, not the separationist model, was the prevailing paradigm in seventeenth and eighteenth century American culture:

A great many early American settlements were formed by dissident religious minorities fleeing from the Protestant establishments of England, Ireland, and

ist” model.⁹ In the Author’s view, a reconfiguration of the Supreme Court’s Establishment Clause jurisprudence into one unified, comprehensive, and consistent approach is highly desirable. A reconfiguration of the Court’s analytical framework in the mold of the separationist model is essential to bolster our pluralistic society by effectuating the dual imperatives of individual autonomy and social cohesion manifested in the Establishment Clause.

Part II discusses the historical evolution of the Supreme Court’s Establishment Clause jurisprudence, including the corruption of the Court’s “*Lemon* test” by the Court’s “secularization”¹⁰ analysis, the

Scotland. Paradoxically, many Europeans who fled to the New World to escape established religion agreed that Church and State should be combined in their new settlements. With few exceptions, those who fled religious persecution were no more tolerant of religious dissenters than [] those from whom they had fled.

ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 3 (1982). See also Stephen B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2099-2100 (1996) (describing the synergy between political and religious life in revolutionary and postrevolutionary America and noting the existence of established state-sponsored churches in ten of the original thirteen colonies).

9. Generally speaking, the “accommodationist” model refers to an interpretation of the Establishment Clause that holds that the government may offer aid and official acknowledgment to religion so long as it does not prefer one religion over another. This view posits that the Establishment Clause requires the government to pursue a course of neutrality only with regard to specific religious sects and not to religion versus nonreligion generally. Adherents to this model perceive anything less as an unwarranted hostility towards religion.

Accommodationists rely on “original intent” to bolster the constitutionality of their model, claiming that the coexistence of the First Amendment alongside practices such as legislative prayer at the founding of the republic demonstrate that the Framers did not intend a “wall of separation” between church and state. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). “Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.” *Id.* (footnote omitted). For a more current exposition of the accommodationist argument, see generally *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 845-46 (1995), which held that the denial of student activity funds to a magazine published by a religious student group functioned as an impermissible viewpoint-based discrimination against religious speech.

10. “Secularization” is a term of art for purposes of this Comment, denoting the interpretative process by which the Supreme Court determines that a formerly religious practice, or a secular practice with sacral antecedents, has been purged of all significant religious content through either temporal or contextual erosion such that it is now sufficiently secular for Establishment Clause purposes. To the best of the Author’s knowledge, the term was coined in Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court’s Secularization Analysis*, 146 U. PA. L. REV. 579, 584 (1998).

conceptual infirmity of the “endorsement test” in light of the Court’s willingness to carve out an exception for “ceremonial deism,”¹¹ and the constitutional redundancy of the “coercion test” as essentially repetitive of a Free Exercise Clause inquiry. Part III critiques the Court’s resort to secularization and ceremonial deism in fashioning its Establishment Clause jurisprudence with an emphasis on the detrimental effects of the Court’s flawed conceptual model on the individual, society, and religion. Part IV suggests and illustrates an alternative approach to the Court’s Establishment Clause jurisprudence—a return to the separationist

11. Professor Stephen Epstein has offered perhaps the most intelligible and comprehensive definition of ceremonial deism to date. Specifically, Professor Epstein identifies several constitutive elements of a ceremonial deistic practice to include:

- 1) actual, symbolic, or ritualistic;
- 2) prayer, invocation, benediction, supplication, appeal, reverent reference to, or embrace of, a general or particular deity;
- 3) created, delivered, sponsored, or encouraged by government officials;
- 4) during governmental functions or ceremonies, in the form of patriotic expressions, or associated with holiday observances;
- 5) which, in and of themselves, are unlikely to indoctrinate or proselytize their audience;
- 6) which are not specifically designed to accommodate the free religious exercise of a particular group of citizens; and
- 7) which, as of this date, are deeply rooted in the nation’s history and traditions.

Epstein, *supra* note 8, at 2095 (footnote omitted). Epstein lists the following as identifiable forms of ceremonial deism prevalent in contemporary American culture:

- 1) legislative prayers and prayer rooms;
- 2) prayers at presidential inaugurations;
- 3) presidential addresses invoking the name of God;
- 4) the invocation “God save the United States and this Honorable Court” prior to judicial proceedings;
- 5) the use of the Bible to administer oaths to public officers, court witnesses, and jurors;
- 6) the use of “in the year of our Lord” to date public documents;
- 7) the Thanksgiving and Christmas holidays;
- 8) the National Day of Prayer;
- 9) the addition of the words “under God” to the Pledge of Allegiance;
- 10) the national motto “In God We Trust”;

...

- [11] commencement prayers;
- [12] governmental displays of nativity scenes;
- [13] religious symbols on government property or embedded on government seals;
- [14] public holiday of Good Friday.

Id. at 2095-96 (footnote omitted).

For the United States Supreme Court’s “definition” of ceremonial deism, see generally *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

model, employing a forthright application of the endorsement test unblemished by any association with ceremonial deism, as illustrated by the Ninth Circuit's recent decision in *Newdow v. U.S. Congress*.¹²

II. HISTORICAL EVOLUTION OF THE SUPREME COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

Initially, the Supreme Court's Establishment Clause jurisprudence reflected its keen sensitivity to the philosophical imperatives of the Establishment Clause by adopting a separationist model of analysis when evaluating Establishment Clause challenges to governmental actions. Generally, the Court's decisions between *Everson v. Board of Education*,¹³ the first modern Establishment Clause case,¹⁴ and *Lemon v. Kurtzman*¹⁵ reflected an attempt to keep the respective realms of "church" and "state" separate in the belief that such an arrangement was beneficial to society because church and state were thought to be mutually corruptive of each other.¹⁶ However, while the Court's pre-*Lemon* caselaw and articulation of the *Lemon* test¹⁷ focused upon the maintenance of a clear delineation of and neutral relationship between religion and the state, the Court's focus shifted in the wake of its decisions in *Marsh v. Chambers*¹⁸ and *Lynch v. Donnelly*.¹⁹ *Marsh* and *Lynch* depict a Court forsaking its traditional role as arbiter of

12. 292 F.3d 597 (9th Cir. 2002), *rehearing denied en banc*, 2003 U.S. App. LEXIS 3665, at *1 (9th Cir. Feb. 28, 2003).

13. 330 U.S. 1 (1947).

14. Strictly speaking, several Establishment Clause flavored cases were presented to the Court before *Everson*, but in each instance the Court narrowed its holding and decided the case on non-Establishment Clause grounds. *See generally* *Bradfield v. Roberts*, 175 U.S. 291 (1899) (affirming federal funding for a Roman Catholic affiliated hospital on corporate law grounds); *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (permitting the use of a federally controlled trust fund financed from contributions by Native Americans to pay for the educational expenses of Native American children at parochial schools because of the origination of the funds from a private source); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating an Oregon law prohibiting private and parochial education on Fourteenth Amendment substantive due process grounds and affirming the right of parents to control the upbringing of their children).

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

16. *See* *Engel v. Vitale*, 370 U.S. 421, 431 (1962). "[A] union of government and religion tends to destroy government and to degrade religion." *Id.*

17. *Lemon*, 403 U.S. at 612-13. The *Lemon* test is a three-pronged test to assess the validity of a challenged governmental action on Establishment Clause grounds. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* (citation omitted).

18. 463 U.S. 783 (1983).

19. 465 U.S. 668 (1984).

constitutional law in exchange for a role as arbiter of cultural semiotics. This shift in the Court's analytical perspective demonstrates a corresponding discernable shift from the separationist to the accommodationist model of decisionmaking by a Court eager to prevent a potential erosion of cultural identity appertaining to a constitutional invalidation of now secularized rituals with sacral antecedents.

A. *The Lemon Test*

1. The Rise of the Separationist Model: Establishment Clause Jurisprudence from *Everson* to *Lemon*. In *Everson*, the Supreme Court, in formally incorporating the protections of the Establishment Clause against the states via the Fourteenth Amendment, articulated a strong endorsement of the separationist model in adjudicating Establishment Clause cases, declaring:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can . . . force him to profess a belief or disbelief in any religion In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between [c]hurch and [s]tate."²⁰

Curiously, after invoking President Jefferson's stirring metaphor as a justification for deducing a constitutional principle of neutrality toward religion, the Court peered over the wall and upheld the constitutionality of a New Jersey statute that provided reimbursement funds to parents for transportation costs incurred in bussing their children to public or parochial schools.²¹ The Court attempted to reconcile its specific holding with its commitment to the "wall of separation" principle, reasoning that the statute's "neutrality" in the disbursement of reimbursement funds to parents comported with the dictates of the Establishment Clause.²² Notwithstanding its specific holding, the Court's endorsement of the separationist principle was emphatic and resolute, asserting that "[t]he First Amendment has erected a wall

20. 330 U.S. at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Jefferson's Letter to Messrs. Nehemiah Dodge and others, a Committee of the Danbury Baptist Association)).

21. *Id.* at 17.

22. *Id.* at 18. "[The statute] does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.*

between church and state. That wall must be kept high and impregnable."²³

In the decades that followed, the Court was routinely confronted with Establishment Clause challenges in the public education context.²⁴ The Court's school prayer decisions in *Engel v. Vitale*²⁵ and *School District of Abington v. Schempp*²⁶ are especially useful in bringing the Court's espousal of the separationist model into sharp relief. In *Engel* the Court confronted and invalidated a New York state statute recommending the daily recitation of a twenty-two word nondenominational prayer²⁷ as violative of the Establishment Clause.²⁸ The Court rejected the State's contention that the prayer, although religious, was still permissible because it served the educational purpose of "[m]oral and [s]piritual [t]raining" and that the prayer itself was nonsectarian and its recital voluntary.²⁹ Responding to the State's argument with separationist-type rhetoric, the Court asserted that the Establishment Clause must "at least mean that in this country it is no part of the business of the government to compose official prayers for any group of American people to recite as a part of a religious program carried on by government."³⁰ Additionally, the Court emphasized its concern with the "subtle coercion" imposed upon a captive audience of impressionable students witnessing such an explicit governmental endorsement of religion: "When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect coercive pressure* upon religious minorities to conform to the prevailing officially approved religion is plain."³¹

23. *Id.*

24. See, e.g., *Illinois ex rel McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (upholding an atheist student's challenge to the constitutionality of a "release time" program for religious instruction in public schools during regular school hours); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a "release time" program providing religious instruction to public school students during school hours but off school premises); *Engel*, 370 U.S. at 424 (invalidating the voluntary daily recitation of a New York Regent's Prayer); *Abington*, 374 U.S. at 224 (holding unconstitutional a Pennsylvania statute requiring the reading of at least ten Bible verses without comment by a teacher, followed by the recitation of the Lord's Prayer by the students in unison).

25. 370 U.S. 421 (1962).

26. 374 U.S. 203 (1963).

27. The prayer reads: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422.

28. *Id.* at 433.

29. *Id.* at 423, 430.

30. *Id.* at 425.

31. *Id.* at 431 (emphasis added).

Building upon this rationale, the Court in *Schempp* struck down a Pennsylvania statute requiring that every teacher read, without comment, at least ten Bible verses, followed by a recitation of the Lord's prayer, at the opening of every school day.³² Interestingly, Justice Clark, writing for the majority, foreshadowed the Court's later adoption of the three-prong *Lemon* test in his incorporation of a two-part test into the Court's Establishment Clause analysis: (1) whether a secular legislative purpose exists for a challenged practice; and (2) whether the "primary effect" of the practice neither advances nor inhibits religion.³³ The Court declared that the practice at issue violated the Establishment Clause's demand for governmental neutrality towards religion because the State's incorporation of these religious practices into its curricular activities had the primary effect of advancing religion.³⁴

The developing logic in this line of school prayer cases was that the Establishment Clause forbade governmental endorsements of religion in curricular activities on public school grounds, whether sectarian or nonsectarian, voluntary or involuntary.³⁵ Read together, these cases demonstrate the Court's familiarity with and fear of the catastrophic consequences to individual liberty that appertain when norm conformity and religious endorsement are in close proximity. Specifically, the Court evinces a particular wariness of government endorsements of religion in the public school context that involve students reciting or passively listening to affirmations of religious belief because of the subtle coercion present in the form of pressure exerted upon students to conform to the norms endorsed by their authority figures (state employed teachers) and the majority of their peers.³⁶ Ultimately though, the primary importance of *Engel* and *Schempp* is the texture they contribute to an understanding of the secular purpose and secular effect prongs of *Lemon*.

In *Lemon*, the Supreme Court, in the course of invalidating Rhode Island and Pennsylvania statutes that appropriated public funds to parochial schools for the instruction of students in secular subjects,

32. 374 U.S. at 223.

33. *Id.* at 222.

34. *Id.* at 224-25. While the school district contended that these practices offered substantial secular benefits including "the promotion of moral values, the contradiction to the materialistic trends of our times, [and] the perpetuation of our institutions and the teaching of literature," *id.* at 223, the Court incredulously responded that "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid." *Id.* at 224.

35. See *Engel*, 370 U.S. at 430. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause." *Id.*

36. See *id.* at 431.

announced a third prong in its evolving Establishment Clause analysis.³⁷ Articulating a concern with “excessive governmental entanglement with religion as a source of constitutional illegitimacy,” the Court invalidated the funding schemes in the statutes before them as inevitably fostering “an *excessive and enduring entanglement* between church and state.”³⁸ Formally adopting a three-pronged Establishment Clause inquiry, the Court acknowledged that its post-*Everson* decisions had established three criteria that any challenged governmental action must satisfy to survive an Establishment Clause challenge: (1) the practice must possess a *secular purpose*; (2) the practice must create a *primary effect which neither advances nor inhibits religion*; and (3) the practice must not foster “an *excessive governmental entanglement* with religion.”³⁹

While upon initial examination the *Lemon* test appears to present a systematic and comprehensive framework for analysis within a separationist model, unfortunately, its appeal is superficial for two related reasons. First, the vagaries of *Lemon*’s three prongs invite ad hoc decisionmaking and threaten inconsistent results.⁴⁰ Second, the secular analysis required under *Lemon* is readily pliable and has resulted in the creation of a secularization analysis⁴¹ “selectively employed in an

37. 403 U.S. at 613-19.

38. *Id.* Chief Justice Burger expressed the Court’s concern in separationist terms, noting that “[w]e simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.” *Id.* at 618-19. Therefore, the Chief Justice concluded, “A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected These prophylactic contacts will involve excessive and enduring entanglement between state and church.” *Id.* at 618-19.

39. *Id.* at 612-13 (emphasis added).

40. With his typical caustic flourish, Justice Scalia unleashed his wry wit upon the inadequacies of the *Lemon* test in application:

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

Lamb’s Chapel v. Moriches Union Free Sch. Dist., 508 U.S. 384, 398, 399 (1993) (Scalia, J., concurring) (citations omitted).

41. *See supra* note 10.

attempt to reconcile religion with tradition.”⁴² Put simply, the Court in post-*Lemon* decisions, most notably *Marsh* and *Lynch*, has been engaged in a radical redefinition of the parameters of the Establishment Clause. Equipped with two new quasi-constitutional doctrines of its own creation (ceremonial deism and secularization), the Court set about erecting an accommodationist model biased towards a majoritarian analysis and relying on historical practice as a proxy for constitutional scrutiny.⁴³

2. Anatomy of an Anomaly: *Marsh v. Chambers* and the Rise of Secularization and Original Intent in Establishment Clause Jurisprudence. In *Marsh v. Chambers*, the Supreme Court eschewed established constitutional doctrine and determined that Nebraska’s use of legislative chaplains to lead the legislature in daily prayer was consistent with the Establishment Clause.⁴⁴ The Court completely abandoned the *Lemon* test and opted instead for an analysis colored entirely by a deference to historical practice as the touchstone of constitutional legitimacy.⁴⁵ While the inclusion of *Marsh* then appears oddly out of place in a discussion of the development of Establishment Clause doctrine through application of the *Lemon* test, the Author places an analysis of *Marsh* here because it demonstrates the *Lemon* test’s potential for abuse. *Marsh* demonstrates how *Lemon*’s vague parameters invite ad hoc rationalizations and how *Lemon*’s focus on defining a practice as secular lures the Court towards attempting to interpretively secularize exercises with sacral antecedents as a means for securing their legitimacy under the Establishment Clause.

Chief Justice Burger’s reasoning for the Court in *Marsh* relied solely upon the weight of history, tradition, and the majority’s version of “original intent.”⁴⁶ The Court’s preferred mode of analysis in *Marsh* was reasoning by *historical syllogism*, i.e., the Framers thought that

42. Furth, *supra* note 10, at 584.

43. See generally *Marsh*, 463 U.S. at 792 (upholding the constitutionality of legislative chaplains by virtue of their continued use since the founding of the Republic, concluding that the practice is therefore constitutionally unoffensive as it has adhered itself to the “fabric of our society”).

44. *Id.* at 795.

45. See *id.* at 786. “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.” *Id.* at 788. “Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment.” *Id.* at 792. “[O]pening legislative sessions with prayer has become part of the fabric of our society.” *Id.*

46. *Id.* at 786.

legislative prayer was constitutional, the Framers wrote the Constitution, the Framers could not have acted unconstitutionally, ergo, legislative prayer is constitutional.⁴⁷ While the Court's analysis possesses some internal consistency, it denies the fundamental dynamic of our constitutional system—judicial review. Courts determine the legality and constitutionality of governmental actions, and the government cannot provide constitutional validity to its own actions by virtue of mere historical practice.⁴⁸ Perhaps cognizant of this fact, the Court did not rest on its resuscitation of the role of original intent in determining constitutional legitimacy. Instead, it admitted that “[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees.”⁴⁹ Notwithstanding this admission, however, the Court insisted that there was more at work here than mere historical practice; there was the consistent practice of legislative prayer since the founding of the Republic, which in turn rendered legislative prayer “part of the fabric of our society” and, therefore, constitutionally permissible.⁵⁰ Thus, in a bold exercise of symbolic interpretation, the Court essentially secularized legislative prayer, categorizing the practice as an acknowledgment of the historical role of religion in the Republic, an invocation of a nonspecific deity without discernable religious substance, a secular ritual utilized merely to solemnize a governmental action:

[O]pening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.⁵¹

47. *Id.* at 788-91.

48. As Justice O' Connor aptly phrased it in *Allegheny County v. ACLU*, “Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment.” 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

At the risk of overstating the obvious, one may discern that Justice O' Connor's statement draws its validity directly from Chief Justice John Marshall's articulation of the judicial review doctrine encapsulated in the directive that “it is, emphatically, the province and duty of the judicial department, to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

49. 463 U.S. at 790.

50. *Id.* at 792.

51. *Id.*

Concluding its analysis, the Court sustained the constitutional legitimacy of legislative prayer as a permissible “acknowledgment” of religion that did not threaten the integrity of the Establishment Clause.⁵²

The willingness of the Court in *Marsh* to engage in contortions of logic to satisfy the “secular” requirement of *Lemon* signaled a fundamental shift in the adjudication of Establishment Clause challenges from the traditional separationist model towards an accommodationist model, careless of the divisive effects⁵³ such a paradigm shift might have upon our pluralistic society. More immediately, the Court’s dual use of history in *Marsh* both as an indicator of original intent and as a “vehicle for altering the religiousness of certain practices and symbols,”⁵⁴ prompted Justice O’Connor to undertake a clarification of the Court’s Establishment Clause analysis in the articulation of her “endorsement test,” which sought to reconcile the Court’s secularization analysis with the traditional separationist model.

B. *The Endorsement Test*

In *Lynch v. Donnelly*, Justice O’Connor introduced what she termed a “clarification” of the Court’s Establishment Clause jurisprudence.⁵⁵ Justice O’Connor’s clarification effectively collapsed the first two prongs of the *Lemon* test into a consolidated inquiry: Does the governmental action symbolically endorse or disapprove of religion?⁵⁶ Therefore, the

52. *Id.* at 795. The Court acknowledged the seeming incongruity of legislative prayer with the Establishment Clause, but concluded that in light of the adherence of the practice to the “fabric of our society,” it did not pose a threat to the Establishment Clause:

We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded The unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and many other states gives abundant assurance that there is no real threat.

Id. (citations omitted).

53. For a discussion of the harmful effects of the Court’s secularization analysis upon society, see *infra* Part II.B.2.

54. Furth, *supra* note 10, at 587.

The *Marsh* opinion . . . indicates the degree to which the Supreme Court understands certain religious practices and symbols to be integral to American history and tradition But history, in [the Court’s] later opinions, has a dual function. It is employed as evidence of original intent, as in *Marsh*, and it is understood as a vehicle for altering the religiousness of certain practices and symbols.

Id.

55. 465 U.S. at 687 (O’Connor, J., concurring).

56. See *id.* at 690 (O’Connor, J., concurring).

relevant inquiry in evaluating Establishment Clause challenges is whether the challenged governmental action's purpose or effect conveys a message of symbolic endorsement or disapproval of religion.⁵⁷ Symbolic endorsement is branded as an unconstitutional malady because "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁵⁸ Moreover, the endorsement analysis is intended to be an "objective standard," employing the perspective of an "objective observer" familiar with the text, legislative history, and implementation of the statute.⁵⁹ An additional, and more controversial, characteristic of the objective observer lies in deeming him "aware of the history and context" in which the allegedly unconstitutional action occurs.⁶⁰ Finally, reasoning from this perspective, the Court must determine whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."⁶¹

The endorsement test, as first articulated by Justice O'Connor's concurrence in *Lynch*, appears, at least in conceptual terms, to be a substantial embodiment of the separationist model inasmuch as it forbids the government to convey or attempt to convey a message that religion generally, or a particular religious belief specifically, is favored or preferred.⁶² Primarily, the endorsement test is concerned with enforcing governmental neutrality toward religion⁶³ and preventing the estrangement and alienation of religious dissidents or nonadherents from the political community by a governmental endorsement of religion that sends a message that "they are outsiders, not full members of the political community."⁶⁴

57. *Id.* (O'Connor, J., concurring) (noting that "[t]he central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche.").

58. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (quoting *Engel*, 370 U.S. at 431).

59. *Id.* at 76.

60. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring). The controversy referred to in the text is in regard to Justice Stevens's contention that a knowledge of community history requirement effectively validates governmental endorsements of religion tolerated by a majority of the community. *See id.* at 808 n.14 (Stevens, J., dissenting).

61. *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

62. *See* 465 U.S. at 687-88 (O'Connor, J., concurring).

63. *See Wallace*, 472 U.S. at 60 ("[T]he government must pursue a course of complete neutrality toward religion.") (citations omitted).

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

1. **“Endorsing” What? Secularization, Symbolism, and the Symbolic Endorsement Test in *Lynch v. Donnelly* and *Allegheny County v. ACLU*.** The Court in *Lynch*, ostensibly applying the *Lemon* test, upheld the constitutionality of the display of a publicly financed nativity scene in a public park.⁶⁵ Engaging in a “contextual” analysis focused upon the history and tradition depicted by the nativity scene, the Court, in a 5-4 decision, declared that the scene served the secular purposes of celebrating the holiday season and commemorating its origins.⁶⁶ Justice O’Connor concurred in the result, but she insisted that the critical inquiry required not merely a historical analysis of the societal acceptance of a challenged governmental practice, but also a determination of whether the practice communicated a symbolic governmental endorsement of religion.⁶⁷ Stressing the contextual nature of this inquiry, Justice O’Connor explained that “[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”⁶⁸

The majority of a similarly divided Court in *Allegheny County v. ACLU* issued a nearly incomprehensibly fractured set of opinions in which two different voting majorities of the Court respectively (1) embraced the endorsement test to invalidate the prominent public display of a nativity scene housed inside a county courthouse building,⁶⁹ while (2) relying on a secularization analysis to permit the public display of a Menorah and

65. *Id.* at 680.

66. *Id.* Relying on prior instances of the Court’s willingness to allow government to accommodate religion in the public sphere (citing, among others, *Everson*, 330 U.S. at 17 (public funds for transportation of children to religious schools); *Marsh*, 463 U.S. at 786 (upholding legislative prayer)), Chief Justice Burger asserted, “We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause.” *Id.* at 682.

67. *Id.* at 687-88 (O’Connor, J., concurring). Describing the analytical implications of an endorsement analysis upon the Court’s traditional *Lemon* test, Justice O’Connor explained:

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, 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.

Id. at 690 (O’Connor, J., concurring).

68. *Id.* at 694 (O’Connor, J., concurring).

69. 492 U.S. at 578-79 (plurality opinion). The panel declaring the prominent display of the crèche at the foot of the main staircase inside the Allegheny county courthouse building to be unconstitutional was composed of Justices Blackmun, Brennan, Marshall, Stevens, and O’Connor.

Christmas tree on the front lawn of the same property.⁷⁰ Turning to the nativity scene display first, the Court abstained from indulging in the contortions of logic and semiotics undertaken by the majority in *Lynch* to secularize the symbolic depiction of the birth of Christ. Instead, the Court began its analysis by acknowledging the nativity display's obvious religious significance, observing that the display's "praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service."⁷¹ Furthermore, the Court reasoned that the message communicated by coupling the religious significance of the nativity scene with the prominent public display of the scene was one of symbolic governmental endorsement of religion.⁷² Accordingly, the Court concluded that "the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity."⁷³ Concurring in the judgment, Justice O'Connor reiterated the role of the endorsement test in securing the ideological imperative of the Establishment Clause, namely, preservation of the social cohesiveness of our pluralistic society achieved in part through religious tolerance:

We [are] a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, *government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.*⁷⁴

Bewilderingly, Justice O'Connor and Justice Blackmun defected from the crèche invalidating panel and cast the deciding votes to uphold the permissibility of the public display of a Menorah, Christmas tree, and secular holiday sign saying the city "salutes liberty" during the holiday

70. *Id.* at 578. The panel of justices supporting the constitutionality of the City of Pittsburgh's holiday display was composed of Justices Blackmun, O'Connor, Kennedy, Rehnquist, Scalia, and White.

71. *Id.* at 598.

72. *Id.* at 599-600. Conducting the symbolic endorsement inquiry from the vantage point of the "objective observer," Justice Blackmun opined, "No viewer could reasonably think that [the nativity scene] occupies [its prominent location] without the support and approval of the government," thereby "send[ing] an unmistakable message that [the country] supports and promotes the Christian praise to God that is the crèche's religious message." *Id.* (internal citations omitted).

73. *Id.* at 612.

74. *Id.* at 627 (emphasis added).

season.⁷⁵ Apparently dissatisfied with the palpable separationist flavor of her depiction of the endorsement test in invalidating the display of the crèche, Justice O'Connor premised her concurrence in the judgment to uphold the display of the Menorah on a secularization analysis.⁷⁶ Specifically, Justice O'Connor indicated that the distinguishing factor between the public display of the nativity scene and the Menorah lay in the latter's accompaniment with secular symbols, which effectively counterbalanced the symbolic religious endorsement otherwise inherent in the public display of religious symbols.⁷⁷

2. Ceremonial Deism and the Corruption of the Symbolic Endorsement Test. As evidenced by the Court's decisions in *Lynch* and *Allegheny*, the endorsement test, much like the *Lemon* test, cannot seem to extricate itself from a reliance upon historical practice as a barometer of constitutional legitimacy under the Establishment Clause. Again, similar to the *Lemon* test, the internal inconsistencies within the endorsement test are wrought from a framework that attempts to reconcile a secularization analysis with a separationist model. Specifically, in the case of the endorsement test, the corrupting influence on the Court's analysis is the Court's willingness to carve out an exception to the prohibitions of the Establishment Clause for practices categorized under the rubric of "ceremonial deism." Ceremonial deism, while a somewhat amorphous term,⁷⁸ generally refers to a category of practices deeply rooted in our cultural history that possess discernable religious content yet are nonetheless immune from Establishment Clause challenges because they are "a class of public activity which . . . [ould] be accepted as so conventional and uncontroversial as to be constitutional."⁷⁹ Interestingly enough, it was Justice Brennan (an erstwhile critic

75. *Id.* at 619 (Blackmun, J., concurring).

76. *Id.* at 632-33 (O'Connor, J., concurring).

77. *Id.* (O'Connor, J., concurring).

78. The term is necessarily nebulous inasmuch as it is necessarily tied to the Court's secularization analysis, which presumes that practices derive their religious content from their social context and can therefore be "purged" of their religious significance when consistently invoked and utilized within a secular context. Timothy Hall is representative of commentators who critique this presumption and approach as hopelessly pliable and unprincipled. Hall also points to the Court's inconsistent holdings in *Marsh* versus *Engel* and *Schempp* as evidence of an unworkable model, and he complains that, "The Court has failed to offer a principled justification for holdings that banished civic prayers from public schools . . . but permitted civic prayers in state legislative assemblies." Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 41 (1993).

79. Epstein, *supra* note 8, at 2091 (quoting former Dean of Yale Law School, Walter Rostow from a 1962 speech (alteration in original)).

in *Marsh* of historical practice as a legitimate form of Establishment Clause analysis)⁸⁰ who made the first explicit mention of ceremonial deism as a constitutionally cognizable category in his dissent in *Lynch*:

[T]he designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood . . . [as forms of] “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.⁸¹

Justice O’Connor has also explicitly endorsed the use of ceremonial deism as a means of insulating longstanding public practices that invoke a nonspecific deity for secular purposes from Establishment Clause scrutiny, explaining that they are a form of acknowledgment that serve, “in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.”⁸² While viscerally appealing, Justice O’Connor’s harkening to history as a primary source of constitutional legitimacy is nonetheless troubling because such a rationale could conceivably produce the perverse result of the Court sanctioning a governmental practice violative of the Establishment Clause merely because (owing in large part to the cultural hegemony of the Judeo-Christian tradition in the United States) it has been a historically accepted practice.⁸³ Unfortunately, while pardoning injustice merely

80. Criticizing the majority’s reliance solely on historical fact and “original intent” as measures of the constitutional validity of legislative prayer, Justice Brennan caustically asserted, “This is a case, however, in which—absent the Court’s invocation of history—there would be no question that the practice at issue was unconstitutional [S]pecific historical practice should not in this case override that clear constitutional imperative [of neutrality towards religion].” 463 U.S. at 814 (Brennan, J., dissenting).

81. 465 U.S. at 716 (Brennan, J., dissenting) (citation omitted) (footnote omitted).

82. *Id.* at 693 (O’Connor, J., concurring). Furthermore, Justice O’Connor reaffirmed her endorsement of ceremonial deism in *Allegheny*, utilizing a secularization analysis in an attempt to avoid admitting that such practices communicated to nonadherents a symbolic endorsement of the majority’s religious beliefs, ceremonial deism practices are permissible because they are today “generally understood as a celebration of patriotic values rather than particular religious beliefs.” 492 U.S. at 631 (O’Connor, J., concurring).

83. This assertion is not novel. Justice O’Connor herself has recognized the vast potential for injustice inherent in placing exclusive reliance upon the historical acceptance of a practice as a measure of its constitutional legitimacy. As she cautions, “Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by the Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment.” *Id.* at 630 (O’Connor, J., concurring). Nonetheless, Justice O’Connor (similar to the Court in *Marsh*, 463 U.S. at 786) considers

because it obtains longevity appears ridiculous, it is not always unconstitutional.

While it may appear self-evident to Justice O'Connor that invocations of ceremonial deism do not create a symbolic governmental endorsement of religion, it seems likely that a truly objective observer would deem this conclusion strongly influenced by an accommodationist viewpoint. In order to justify her conclusions that ceremonial deistic practices are secularized to the point of appearing innocuous, Justice O'Connor's objective observer would have to assume the perspective of a person espousing a belief in monotheism. One must therefore critically inquire whether the primary effect of an endorsement test equipped with a robust toleration for ceremonial deism accomplishes anything more than the creation of a constitutional framework that encourages the politicizing and secularization of the Judeo-Christian tradition pursuant to the establishment of a "civil religion"⁸⁴ immune from Establishment Clause scrutiny.⁸⁵

historical acceptance of ceremonial deism type acts to be particularly compelling when combined with their alleged "nonsectarian nature." See *id.* at 631 (O'Connor, J., concurring).

84. Sociologist Robert Bellah first articulated the concept of "American Civil Religion" as the organic compilation and distillation of values, ideals, symbols, and rituals derived from common cultural experience that serve to unify people in loosely affiliated social structures. See generally ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS IN RELIGION IN A POST-TRADITIONAL WORLD* (1970). The core tenets of American Civil Religion include: "the existence of God, the life to come, the reward of virtue and the punishment of vice, and the exclusion of religious intolerance." *Id.* at 172 (citing JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 186 (Maurice Cranston trans., Penguin Books 1968) (1762)).

While ceremonial deism and civil religion are both evolving concepts, inasmuch as both are tied to cultural internalization of historical practice, some commentators attempt to delineate between the concepts by reference to theological substance, asserting that civil religion is devoid of theistic connections. As one commentator stated, "The sociological concept of civil religion illuminates the values involved in the practices deeply rooted in American life. Civil religion is not theologically religious, despite the use of the word 'God.' It is mythic, patriotic, and secular." Michael M. Maddigan, Comment, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293, 326 (1993). But see Janet L. Dolgin, *Religious Symbols and the Establishment of a National "Religion,"* 39 MERCER L. REV. 495, 505 (1988) (positing that the Supreme Court's understanding of American Civil Religion is essentially a political interpretation and adaptation of Christianity).

85. See Jimmy Daniels, *The First Amendment: Has The Supreme Court Overlooked Its Role as Guardian of Our Freedom by Failing to Distinguish Between Real Threat and Mere Shadow?*, 46 MERCER L. REV. 1167, 1185-87 (1995). Daniels concludes by asserting that public rituals with Christian origins (e.g., student-authored high school graduation prayers) do not offend the Establishment Clause because they encompass core aspects of an American Civil Religion. *Id.*

Finally, the confounding effect of ceremonial deism upon the Court's Establishment Clause jurisprudence is epitomized in the Court's prominent pair of inconsistent holdings observable in *Lynch* (upholding a public crèche display) contrasted with *Allegheny* (invalidating a public crèche display), which in turn mirror the Court's inconsistent holdings in *Marsh* (affirming the constitutionality of legislative prayer) contrasted from *Engel* and *Schempp* (invalidating public school prayer). These inconsistencies evince the conceptual shortcomings of ceremonial deism: It imposes upon the Court the role of arbiter of cultural semiotics, thereby enabling the Court to concoct the same ad hoc rationalizations that beset a standard secularization analysis.⁸⁶ That is, the Court grants itself license to determine, first, the social desirability of the challenged act or symbol and, second, the residual spiritual significance of the challenged act or symbol. As evidenced by the previously discussed line of cases, the reliability of the application and the predictability of results obtained from an analytical model with such nebulous standards is dubious.⁸⁷

C. *The Coercion Test*

The most recent test incorporated into the Court's Establishment Clause jurisprudence is Justice Kennedy's coercion test, first espoused in *Allegheny*⁸⁸ and first applied in a majority opinion in *Lee v. Weisman*.⁸⁹ Writing for the majority in *Lee*, Justice Kennedy found it unnecessary to apply the *Lemon* test to declare unconstitutional the delivery of a nonsectarian graduation prayer by a clergyman at a public

86. See Furth, *supra* note 10, at 596.

87. No lesser authority than Chief Justice Rehnquist has admitted the accuracy of the last observation, for as the exasperated jurist complained in *Wallace*, the Court's Establishment Clause jurisprudence "has produced only consistent unpredictability." 472 U.S. at 112 (1985) (Rehnquist, C.J., dissenting).

88. Justice Kennedy argued that the Establishment Clause is only violated when a governmental action "coerces" an individual to espouse a belief in a particular doctrine. 492 U.S. at 659 (Kennedy, J., concurring). This initial formulation of Justice Kennedy's "coercion" analysis manifests his preference for the accommodationist model. More pointedly, while Justice Kennedy was willing to recognize the constitutional invalidity of governmental impositions of "indirect" coercion (i.e., psychological coercion) upon the individual, he refused to impose the endorsement test on the ground that it manifested hostility towards religion:

[A]s the modern administrative state expands to touch the lives of citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Id. at 657-58 (Kennedy, J., concurring).

89. 505 U.S. 577, 593 (1992).

school graduation.⁹⁰ Instead, Justice Kennedy utilized a coercion rationale to invalidate the prayer at issue, describing the prayer's utterance at a school sponsored event as an exercise of "indirect coercion" violative of the Establishment Clause.⁹¹

Primarily, the majority in *Lee* was concerned with the inherent coercion present in the public school setting where impressionable students are subject to the dual influences of peer pressure and norm conformity.⁹² Reasoning from this perspective, the Court first observed that given the official status of graduation as a school function, the graduation prayers unmistakably bore the imprimatur of the state.⁹³ Furthermore, the Court reasoned that given the symbolic importance of graduation in the life of a student, and hence the student's desire to participate in it, the students likely felt psychological pressure to participate in, or at least not to absent themselves during the prayer.⁹⁴ Therefore, due to the "inherent coercion" of the public school social dynamic, coupled with the school's sponsorship, supervision, and control over the graduation ceremony, the Court held that the commencement prayer produced the coercive effect of placing the students in the untenable position of choosing between either participating in an exercise with religious content or protesting and risking social alienation.⁹⁵

Interestingly, Justice Kennedy's focus upon "psychological coercion" as a measure of an Establishment Clause violation necessitated the Court's reasoning from the perspective of the nonadherent in contrast to the objective observer invoked for an endorsement analysis. Specifically, Justice Kennedy explained, "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."⁹⁶ In Justice Kennedy's estimation, the exertion of such subtle coercion violated the Establishment Clause because "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its

90. *Id.*

91. *Id.* at 592.

92. *See id.*

93. *Id.* at 590.

94. *Id.* at 593.

95. *Id.*

96. *Id.* at 592.

exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'⁹⁷

Recently the coercion test was again invoked by a majority of the Court, whose members found the test useful in invalidating a school's practice of encouraging student-led prayer before varsity football games.⁹⁸ Building upon Justice Kennedy's initial rendering of the coercion test in *Lee*, the Court in *Sante Fe Independent School District v. Doe*⁹⁹ noted several coercive aspects of the school's endorsement of pre-game prayer.¹⁰⁰ Of particular importance to the Court was the fact that many students were required to be present at these state-sponsored and facilitated religious exercises in order to receive the academic credit and social benefits of participating in an extracurricular activity.¹⁰¹ Criticizing the school for creating a situation wherein students were forced to choose between attending the game and avoiding state-sponsored religion, Justice Stevens, writing for the Court, declared,

The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."¹⁰²

In critiquing the conceptual approach of the coercion test, one is confronted with the fact that Justice Kennedy's identification of psychological coercion to conform as indicative of an impermissible governmental endorsement of religion adds nothing to the analysis. The endorsement test would certainly consider any psychological coercion resulting from a governmental action with religious content to be an Establishment Clause violation because the resulting anxiety would

97. *Id.* at 587 (quoting *Lynch*, 465 U.S. at 678) (alteration in original).

98. *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). Strictly speaking, the Court applied each of the three Establishment Clause tests en route to invalidating the practice of student-led prayer at school sponsored events. After applying the coercion test to invalidate the student-led prayer, the Court progressed to a determination that the school policy lacked a secular purpose. *Id.* at 314-16. Finally, the Court invoked the endorsement test in concluding that the "policy was implemented with the purpose of endorsing school prayer." *Id.* at 315.

The Author has chosen to focus discussion of *Santa Fe* on the Court's coercion analysis in hopes of providing greater texture to his discussion of the decisional operation of the coercion test generally.

99. 530 U.S. 290 (2000).

100. *Id.* at 302-13.

101. *Id.* at 307-08.

102. *Id.* at 312 (citations omitted).

make the nonadherent feel like an “outsider in the political community.”¹⁰³ What distinguishes Justice Kennedy’s formulation of coercion is his hesitancy to consider governmental endorsements of religion, outside of the inherent coercion of the public school context, as producing the necessary indirect pressures to conform that characterize an Establishment Clause violation. For example, in *Allegheny*, Justice Kennedy’s application of his coercion rationale would have upheld an explicitly theological governmental practice (display of a crèche on courthouse grounds) on the ground that the display did not coerce anyone towards adherence or conformity to a religious practice.¹⁰⁴ Thus, the distinguishing factor between the coercion and endorsement tests is that the latter focuses on social alienation, while the former focuses on social conformity. Ultimately, the inadequacy of Justice Kennedy’s formulation of the coercion test stems from its similarity to a Free Exercise inquiry (finding a constitutional violation only for coercing or constraining an observer from conformity to or abstention from a religious practice).¹⁰⁵ The result of such a similarity is a constitutionally untenable redundancy in the religion clauses, with a resulting cost to both the individual liberty the First Amendment seeks to protect and the social cohesion it seeks to foster.

III. THE SCOURGE OF SECULARIZATION

When confronted with evidence of the paradigm shift at work in the Supreme Court’s Establishment Clause jurisprudence from separationist to accomodationist (occurring as a result of the incorporation of secularization and ceremonial deism into the Court’s analysis), the layman may well be tempted to ask, “What’s the harm?” After all, the

103. *Lee*, 505 U.S. at 604-06 (Blackmun, J., concurring). Qualifying Justice Kennedy’s application of his “coercion test,” Justice Blackmun’s concurrence emphasized that Establishment Clause violations are possible even absent coercion: “it is not enough that the government restrain from compelling religious practices: It must not engage in them either Our decisions have gone beyond prohibiting coercion.” *Id.* at 604, 606.

104. 492 U.S. at 679 (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy considered the crèche display to be a constitutionally unoffensive acknowledgment of the community’s religious practices: “[T]he principles of the Establishment Clause and our Nation’s historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects.” *Id.*

105. Justice O’Connor took strong exception to the assertion that governmental action falling short of psychological coercion was insufficient to create an Establishment Clause violation: “[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy.” *Id.* at 628 (O’Connor, J., concurring) (citations omitted).

practices ratified by the Court as nonoffensive to the Establishment Clause by virtue of their classification as ceremonial deism do no more than merely acknowledge the historical religious antecedents of our polity; they do not affirmatively proselytize or attempt to establish a state sponsored church, and was that not the primary concern of the Framers?¹⁰⁶ With due respect to well-meaning members of America's

106. Of course history denies one a simple explanation of what the "Framers were concerned about" in their crafting of the Establishment Clause and in reference to the relationship between church and state generally. In a superb and detailed treatment of the perspectives of the Framers regarding the principles animating the Free Exercise and Establishment Clause specifically and religious liberty within the newly founded Republic generally, Adams and Emmerich argue in *A Heritage of Religious Liberty* that the Framers' perspectives on religion may be narrowed into three categories: 1) Enlightenment Separationists, 2) Political Centrists, and 3) Piestic Separationists. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1583 (1989).

Enlightenment Separationists embraced a separation of church and state as the surest means for ensuring the individual's liberty of religious conscience and for insulating civil government from possible corruptions by institutional religion. *Id.* at 1584-87. Prominent Enlightenment Separationists included Thomas Paine, Thomas Jefferson, and James Madison. *Id.* Political Centrists viewed religion (or more precisely Christianity) as "an essential cornerstone for morality, civic virtue, and democratic government." *Id.* at 1588. In practical terms, this view affirmed the imperative of religious toleration and liberty of conscience, yet it also viewed direct governmental accommodations of religion as productive of both good citizenship and good governance. Centrists therefore interpreted the Establishment Clause as forbidding only governmental favoritism between sects of Christianity and not as precluding governmental endorsement and accommodation to Christianity in general. *Id.* at 1590. Prominent Political Centrists included George Washington, John Adams, John Marshall, and Joseph Story. *Id.* at 1588-91. Piestic Separationists were generally members of the dissenting or fringe sects of Christianity who fiercely advocated the imperative of religious liberty as the defender of an authentic faith in and voluntary worship of God. *Id.* at 1591-92. In turn, the Piestic Separationists viewed the legitimate role of the secular authority as a facilitator and promoter of religious faith. *Id.* at 1593. Therefore, practices such as blue laws, religious instruction in public schools, and national days of prayer were considered by this group as wholly appropriate governmental actions to foster an environment in which voluntary religious belief and practice could flourish. *Id.*

Adams and Emmerich conclude that the Political Centrists are the most representative category with regard to the Framers' overall perceptions on religious liberty and church state interaction, and thus contribute the most historical meaning to an interpretation of the First Amendment's religion clauses. *Id.* at 1594. The authors discern four primary principles that permeate the meaning of the Establishment and Free Exercise Clauses: federalism, institutional separation, accommodation, and benevolent neutrality. *Id.* at 1604, 1615, 1625, 1634. By implication then, Adams and Emmerich reason that the Constitution, interpreted from a historical perspective, has accommodationist tendencies: "Although the Founders represented a broad spectrum of views, they were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they did not envision a secular society, but rather one receptive to voluntary religious expression." *Id.* at 1595.

Judeo-Christian cultural majority, who perceive that these practices are unoffensive to the Constitution because they are unoffensive to the majority of society, such a majoritarian analysis is jurisprudentially unwarranted and harmful. First, historical analysis inverts a traditional constitutional inquiry by allowing the past activities of governmental actors to both evince and dictate the constitutionality of the government action in question. Secondly, a decisional framework tethered in large measure to a historical analysis is necessarily static and unresponsive to the social progressivism that has typified the evolution of constitutional law in other meaningful contexts such as race relations¹⁰⁷ and criminal procedure.¹⁰⁸

Additionally, at least three separate, readily identifiable classes of social harm result from the incorporation of secularization and ceremonial deism within the Court's Establishment Clause analysis: (1) *harm to the individual* by making full inclusion within the political community contingent upon religious belief; (2) *harm to society* by discouraging religious tolerance and thereby rendering peaceful coexistence in a pluralistic society untenable; and (3) *harm to religion* in undermining the spiritual experience through secular iconography, making God the equivalent of a public display and limiting the reality of the deity's existence to that of a mere social phenomenon.

A. *Jurisprudential Detriments of Secularization and Ceremonial Deism*

While a critique of the Court's reliance on original intent or, more broadly, a historical analysis, is not novel, it is nonetheless particularly apt with regard to an evaluation of the Court's Establishment Clause jurisprudence. Ironically, no less an authority than Chief Justice John Marshall, a member of the founding generation of the American Republic, disputed the assertion that constitutional analysis requires a historical inquiry. For it was Chief Justice Marshall who, in discussing the parameters of the "Necessary and Proper" clause¹⁰⁹ in *McCulloch*

107. See, e.g., *Brown v. Topeka Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating state sponsored segregation of public schools notwithstanding historically accepted practice of de jure segregation); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's anti-miscegenation statute as violative of the Fourteenth Amendment's Equal Protection Clause).

108. See, e.g., *Wolf v. Colorado*, 338 U.S. 25 (1949) (incorporating the Fourth Amendment's protections against unreasonable searches and seizures and warrants based on probable cause against the states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating against the states the "exclusionary rule," precluding governmental use against an accused of evidence seized in violation of the Fourth Amendment).

109. U.S. CONST. art. I, § 8, cl. 18.

v. Maryland,¹¹⁰ admonished, “We must never forget that it is a constitution we are expounding,”¹¹¹ that is, that the broad generalities of the Constitution should be interpreted broadly to allow for its continued flexibility and applicability to unforeseen circumstances. Thus, if one is at pains to make recourse to original intent as a measure of constitutionality, one should recognize that influential members of the founding generation intended primarily that constitutional interpretation should possess enough flexibility to allow the Constitution to endure beyond the narrow context of a fledgling eighteenth-century agrarian Republic.¹¹²

In the First Amendment context specifically, Justice Robert Jackson eloquently seconded the notion of the counterproductiveness of a purely historical inquiry in his majority opinion in *West Virginia State Board of Education v. Barnette*.¹¹³ Asserting that it should be the principles and not necessarily the practices of the Framers that provide valuable instruction in constitutional interpretation, Justice Jackson announced: “[Our] task [is to translate] the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with problems of the twentieth century.”¹¹⁴ Justice Brennan, in his concurrence in *School District of Abington v. Schempp*,¹¹⁵ similarly rejected an originalist

110. 17 U.S. (4 Wheat) 316 (1819). Although Chief Justice Marshall did rely on the probative value of recent history in affirming the constitutionality of the Second Bank of the United States, this reliance on history should be viewed in the larger context of the opinion in which Chief Justice Marshall explicitly advocates broad interpretation of the text of the Constitution precisely so that constitutional text can triumph over the mere incident of historical circumstance. *See id.* at 407.

111. *Id.* Chief Justice Marshall further explained:

A constitution, to contain an accurate detail of all subdivisions of which its great powers will admit . . . would partake of the proximity of a legal code, and could scarcely be embraced by the human mind . . . Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.

Id.

112. *See id.* at 413. “[Our] constitution [was] intended to endure for ages to come, and consequently, to be adapted to various crises of human affairs.” *Id.*

113. 319 U.S. 624 (1943).

114. *Id.* at 639. For further reinforcement of this “principles versus practices” historical analysis, see *School District of Abington v. Schempp*, 374 U.S. 203, 236 (Brennan, J., concurring): “A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.” *Id.* (Brennan, J., concurring) (footnote omitted).

115. 374 U.S. 203 (1963).

approach to interpretation of the First Amendment as obfuscating the relevant constitutional inquiry.¹¹⁶ Specifically, Justice Brennan commented on how the passage of time has transformed our social practices and, in turn, how contemporary practice should therefore inform constitutional interpretation:

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices It is "a *constitution* we are expounding" and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.¹¹⁷

In addition to the critiques from within the Court regarding the advisability of historical analysis in constitutional interpretation, academic commentators have hastened to detail how the Court's reliance on historical practice undermines the Constitution's legacy and continuing identity as a dynamic document capable of adapting to and initiating social change.¹¹⁸ It need not be gainsaid that if original intent (as measured by historical practice) were the conclusive and

116. *Id.* at 241 (Brennan, J., concurring).

117. *Id.* (Brennan, J., concurring). Moreover, Justice Brennan detailed three specific evolutions in American social practice that rendered a static historical interpretation both inaccurate and counterproductive:

A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous Second, the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision Third, . . . [t]oday the Nation is far more heterogeneous religiously In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Id. at 237, 238, 240, 241 (Brennan, J., concurring).

118. *See* Epstein, *supra* note 8, at 2158-59.

If there is to be freedom of religion in this country today of the type the Framers contemplated 220 years ago, some practices that seemed perfectly permissible then cannot be perfectly permissible now. Otherwise, only eighty percent of Americans would truly have freedom of religion [according to 1990 Census figures approximating that eighty-one percent of the American population espouses belief in the Judeo-Christian concept of God] while the remainder would be constantly reminded [through symbolic governmental endorsements of religion] that their government considers them second-class citizens.

Id. (footnote omitted).

authoritative constitutional analysis, segregation would have remained constitutional,¹¹⁹ women would be denied substantive protection under the Fourteenth Amendment's Equal Protection Clause,¹²⁰ and the Bill of Rights would never have been incorporated against the states.¹²¹ Reasoning from a socially progressive perspective, "broad constructionists" primarily consider historical analysis to be a faulty measure of constitutional scrutiny because it tends to bootstrap majoritarian practices and preferences as per se constitutional: "The purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from raw majoritarian impulses. That purpose 'is undermined if the majority's views govern the determination of whether the majority's accommodation of its own "widely held" religious beliefs violates the Clause's [sic] guarantee.'"¹²²

In the Author's opinion, historical analysis and familiarity with historical practice is a valuable tool, but the Court should utilize it for

119. As illustrative of the point, compare *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (upholding the constitutionality of de jure segregation in public accommodations, asserting that the Fourteenth Amendment was not intended to "abolish distinctions based upon color") with *Brown v. Topeka Bd. of Ed.*, 387 U.S. 483 (1954) (holding racially segregated school systems to be inherently unequal and violative of the Fourteenth Amendment Due Process Clause). In *Plessy* the Court made use of the same reasoning by historical syllogism as was utilized by the Court in *Marsh* to validate legislative prayer. Specifically, the Court in *Plessy* mentioned that

we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress [enacted the week following the ratification of the Fourteenth Amendment] requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned.

163 U.S. at 550-51. Eschewing this excessive reliance on historical practice as a proxy for constitutional analysis, the Court in *Brown* considered contemporary social circumstances in reshaping constitutional doctrine declaring, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." 347 U.S. at 492-93.

120. Compare *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding the constitutionality of a Michigan law restricting bartenders licences to women unless they were the wife or daughter of the proprietor), with *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating a state statutory scheme evincing a preference for appointment of male estate administrators).

121. Compare *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding the Bill of Rights inapplicable to state action), with the Incorporation Cases in which the Supreme Court incorporated selected civil liberties from the Bill of Rights into the Fourteenth Amendment's Due Process Clause in recognition of the fundamental nature of the right in light of both historical practice and contemporary opinion.

122. Epstein, *supra* note 8, at 2171 (quoting *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1656 (1987)) (footnotes omitted).

providing perspective not prescription. The most relevant history of American Constitutional Law should be contemporary history, informed by a consideration of the libertarian principles of the Founders, but not necessarily their practices. As the Warren Court demonstrated so spectacularly in the 1950s and 1960s, the Constitution is capable of accommodating a jurisprudence driven by social progressivism because its glorious generalities lend themselves readily to interpretation and reinterpretation. Therefore, the syllogistic historical reasoning of the Court in opinions such as *Marsh* is inherently flawed because it fails to account for the core constitutional value that animated the Supreme Court's interpretation and expansion of civil liberties in the twentieth century (and which hopefully will extend into the Court's twenty-first century jurisprudence): social progressiveness. Ultimately, in order to maintain its relevancy and legitimacy in a democratic regime, the Constitution must be allowed to continue to evolve as a dynamic document.¹²³ The implications of this dynamic interpretation on the Court's Establishment Clause jurisprudence include acknowledging the demographic shift underway in the United States and the accompanying cultural pluralism it entails. With this in mind, the Court must re-evaluate the continuing constitutional validity of ceremonial deism "because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experiences of the Framers."¹²⁴

B. *Social Harms Accruing From Symbolic Endorsements of Religion*

Qualifying and quantifying the social harm accruing from the Supreme Court's inclusion of ceremonial deism and secularization into its Establishment Clause jurisprudence is difficult because the impact is largely restricted to a psychological impact upon the American population.¹²⁵ Moreover, inasmuch as acts identified as ceremonial deism

123. See *Marsh*, 463 U.S. at 814-16 (Brennan, J., dissenting). Moreover, in advocating a more "flexible" Constitution, Justice Brennan summoned his reasoning in *Schempp*, regarding the relevancy of historical practice in constitutional analysis, to deftly recast the scope of "original intent" so as to serve as a rebuttal to Chief Justice Burger's conception of "original intent": "To be truly faithful to the Framers, 'our use of the history of their time must limit itself to broad purposes, not specific practices.'" *Id.* at 816 (Brennan, J., dissenting) (quoting *Schempp*, 374 U.S. at 241 (Brennan, J., concurring)) (emphasis added).

124. *Id.* at 816.

125. Epstein, *supra* note 8, at 2169-71. Professor Epstein describes the socially alienating consequences extending from ceremonial deism. Specifically, Epstein records the public condemnation and even threats of physical violence rebounding to nonadherents challenging practices of ceremonial deism through litigation, as he laments, "[T]he ostracism that befalls plaintiffs who challenge cherished governmental endorsements of

(i.e., legislative prayer, “under God” in the pledge, “In God We Trust” as the national motto) serve to ratify the sometimes vague and nebulous theistic notions of the majority of Americans, the Court’s Establishment Clause jurisprudence may have gone largely unnoticed by the general population. However, the Court’s reliance on ceremonial deism and a secularization analysis have tremendous symbolic meaning because they represent a paradigm shift (separationist to accommodationist) facilitated by a larger social phenomenon—the tacit judicial approval of an American civil religion.¹²⁶

A movement from one national epigram to another; it is the movement from “E Pluribus Unum” to “In God We Trust,” from the ideal expressed by our original Latin motto—one nation out of highly diverse but equally welcome states and people—to an increasingly pressing enthusiasm in which government re-establishes itself under distinctly religious auspices.¹²⁷

While this phenomenon of American civil religion¹²⁸ may appear upon cursory examination to function as a benign invocation of a nonspecific deity in service to and in legitimization of culturally held values, its nebulous nature attaches a monolithic quality to it, creating destructive impulses towards intolerance by inciting members of society to view nonadherence to this new secularized religion as un-American. Related and derivative harmful effects of the Court’s secularization of religion include a corresponding fracturing of the political community along religious lines and finally, a pollution and debasement of spiritual religion. In short, while ceremonial deism and secularization were likely intended by the Court to provide a shared corpus of secularized values in the hope of crafting a more unified cultural identity for an increasing-

religion is so extreme that most who are offended by these practices bite their tongues and go about their lives.” *Id.* at 2171.

126. While the Court has never acknowledged civil religion as a concept per se in its Establishment Clause decisions (as it has explicitly done in the case of ceremonial deism), the Court is implicitly doing so when it engages in a secularization analysis to declare that a specific practice has “lost” its religious content or adhered itself to the “fabric of our society” because it is sanctioning the coalescence of social norms, religion, and political pragmatism.

127. William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 771 (1984).

128. See *supra* text accompanying note 84.

ly heterogenous society,¹²⁹ the unfortunate result of this endeavor is the potential unraveling of the fabric of our society.

1. Threatening Conscience and Citizenship: Harm to the Individual. Secularization and ceremonial deism function as symbolic governmental endorsements of religion that threaten the nonadherent with potential ostracism from the political community. Justice O'Connor identified social alienation as the chief ill arising from symbolic governmental endorsements of religion in her concurrence in *Lynch*, in which she insisted that the goal of the Establishment Clause was to function as a co-guarantor of religious liberty (in concert with the Free Exercise Clause) by ensuring that religious belief was in no way relevant to one's inclusion within the political community.¹³⁰ Therefore, especially to nonadherents, the Court's exemption of acts of ceremonial deism from constitutional scrutiny is disconcerting because it signals the Court's willingness to permit the fusion of religion and civil society. The resulting creation of a polity saturated with civil religion, complete with ubiquitous public rituals with obvious religious overtones and residual spiritual meaning, confronts nonbelievers with a crisis of conscience to either "deny their citizenship [or] submit to an unholy spiritual fellowship."¹³¹ In essence, by secularizing the religious (i.e., by declaring that a given theistic invocation or ritual has lost all spiritual significance), the Court has sanctified the secular and thereby effectively limited the nonadherent's full exercise of citizenship and membership within the political community.¹³²

129. Furth, *supra* note 10, at 612. Furth views the fluctuations in the Court's Establishment Clause jurisprudence as a struggle to solve America's "national identity crisis." "[T]he pursuit of secularization analysis is a desperate and misguided attempt to preserve a particular construction of American identity that is based largely on the Christian and Jewish traditions. Secularization facilitates a myth of collective American identity." *Id.*

130. 465 U.S. at 687-88 (O'Connor, J., concurring).

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition [by] . . . endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id.

131. Hall, *supra* note 78, at 80-81 (footnote omitted).

132. In this regard Justice Brennan's discussion in *Marsh* of the core separationist and neutrality principles animating the ideological purposes of the Establishment Clause is particularly apt: "[T]he principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the

Governmental endorsements of religion pardoned as acts of ceremonial deism (i.e., justified solely as a function of historic fact and majoritarian practice) are antithetical to both a pluralistic society and individual liberty because they serve to estrange and alienate religious dissidents or nonadherents from the political community and thereby excuse and even enable religious intolerance.¹³³ For what incentive does society generally, and the majority particularly, have to integrate dissident beliefs unto itself in an attempt to forge a cohesive, pluralistic whole when the State has already announced what viewpoints are preferred? Respect for individual liberties cannot survive, much less thrive, in an environment where the government has effectively announced the proper perspective that all responsible citizens should adopt if they wish to be considered full members of the polity.

Obviously, the majority will always view governmental endorsements of their beliefs as uncontroversial, but in our constitutional system, the “tyranny of the majority” is restrained from trouncing the individual’s autonomous exercise of conscience (religious and otherwise) via constitutionally guaranteed civil liberties that preserve the delicate political and social balance between the individual and the collective:

*The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to . . . freedom of worship . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.*¹³⁴

One purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from unchecked majoritarian impulses.¹³⁵ This is especially true when the government endorses something as fundamental and polarizing as belief or nonbelief in religion because such a governmental endorsement threatens to alienate

occasion for battle in the political arena.” 463 U.S. at 805 (Brennan, J., dissenting).

133. Moreover, because the Court’s application of ceremonial deism is decidedly sectarian (that is Judeo-Christian, see *Lynch* (upholding the display of a nativity scene) and *Allegheny* (upholding the display of a Menorah and Christmas tree)), the intolerance extends to all non-Judeo-Christian beliefs: “Late arrivals to America may suppose they can take the government’s religiosity or leave it, but they are stuck with the reality that . . . [o]urs is basically a Christian-pretending government where they will be made to feel ungrateful should they complain.” Van Alstyne, *supra* note 127, at 787.

134. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).

135. Here again Justice Brennan’s brief exegesis in *Marsh* of the philosophical underpinning of the Establishment Clause is instructive, as he describes the first purpose of the clause as “guarantee[ing] the individual *right to conscience*.” 463 U.S. at 803 (Brennan, J., dissenting) (emphasis added) (footnote omitted).

the dissident from the political community.¹³⁶ Thus, the normative imperative of the Establishment Clause (to protect individual autonomy by rendering religious belief (or nonbelief) irrelevant for purposes of membership in the political community) is undermined if the majority's views are allowed to govern the determination of whether the government's accommodation of the majority's own widely held religious beliefs violate the Establishment Clause. Moreover, to any members of the Judeo-Christian majority (of which the Author professes to be a member) who are unmoved by the plight of the conscientious nonbeliever exiled in a culture replete with ceremonial deism, consider Professor Stephen Epstein's role-reversing, deity-swapping hypothetical before too hastily declaring that acts of ceremonial deism inflict de minimis harm at worst upon overly sensitive nonadherents:

Due to radically altered immigration and birth patterns over the past century, Muslims now comprise seventy percent of the American population, while Christians and Jews comprise only twenty-five percent collectively. Elementary school students in most public school systems begin each day with the Pledge of Allegiance in which they dutifully recite that America is one nation "under Allah;" our national currency . . . contains the inscription codified as our national motto, "In Allah we trust;" . . . presidential addresses are laced with appeals to Allah . . . and, pursuant to federal and state law, only Muslim holy days are officially celebrated as national holidays Surely any court addressing these practices would conclude that the federal and state governments behind them have impermissibly sought to "establish" the religion of Islam. Right?¹³⁷

Finally, because the Court's secularization and ceremonial deism analyses "sacrifice[] minority interests in order to preserve agreeable traditions," an Establishment Clause test encumbered with these impediments to individual liberty is untenable in and antithetical to our pluralistic society.¹³⁸

2. Encouraging Exclusion and Erecting Barriers: Harm to Society. The symbolic endorsements of religion represented by exercises of ceremonial deism or civil religion threaten the social fabric of American society because they provide an incentive for intolerance by those groups favored by the governmental endorsement. More broadly, governmental endorsements of one religious viewpoint over another, or of religion versus nonreligion generally, subvert the core First Amend-

136. See *Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring).

137. Epstein, *supra* note 8, at 2084-85 (footnotes omitted).

138. Furth, *supra* note 10, at 611.

ment value of a “vigorous public discourse”¹³⁹ regarding issues of public concern. Governmental endorsements of religion skew the public debate by involving the government in what should be a discussion among citizens regarding how they will coexist in civil society despite their conflicting theological or nontheological beliefs. Put simply, when the government interferes in the public discourse on religion by endorsing one viewpoint over another it corrupts the process whereby society finds ways to accommodate dissident beliefs within the political community.¹⁴⁰

Ironically, while exercises in ceremonial deism and other secularized rituals (such as crèche displays, legislative prayer, and the Pledge of Allegiance (complete with theistic reference)) are viewed as presumptively valid by the Court precisely because they are widely acknowledged public traditions with incidental or purged religious significance, the practical impact of these practices on society is the social stratification of individuals and groups according to their religious preferences. For instance, as Justice Kennedy recognized in *Lee v. Weisman*,¹⁴¹ graduation prayers in the public school setting impose a “subtle coercion” upon the nonadherent to either conform or suffer the social alienation of a conscientious objection.¹⁴² Rather than encouraging full participation in a culture dedicated to neutrality towards all views on religion, the culture of civil religion created by ceremonial deism succeeds in

139. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). Justice Brennan justified providing limited First Amendment protection for media defamation of public officials by reference to “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.*

Years earlier in *Whitney v. California*, 274 U.S. 357 (1927), Justice Brandeis described the First Amendment in similarly libertarian terms, extolling the First Amendment as an expression and guarantor of personal autonomy and political freedom:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties They valued liberty both as an end and as a means They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Id. at 375 (Brandeis, J., concurring) (footnote omitted).

140. See Furth, *supra* note 10, at 606, arguing that governmental endorsements of religion instigate cultural divisiveness because “[s]uch implicit endorsements result in religious divisiveness and jeopardize the truly common culture that unites adherents of all religious sects and nonadherents.” *Id.* (footnote omitted).

141. 505 U.S. 577 (1992).

142. *Id.* at 592.

alienating individuals and groups from society by creating a political community pregnant with religious symbols and significance. As one commentator astutely asserted, “Individuals and religious groups are forced to isolate themselves, either by exempting themselves from secularized practices such as the Pledge or by withdrawing from civic functions to avoid spiritual pollution. Thus, secularization injures the civil community by forcing religious groups to choose between their religious and civil allegiances.”¹⁴³

The potential for the alienation of the theistic believer and the nonadherent alike from the political community by virtue of ceremonial deism is exacerbated when one considers that ceremonial deism in its current incarnation is decidedly sectarian.¹⁴⁴ To date, the Court’s ceremonial deism analysis has been highly colored by the Judeo-Christian beliefs of the majority of American society. This is emphasized not to suggest that the Author deems exercises of the Judeo-Christian tradition unwelcome in society; rather, the Author seeks to underscore the point that ceremonial deism is not as benign and universally inclusive as its proponents suggest. Specifically, the selective application of ceremonial deism only to those religious symbols consistent with the Judeo-Christian tradition serves to identify these symbols with the secular culture and define the pluralistic American cultural experience

143. Furth, *supra* note 10, at 606. *But see* Maddigan, *supra* note 84, at 293 (arguing that “civil religion embodies values that are essential to American democracy.”) Moreover, Maddigan rejects the assertion that civil religion is capable of fomenting social division by either proscribing or prescribing religious belief. *Id.* at 342. Civil religion, Maddigan insists, is primarily a cultural construct rather than a governmental construct, functioning in large measure as a descriptor of the “American identity myth.” *Id.* Ultimately for Maddigan civil religion plays a distinct and indispensable role in civil society distinct from both church and state:

Civil religion is the set of basic beliefs that a nation has about itself.

...

[C]ivil religion is independent of both church and state. Civil religion is independent of the church because its conception of God is unique and does not match that of any particular religious group Admittedly, civil religion is in some ways more consistent with the beliefs of many traditional churches than it is with . . . antireligious beliefs. This consistency is an inevitable outgrowth of the historical religiousness of the American people American civil religion is also independent of the state because it represents more than blind nationalism. Civil religion often involves unfavorable comparisons of the real nation with the ideal country.

Id. at 317, 324-26 (footnote omitted).

144. *See Lynch*, 465 U.S. at 687 (validating the public display of a nativity scene (Christian symbol) on courthouse grounds); *Allegheny*, 492 U.S. at 579 (validating the public display of a Menorah, a Jewish symbol, on courthouse grounds).

according to a “Christian ethnocentrism.”¹⁴⁵ This manifest governmental sectarian preference for Judeo-Christian symbols as representing the American cultural identity and experience serves both to overlook and exclude nonadherents from the definition of what it is to be an “American.” This in turn threatens to rend the “fabric of our society” because it reiterates the force of religion in maintaining standing in the political community.¹⁴⁶

3. Secularizing the World and Enfeebling Spiritual Experience: Harm to Religion. The Supreme Court has long recognized that the separation of church and state is essential to preserve the integrity of religious practice and religious liberty.¹⁴⁷ However, the Court’s current reliance upon ceremonial deism as a component of its Establishment Clause jurisprudence encroaches upon religious autonomy. Specifically, the integrity of religious practices is questioned rather than affirmed when the Court secularizes religious symbols and rituals by declaring them bereft of spiritual substance and hence fit for secular public use.¹⁴⁸ Undoubtedly, practicing Christians everywhere would be

145. See *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1651-52 (1987).

146. See *Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring). See also Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 367-68 (1996). “History provides us with abundant lessons of the unique dangers of encouraging sectarian competition State creation of explicitly sectarian benefits may foster resentment among sects, which in turn may aggravate preexisting and potentially destructive social divisions.” *Id.* A sampling of historical examples of the catastrophic results of a state’s sectarian preferences include: the French wars of religion, (pitting the Catholic League versus the Huguenots) 1562-1598; the Thirty Years War 1618-1648; and the ongoing Catholic/Protestant turmoil in Northern Ireland.

Finally, the First Amendment is not the only source of authority in the Constitution regarding the prohibition against government making adherence to religion in any way relevant to a person’s standing in the political community. Article VI, clause 3 of the U.S. Constitution forbids the imposition of religious oaths as a prerequisite qualification for public officers of the United States government. U.S. CONST. art. VI, cl. 3. See also *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (incorporating the religious test or oath prohibition against the states via the Fourteenth Amendment Due Process Clause).

147. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871)). “The structure of our government has . . . secured religious liberty from the invasion of the civil authority.” *Id.*

148. See *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting). Justice Brennan asserted that this “secular conversion” of religious events occurred when 1) public necessity required religious ritual to “serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge,” and 2) the practice has cultural longevity (which presumably renders it culturally unobtrusive and constitutionally permissible). *Id.*

shocked and offended to hear that a nativity scene is a mere historical acknowledgment of Christmas,¹⁴⁹ rather than a tangible depiction of God's promise of salvation to mankind manifest in the birth of Jesus Christ. Likewise, conscientious Jews would no doubt find fault with a description of the significance of a Menorah that denies the ascendent spiritual content of that symbol as a representation of the covenant between Jehovah and the Israelites.¹⁵⁰ Finally, it would no doubt surprise people of all monotheistic faiths to learn that the act of prayer, a sacred act of communication with one's God, is considered by the Court to be a mere ceremonial gap filler used to solemnize the opening of legislative sessions.¹⁵¹

In the process of its secularization analysis in *Lynch* (nativity scene), *Allegheny* (Menorah), and *Marsh* (legislative prayer), the Court negated the religious import and significance of the symbols and practice at issue and thereby undermined their spiritual authenticity. Furthermore, by secularizing the rituals and practices at issue, the Court has effectively undercut the autonomy of religious practice, divorcing the rituals and practices from their spiritual foundations. Thus, ceremonial deism entices the Court to comment upon the authenticity and spiritual substance of religious symbols and practices, thereby placing the Justices in the perilous and unprecedented role of arbiters of cultural semiotics. Unfortunately, in fulfilling this hastily assumed role, the Court ultimately succeeds only in offending adherent and nonadherent alike by diluting religious symbols and practices of their spiritual significance (via a secularization analysis), while simultaneously imposing this watered down version of secularized religion upon society as a permissible form of ceremonial deism.

Finally, the secularization of religious acts and symbols into acts of ceremonial deism, isomorphically merged into the cultural mainstream as civil religion, serves to distort the genuineness of adherence as a

149. The majority in *Lynch* confined the significance of the nativity scene to merely, "engendering a friendly community spirit of good will in keeping with the season." *Id.* at 685.

150. In his plurality opinion in *Allegheny*, Justice Blackmun described the Menorah as "simply a recognition of cultural diversity." 492 U.S. at 619.

151. In *Marsh*, Chief Justice Burger described prayer in sociological rather than spiritual terms, asserting that opening legislative sessions with prayer "is simply a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. Professor Hall responds incredulously to this analysis by the Court, commenting that, "[i]t would, no doubt, come as a surprise to those who offer legislative prayers that their efforts are constitutional only because the Court construes their words to be the functional equivalent of the gavel used to bang a meeting to order." Hall, *supra* note 78, at 63.

component of religious faith and, thus, is inconsistent with the voluntarist model of religious practice. Simply put, subtly coerced adherence to a civil religion that extolls God's presence as a social fact or social construct, rather than a spiritual phenomenon, degrades the conceptual validity of religion generally. "If God is a social fact rather than a spiritual choice, the belief of members may be a result of social conformance rather than individual conviction."¹⁵²

IV. RECONFIGURATION

Having diagnosed what ails the current incarnation of the Supreme Court's Establishment Clause jurisprudence, it seems appropriate to offer some suggestions for a cure. Ironically enough, the proper inoculation to ward off the scourge of secularization has already been identified (unintentionally) by the Court: a forthright, consistent application of the endorsement test, free of the dual corruptions of ceremonial deism and secularization analysis. It was most notably Justice Kennedy who, in his dissenting opinion in *Allegheny County v. ACLU*,¹⁵³ recognized the incongruity between a strict application of the endorsement test and any allowances for ceremonial deism.¹⁵⁴ As he remarked in exasperation, "Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past."¹⁵⁵ While Justice Kennedy views this incongruity as a reason to reject the use of the endorsement test as a measure of constitutional legitimacy¹⁵⁶ (because application of the test without its ceremonial deism exception would "invalidate scores of traditional practices"),¹⁵⁷ in *Newdow v. U.S. Congress*,¹⁵⁸ the Ninth Circuit embraced this concept and demonstrated the efficacy and conceptual integrity of an endorsement test purged of the corruptive influences of ceremonial deism and secularization analysis.¹⁵⁹

152. Furth, *supra* note 10, at 604.

153. 492 U.S. 573 (1989).

154. *Id.* at 601 n.51 (Kennedy, J., dissenting).

155. *Id.* at 674 (Kennedy, J., dissenting).

156. *Id.* at 669 (Kennedy, J., dissenting) (concluding that the endorsement test was "flawed in its fundamentals and unworkable in practice.").

157. *Id.* at 674 (Kennedy, J., dissenting).

158. 292 F.3d 597 (9th Cir. 2002).

159. *See id.* at 607-08. Circuit Judge Goodwin, writing for the court, exposed the frailty of the "acknowledgment" and "solemnization" arguments traditionally offered by accommodationist justices on the Supreme Court to justify the constitutional permissibility of acts of ceremonial deism:

A. *Enlightened Endorsement Analysis: Newdow v. United States Congress*

In June of 2002, the United States Court of Appeals for the Ninth Circuit demonstrated the veracity of Justice Kennedy's poignant observation of *Allegheny* in *Newdow*, wherein the court subjected the text of the Pledge of Allegiance to constitutional scrutiny and found it wanting.¹⁶⁰ After first acknowledging the current state of flux in the Supreme Court's Establishment Clause jurisprudence, and finding no specific directive from the Supreme Court regarding the appropriate test to apply,¹⁶¹ the Ninth Circuit decided to undertake a rigorous application of the endorsement test, the coercion test, and the *Lemon* test respectively.¹⁶² Applying the three existing Establishment Clause tests, the court held that the inclusion of the phrase "one Nation under God" in the text of the Pledge of Allegiance, when recited in public schools by school children led by their teachers, violates the Establish-

In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is *not a mere acknowledgment* that many Americans believe in a deity Rather, the phrase "one nation under God" in the context of the Pledge is normative The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God.

. . . .
The Pledge, as currently codified, is an *impermissible government endorsement of religion* because it sends a message to unbelievers "that they are outsiders, not full members of the political community."

Id. (emphasis added) (citation omitted).

160. *Id.* at 608 (endorsement test), 608-09 (coercion test), 611 (*Lemon* test).

161. The Ninth Circuit's indecision concerning which Establishment Clause test to apply vividly demonstrates both the unnecessary complexity of the current triumvirate of Establishment Clause tests and the practical need (to say nothing of the philosophical and sociological need for a consistent, separationist standard as discussed in *infra* Part III) for a unified, comprehensive standard. Specifically, a new comprehensive, unified standard is desirable to both alleviate any confusion by the lower courts as to which test to apply and to avoid unscrupulous results-based selection of a particular test as more advantageous than another in a given circumstance (e.g., under the "coercion" test, the display of a crèche would be considered constitutional because the display did not involve the government in coercing anyone either to preform or conform to a religious exercise. *Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting). By contrast, the Court has held a public crèche display violative of the endorsement test because an "objective observer" would conclude that the central placement of the display on public property signaled the government's endorsement of the theological message communicated by the crèche. *Id.* at 599, 600.).

162. 292 F.3d at 607.

ment Clause.¹⁶³ Considering how well ensconced the Pledge of Allegiance was in the pantheon of ceremonial deism in the years prior to the Ninth Circuit's decision in *Newdow*,¹⁶⁴ the significance of this decision cannot be overestimated.

Turning to the decisional particulars of the case, in *Newdow* the court was faced with a constitutional challenge to the Pledge of Allegiance by Michael Newdow, a parent whose daughter attended elementary school in the Elk Grove Unified School District ("EGUSD").¹⁶⁵ Beginning its

163. *Id.* at 608, 611.

164. On no fewer than five prior occasions the Supreme Court, in dicta, had affirmed the constitutionality of the Pledge of Allegiance as a permissible patriotic exercise whose religious substance is overshadowed by its secular purpose. See *Allegheny*, 492 U.S. at 602-03; *Lynch v. Donnelly*, 465 U.S. 668, 676, 693 (1984) (O'Connor, J., concurring); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring); *Schempp*, 374 U.S. at 306-08 (Goldberg, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

Equally interesting are the prior references in Establishment Clause caselaw wherein several members of the Court candidly admitted that under a strict application of the endorsement test, the constitutionality of the pledge must fail. See *Lee v. Weisman*, 505 U.S. 577, 639 (1992) (Scalia, J., dissenting) (stating that "recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction [at issue here];") *Allegheny*, 492 U.S. at 673 (Kennedy, J., dissenting) (stating that "it borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a 'full membe[r]' of the political community' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false"); *Wallace v. Jaffree*, 472 U.S. 38, 88 n.3 (1985) (Burger, C.J., dissenting) (citing the legislative history of the amended text to the Pledge of Allegiance as demonstrating the indistinguishable similarity between government's "acknowledgment" versus endorsement of religion and concluding, "[i]f this is simply 'acknowledgment,' not 'endorsement,' of religion . . . the distinction is far too infinitesimal for me to grasp." *Id.*).

165. 292 F.3d at 600. For purposes of clarity, the Author now includes a brief factual and procedural history of the case. Michael Newdow's daughter attended elementary school in the EGUSD where, in accordance with state law and local school district rule, teachers in EGUSD begin each day by leading their students in reciting the Pledge of Allegiance. Newdow filed claim in the United States District Court for the Eastern District of California asserting that his daughter suffered a constitutional injury when she observed and listened to the daily recitation of the pledge by her teacher and classmates that included the phrase "under God." Seeking injunctive and declaratory relief only, Newdow challenged the constitutionality of 4 U.S.C. § 4 (1998) (legislation amending the Pledge text to include "under God"), the California statute mandating the daily recitation of the Pledge, and the school district policy implementing the state statute. *Id.* at 600-01.

The EGUSD responded by filing a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. At the motion to dismiss hearing held before the Magistrate Court for the Eastern District of California, the EGUSD requested that the court consider only the constitutionality of the Pledge. The magistrate court reported findings and a recommendation in favor of the constitutionality of the Pledge and the dismissal of Newdow's claim. The district court adopted the recommendation of the magistrate court and dismissed Newdow's claim. Newdow subsequently appealed to the United States Court of Appeals for the Ninth

constitutional analysis, the court applied the endorsement test first and determined that the phrase “under God” in the context of the Pledge is not merely descriptive of the historical role of religion in the republic, but rather functions as a normative statement because “[t]o recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954¹⁶⁶—monotheism.”¹⁶⁷ Therefore, when uttered in the context of the Pledge, the phrase under God espouses a religious belief in monotheism and, by virtue of its codification as federal law,¹⁶⁸ embroils the government in a symbolic endorsement of religion because it “impermissibly takes a position with respect to the purely religious question of the existence and identity of God.”¹⁶⁹ Moreover, the court considered this normative affirmation to be violative of the endorsement test because “it sends a message to unbelievers ‘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.’”¹⁷⁰

Proceeding to an evaluation of the constitutional significance of the recitation of the phrase under God in the public school classroom, the

Circuit, and the court accepted the appeal. *Id.*

166. In 1942 Congress codified the Pledge of Allegiance as “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all.” Pub. L. No. 623, ch. 435, § 7 (1942). Congress amended the text of the pledge in 1954 to include the words “under God.” 4 U.S.C. § 4. The legislative history of the revised language of the pledge demonstrates that Congress sought to include the reference to “God” as an acknowledgment of “the guidance of God in our national affairs,” 1954 U.S.C.C.A.N. 2339, 2341-42, thereby emphasizing a stark contrast between the “materialist” Communist society of the U.S.S.R. versus the United States’s belief in the “sovereignty of God.” *Id.* at 2341. While the legislative history also contains an explicit Congressional disclaimer that “[t]his is not an act establishing a religion,” *id.*, statements from the sponsor of the revised Pledge language demonstrate that at best Congress’s motives were a mixture of both patriotism and religious ideology with the later predominating:

Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

Id. at 2340-41.

167. *Newdow*, 292 F.3d at 607.

168. 4 U.S.C. § 4.

169. *Newdow*, 292 F.3d at 607.

170. *Id.* at 608 (quoting *Lynch*, 465 U.S. at 688).

court applied the coercion test in exploring its concerns with what the Supreme Court had previously termed the inherent or subtle coercion¹⁷¹ towards norm conformity present in the public schools (given the young age and impressionability of the children and the authoritarian dynamic present in the classroom between teacher and student).¹⁷²

Responding to the school board's arguments that exposure of nonadherents to the recitation of the phrase under God imposed no more than a de minimis constitutional injury,¹⁷³ the court quoted *Lee v. Weisman*¹⁷⁴ with approval in support of the court's position that a majoritarian analysis is an improper perspective from which to view the severity of an Establishment Clause violation.¹⁷⁵ In fact, the court chided EGUSD, stating that while the phrase of monotheistic affirmation included within the Pledge is unoffensive to a believer, to a nonbeliever (in the norm conformity context of the public school) the religious content of the Pledge may reasonably appear "to be an attempt to enforce a 'religious orthodoxy'" of monotheism.¹⁷⁶ Therefore, the court held that the Pledge in this context was impermissibly coercive in violation of the Establishment Clause because "[it] place[s] students in the untenable position of choosing between participating in an exercise with religious content or protesting."¹⁷⁷

Finally, the court concluded its analysis with an application of the three-pronged *Lemon* test, and after an examination of the legislative history of the codification of the Pledge text (as amended in 1954 at 4 U.S.C. § 4), concluded that the phrase "one Nation under God" lacked a

171. See *Engel*, 370 U.S. at 431, "When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect coercive pressure* upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* (emphasis added).

172. *Newdow*, 292 F.3d at 608-09.

173. This point was seized upon by Judge Fernandez, the dissenting circuit judge in *Newdow* who was incredulous of the notion that the pledge language trespassed upon the neutrality toward religion required by the First Amendment:

[T]he danger that "under God" in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis.

...

[I]t comes to this: such phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity.

Id. at 613, 614 (Fernandez, J., concurring in part and dissenting in part).

174. 505 U.S. 577 (1992).

175. *Newdow*, 292 F.3d at 613, 614.

176. *Id.* at 609 (quoting *Lee*, 505 U.S. at 592).

177. *Id.* at 608.

secular purpose.¹⁷⁸ Specifically, when the court examined the legislative history, it determined that indeed the Act's sole purpose was to advance religion as a means of differentiating the United States from the "atheist" Communist nations.¹⁷⁹ EGUSD argued that the Pledge, considered as a whole, possessed a secular purpose, namely, the inculcation of patriotism. Moreover, the school board argued that the reference to "God" was a mere invocation of "ceremonial deism," a constitutionally permissible means of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."¹⁸⁰ The court dismissed this argument, refusing to forsake a constitutional analysis in deference to ceremonial deism and instead declared itself bound by the Supreme Court's analysis in *Wallace v. Jaffree*¹⁸¹ to examine the revised text and the purpose for the revision standing alone.¹⁸² Applying *Wallace*, the court concluded that the legislative history indicated a clear governmental endorsement of monotheism¹⁸³ and accordingly declared that the revised Pledge lacked a secular purpose because "[t]he Establishment Clause guards not only against the establishment of 'religion as an institution,' but also against the endorsement of religious ideology by the government."¹⁸⁴

B. Endorsing A New Standard: The Desirability of Reconfiguring the Supreme Court's Establishment Clause Jurisprudence According to the Newdow Endorsement Test

The Supreme Court should undertake to reconfigure its Establishment Clause jurisprudence with reference to the analytically consistent separationist model of the symbolic endorsement test as applied by the Ninth Circuit in *Newdow*. Specifically, the Supreme Court should undertake a "pure" endorsement inquiry that employs the perspective of the objective observer to determine whether the purpose or effect of a

178. *Id.* at 609.

179. *Id.* The court found the declaration of the congressional sponsor of the revised Pledge language particularly revealing of the legislative intent: "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism . . ." *Id.* at 610 (quoting 1954 U.S.C.C.A.N. 2339, 2340).

180. *Id.* at 610 (quoting *Lynch*, 465 U.S. at 693).

181. 472 U.S. 38 (1985).

182. *Newdow*, 292 F.3d at 610.

183. See *supra* note 166. For a treatment of the legislative history of the 1954 amendment to the text of the Pledge of Allegiance, see *supra* note 166.

184. *Newdow*, 292 F.3d at 611.

governmental action communicates a symbolic governmental endorsement or disapproval of religion. In elucidation of this standard, the Court could make recourse to its own elaboration of this symbolic endorsement inquiry in *Grand Rapids School District v. Ball*,¹⁸⁵ in which the Court advised that a proper endorsement inquiry would ascertain whether “the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices.”¹⁸⁶

To ensure the efficacy and neutrality in the application of this “pure endorsement test,” care must be taken to ensure that the objective observer’s viewpoint is not tainted with majoritarian tendencies. Specifically this observer’s viewpoint should be sanitized from a perceivable bias or influence by his over-familiarity with the particular historical practices of the community in question (because this approach inevitably ratifies the constitutional validity of continued governmental endorsements based upon an established historical practice of governmental endorsements, e.g., *Marsh v. Chambers*¹⁸⁷). Rather, the objective observer utilized in a pure endorsement inquiry is capable of recognizing obvious manifestations of theological substance in public displays and acts (i.e., he would recognize prayer as a spiritual act of communication with God and would recognize a crèche as a symbolic depiction of the birth of Christ as a profound depiction of God’s love and not merely a representation of an historical event). In more intelligible terms, the closest approximation yet conceived appears to be either Professor Tribe’s nomination of the “reasonable nonadherent”¹⁸⁸ or, perhaps as a more “neutral” alternative, Justice Stevens’s “casual passerby.”¹⁸⁹

185. 473 U.S. 373 (1984).

186. *Id.* at 390.

187. 463 U.S. 783 (1983).

188. Tribe, *supra* note 8, at 1293.

“When deciding whether a state practice makes someone feel like an outsider, the result often turns on whether one adopts the perspective of an outsider or that of an insider It seems clear that, in deciding whether a government practice would impermissibly convey a message of endorsement, one should adopt the perspective of a non-adherent.”

Id. (footnotes omitted).

189. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799, 808 n.14 (1995).

At least when religious symbols are involved, the question whether the State is “appearing to take a position” is best judged from the standpoint of a “reasonable observer.” It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses.

In any case, this newly modified objective observer will be rightly insensitive and impervious to ceremonial deism arguments in favor of governmental endorsements of religion (i.e., acknowledgment, secularization, de minimis harm, historical practice) as detrimental to and derogative of individual liberty, social cohesiveness, and religious autonomy. Application of this insensitivity to insulating public rituals and symbols with sacral antecedents (i.e., ceremonial deism) would no doubt result in an invalidation of many presently cherished public rituals and symbols¹⁹⁰ (including the Pledge, the national motto “In

. . .

Justice O'Connor apparently would not extend Establishment Clause protection to passersby who are unaware of Capitol Square's history But passersby, including schoolchildren, traveling salesmen, and tourists as much as those who live next to the statehouse, are members of the body politic, and they are equally entitled to be free from government endorsement of religion.

Id. (internal citation omitted).

In *Pinette* Justice Stevens reasoned that the “reasonable passerby” would interpret an unattended gothic cross in a public park as a governmental endorsement of the religious ideas associated with that symbol. *Id.* at 801-02 (Stevens, J., dissenting). Thus Justice Stevens's “reasonable passerby” has considerably more power to perceive governmental endorsements than Justice O'Connor's observer, whose knowledge of community history prerequisite inculcates a majoritarian preference to validate the status quo.

190. Epstein, *supra* note 8, at 2137-54. Professor Epstein provides a cogent and comprehensive constitutional analysis of the validity of ten examples of ceremonial deism (legislative prayer; prayers at presidential inaugurations; presidential addresses invoking the name of God; the invocation “God save the United States and this Honorable Court”; oaths of public officers, court witnesses, and jurors; the use of “in the year of our Lord” on public documents; official observation of Thanksgiving and Christmas holidays; the National Day of Prayer; the phrase “under God” in the Pledge; the National Motto “In God We Trust”) and concludes that all of them, save theistic invocations at presidential inaugurations, communicate an impermissible governmental endorsement of religion. *Id.*

For Epstein, the sacrifice of these “core” practices of ceremonial deism, while culturally disruptive to the majority, are nonetheless constitutionally and socially desirable to maintain integrity in the Supreme Court's Establishment Clause jurisprudence and a tolerant, pluralistic society.

If, however, the Court means what it says when it espouses the principle that government may not, consistent with the Establishment Clause, endorse religion and send messages to citizens that cause them to feel like outsiders in the political community, the Court should have the intellectual honesty and fortitude to recognize that ceremonial deism violates a core purpose of the Establishment Clause. Undoubtedly, such a decision will be very unpopular But the Court has in the past had the courage to make and enforce unpopular decisions in the areas of segregation, school prayer, [and] criminal procedure Just as society has, in large measure, grown to accept these decisions, American citizens can certainly learn to accept a decision that will ensure that their grandchildren and great-grandchildren, no matter what America's religious composition is in their time, will never be made to feel like outsiders.

Id. at 2174.

God We Trust,” National Days of Prayer, publicly observed religious holidays, etc.), however, as described in Part II, American society will reap an abundant recompense when it exiles ceremonial deism from its currently privileged position within the Court’s Establishment Clause jurisprudence.

To further demonstrate the conceptual distinctions between and practical implications of the Court’s presently corrupted model of the endorsement test, as distinguished from the pure model of endorsement advocated here, a more specific critique of the decisional components is desirable. To that end, one should first acknowledge that the Ninth Circuit’s application of the endorsement test in *Newdow* is strikingly dissimilar from the Supreme Court’s unnecessarily complex treatment of the same subject matter. Whereas the Supreme Court usually attempts to convince itself, and its audience, that the putatively ceremonial deistic act at issue has “lost through rote repetition any significant religious content,”¹⁹¹ the Ninth Circuit in *Newdow* refused to engage in any such contorted, deconstructionist, secularization analysis.¹⁹² Specific evidence of this assertion may be found in a comparison of the respective courts’ constructions of the objective observer utilized in an endorsement analysis. The Ninth Circuit’s treatment of the objective observer is more consistent with the Supreme Court’s own decisions regarding the knowledge and characteristics attributed to the objective observer. Specifically, the Ninth Circuit evaluated the text, legislative history, and implementation of the challenged policy from the perspective of an objective observer (per the Supreme Court’s instruction to that effect in *Wallace*¹⁹³ and *Ball*¹⁹⁴) without any preconceived majoritarian impulses, who was rightfully incredulous of the secular purpose of the overt theistic invocation contained within the Pledge.¹⁹⁵ By contrast, the Supreme Court routinely attempts to circumvent the neutrality requirement¹⁹⁶ of the endorsement test by equipping its objective observer with an implacably majoritarian viewpoint.¹⁹⁷

191. *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (citation omitted).

192. See 292 F.3d at 607-08.

193. 472 U.S. at 76. “The relevant issue is whether an *objective observer*, acquainted with the text, legislative history, and implementation of the statute, would perceive [the challenged practice at issue] as a state endorsement of [religion].” *Id.* (emphasis added).

194. 473 U.S. at 370.

195. *Newdow*, 292 F.3d at 607-08.

196. *Wallace*, 472 U.S. at 60. “The government must pursue a course of *complete neutrality* toward religion.” *Id.* (emphasis added).

197. Justice O’Connor’s concurring opinion in *Pinette* is an excellent illustration of this inculcation of a majoritarian viewpoint into the “objective observer.” See 515 U.S. at 772-83 (O’Connor, J., concurring). Retreating from her announcement in *Ball* that the views

Certainly the most desirable aspect of the Ninth Circuit's application of the endorsement test lies in its expulsion of ceremonial deism from the analysis. While the court would have spared itself considerable public contempt and been on relatively safe constitutional ground had it chosen to affirm the constitutionality of the Pledge (given the Supreme Court's five prior affirmations in dicta of the constitutionality of the Pledge¹⁹⁸), the court not only refused to employ any ceremonial deism arguments to salvage the constitutionality of the Pledge, the language of the decision communicates a disregard for the legitimacy of such arguments.¹⁹⁹ Specifically, the court vitiated the foundation of the ceremonial deism rationale by refusing to infuse majoritarian tendencies

of the nonadherent should be taken into consideration when evaluating a potential Establishment Clause violation (suggesting that the appropriate inquiry required judicial consideration of whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Ball*, 473 U.S. at 390 (emphasis added)), in *Pinette* Justice O'Connor appears primarily concerned with insulating majoritarian impulses from constitutional scrutiny. See 515 U.S. at 779-81 (O'Connor, J., concurring). (Although Justice O'Connor explicitly disclaims any such intent, "[s]aying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share [does not] choose[] the perceptions of the majority over those of a 'reasonable non-adherent.'" *Id.* at 780 (O'Connor, J., concurring) (citation omitted)).

The construction of Justice O'Connor's increasingly accommodationist reasonable observer is facilitated by her attributing several majority friendly inferences regarding the relationship between the government and public displays of religious symbols to her reasonable observer. *Id.* at 780-81 (O'Connor, J., concurring). Specifically, in her concurring opinion in *Pinette* (wherein she affirmed the constitutionality of a display of a gothic cross in a public park because the park had traditionally been an open public forum for secular and religious speech), Justice O'Connor asserted that the reasonable observer should be familiar with the particular history and context of that community when evaluating possible governmental endorsements of religion. *Id.* at 780 (O'Connor, J., concurring). However, as discussed *supra* Part III.A., using history as a self-validating measure of constitutional scrutiny is jurisprudentially suspect. Moreover, in her attempt to establish a workable "collective standard" that all members of a given community can support, Justice O'Connor treads dangerously close to making constitutional protections more a matter of majoritarian impulse rather than legal right. Her remarks reflect a willingness to alienate "unreasonable" nonadherents from the political community when she posits that the endorsement test is not concerned with "saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe," nor had "[a] State . . . made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Id.* at 779-80 (O'Connor, J., concurring).

198. *Allegheny*, 492 U.S. at 602-03; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring); *Schempp*, 374 U.S. at 306-08 (Goldberg, J., concurring); *Engel*, 370 U.S. at 435 n.21.

199. See *Newdow*, 292 F.3d at 610.

into its objective observer;²⁰⁰ the result is an observer who is unconcerned with the traditional arguments advocating ceremonial deism: acknowledgment of historical practice and de minimis harm to nonadherents.

The strength and appeal of this pure endorsement approach utilized in *Newdow* lies in the neutral public sector it preserves for societal debate concerning religious beliefs, free from any unnecessary governmental disruptions and distortions of that debate via impermissible endorsements of one religious viewpoint over another or of religion versus nonreligion generally. Governmental endorsements of religion inhibit the vigorous public discourse sought by the First Amendment because they effectively sanction religious intolerance. As referred to earlier in this Comment,²⁰¹ those in the majority who have their religious beliefs incorporated unto the entire society via governmental endorsement have no incentive to be tolerant of nonadherents because they have essentially been assured by the government of the rectitude of their views. While in solely cultural organizational terms the attendant homogenizing results of a newly wrought common culture premised upon an American civil religion (wherein the shared values of the majority are depicted by secularized public rituals or iconography) has some appeal,²⁰² a constitutional inquiry should not end there.

200. *Id.*

The flaw in defendants' argument is that it looks at the text of the Pledge "as a whole," and glosses over the 1954 Act. The problem with this approach is apparent when one considers the Court's analysis in *Wallace* [wherein Justice O'Connor's concurrence advised that]

...

[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of [religion].

Id. at 604, 610 (quoting *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring)).

Abiding by the Supreme Court's instructions in *Wallace*, the Ninth Circuit was unwilling to engage in a secularization analysis. Rather, the Ninth Circuit insisted upon an application of the endorsement analysis, which adopted a sterilized, neutral view of the practice at issue, unmitigated by any viscerally satisfying references to history and tradition. *See id.* at 607-08.

201. *See supra* Part III.B.1.

202. Regarding the salutary effects of American Civil Religion, Maddigan asserts that apart from equipping secular society with a set of referential traditions, rituals, and icons, Civil Religion is the repository of a set of moral and democratic values essential to constructing and sustaining the identity of the American polity. *See Maddigan, supra* note 10, at 321. In Maddigan's estimation, a sampling of the virtues which spiritual religion contributes to American Civil Religion include: "the infinite worth of the individual, the obligation to tell the truth, the importance of mutual respect, and the value of mutual care—all of the values that make other associations and indeed, democratic government

Rather, an inquiry into the quality of the civil liberties exercised by the citizens of that culture should be considered. Here ceremonial deism (and by implication, American civil religion) is rightfully found lacking by the Ninth Circuit's proper utilization of the critical framework of the endorsement test:

"[T]he government must pursue a course of complete neutrality toward religion."

...

[T]he school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals.

...

"[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion draws support . . . from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain."²⁰³

V. CONCLUSION

The First Amendment was not intended to propagate social conformity, but rather to safeguard individual conscience. More pointedly, by protecting the individual from undue governmental interference in the exercise of one's moral autonomy and personal conscience, the First Amendment protects our right to *disagree* (peacefully), while promoting the construction of a tolerant social framework in which the conflicting opinions of citizens are allowed not merely to coexist but to thrive. Thus, the Supreme Court's attempts to contribute to the creation of a unified cultural identity, by accommodating and acknowledging religion in government via ceremonial deism, while well intentioned, are both misguided and unnecessary because an evolving pluralistic cultural identity is already enshrined in the tolerant tendencies of the First Amendment.

The demographics of the United States are changing and an anachronistic attempt to foist historically accepted religious referents onto our modern cultural identity is counterproductive. The Supreme Court should therefore reconfigure its endorsement analysis with these social facts and libertarian values in mind. Reconfiguring the Court's

possible." *Id.* at 316 (footnote omitted).

203. *Newdow*, 292 F.3d at 608, 610-11 (quoting *Wallace*, 472 U.S. at 52-54, 60).

Establishment Clause jurisprudence by reference to the pure symbolic endorsement analysis undertaken in *Newdow* is desirable because it will insure the social cohesion of a pluralistic American polity by forbidding governmental endorsements of religion that send messages to citizens that cause them to feel like outsiders in the political community. A reconfiguration of the Supreme Court's Establishment Clause jurisprudence upon these terms does not harbor a hostility for religion, rather it facilitates religious autonomy free of either governmental interference or co-opting (via secularization and endorsement). Furthermore, if genuinely held, religious beliefs and traditions will continue to thrive in a tolerant American society free of judicially sanctioned ceremonial deism because the vitality and meaning of those beliefs derive from individual conviction, not social conformity. Finally, all people of faith can take solace in President James Madison's (author of the First Amendment) perceptive observation that "Religion flourishes in greater purity, without than with the aid of Government."²⁰⁴

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204. Letter from James Madison to Edward Livingston (July 10, 1822) in 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed., 1910).