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Resolving Establishment Clause Issues Is No Longer "Easy-Peasy, Lemon-Squeezy"

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RESOLVING ESTABLISHMENT CLAUSE ISSUES IS NO LONGER "EASY-PEASY, *LEMON*-SQUEEZY"

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I. INTRODUCTION

The notion of separating Church and State is one that is deeply rooted in American history.[1] Although simple on its face, as the American population grows more diverse, the idea of separation has become a convoluted concept difficult to apply.[2] In an attempt to create a "one-size-fits-all" solution to issues regarding government intruding on the individual's religious freedoms, the Supreme Court developed a tripartite test to determine whether a statute violated

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[1] *See* James Lankford & Russell Moore, *The Real Meaning of the Separation of Church and State*, TIME (Jan. 16, 2018, 1:47 PM), https://time.com/5103677/church-state-separation-religious-freedom/ (showing the 1786 Virginia Statute for Religious Freedom shaped the religious liberties found in the First Amendment. This Act affirmed "the right to practice any faith, or to have no faith, is a foundational freedom for all Americans"); *see also Religious Freedom FAQ,* FREEDOM F., https://www.freedomforum.org/freedom-of-religion/religious-freedom-faq/ (last visited Oct. 20, 2023) ("All of the Framers understood that 'no establishment' meant no national church and no government involvement in religion. Thomas Jefferson and James Madison believed that without separating church from state, there could be no real religious freedom.").

[2] *See* Hana M. Ryman & J. Mark Alcorn, *Establishment Clause (Separation of Church and State)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state (last updated Oct. 17, 2023) (noting that the separation of church and state was easy in the first "150 years of the country's existence [because] there was little debate over the meaning of this clause in the Constitution." The increase in religious diversity in recent decades forced the Supreme Court to determine the meaning of the Establishment Clause); *see also Religious Freedom FAQ*, *supra* note 1 ("Our nation's founders disagreed about the exact meaning of 'no establishment' under the First Amendment; the argument continues to this day.").

the Establishment Clause.[3] In *Lemon v. Kurtzman*, the Court combined several tests originating in prior case law to develop the singular, infamous *Lemon* test.[4]

However, in June 2022 with a 6–3 decision in *Kennedy v. Bremerton School District*, the Court officially abolished the *Lemon* test and replaced it with a familiar, albeit vague, "history and tradition" test.[5] The Court concluded that an approach emphasizing a "reference to historical practice and understandings" would be more appropriate to determine whether a law violates the Establishment Clause.[6]

Although for decades adversaries criticized the *Lemon* test for being highly subjective and entirely unpredictable, at least it had structure.[7] The new "history and tradition" test now directs judges in lower courts to decide constitutional issues about religion by looking to historical practices and understandings, without further guidance.[8] The unfortunate result of the new test is that judges will

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[3] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing the three-prong *Lemon* test to identify Establishment Clause violations. The statute must have a secular purpose, its primary effect must be one that neither promotes nor inhibits religion, and it must not foster excessive government entanglement with religion); *see also First Amendment and Religion*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion (last visited Oct. 20, 2023) (articulating that the three-prong *Lemon* test was used to determine what constitutes an establishment of religion. The prongs consider (1) the primary purpose of the law, (2) primary effect of the law, and (3) whether there is excessive entanglement between the church and government).

[4] *See Lemon*, 403 U.S. at 612–13 (establishing the three-prong test to identify Establishment Clause violations. The statute at issue must have a secular purpose, its primary effect must be one that neither promotes nor inhibits religion, and it must not foster excessive government entanglement with religion); *see also First Amendment and Religion*, *supra* note 3 (articulating that the three-prong *Lemon* test was used to determine what constitutes an establishment of religion. The prongs consider (1) the primary purpose of the law, (2) primary effect of the law, and (3) whether there is excessive entanglement between the church and government).

[5] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (overruling *Lemon* and replacing it with an originalist interpretation test for resolving Establishment Clause issues); *see also* Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 566 (2014) (applying the "history and tradition" test); *see also* Marsh v. Chambers, 463 U.S. 783, 790 (1983) (applying the "history and tradition" test).

[6] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (articulating the importance of reflecting upon the meaning as the Founding Fathers understood it); *see also* Kimberly Robinson, *Supreme Court Again Nods to History, Tradition in Religion Case*, BLOOMBERG L. (June 28, 2022, 4:46 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-again-nods-to-history-tradition-in-religion-case (emphasizing that "[t]hough history and tradition have always been part of the court's analysis when deciding the bounds of constitutional rights, now it is the exclusive mechanism").

[7] *See* Luke Goodrich, *Will the Supreme Court Replace the Lemon Test?*, HARV. L. REV. BLOG (Mar. 11, 2019), https://blog.harvardlawreview.org/will-the-supreme-court-replace-the-_lemon_-test/ (noting that lower courts and Supreme Court Justices have long criticized the three-prong *Lemon* test); *see also* Ryan Colby, *Supreme Court overrules Lemon test, rules in favor of prayer for football coach*, BECKET RELIGIOUS LIBERTY FOR ALL (June 27, 2022), https://www.becketlaw.org/media/supreme-court-overrules-lemon-test-rules-in-favor-of-prayer-for-football-coach/ (noting that an amicus curiae brief filed in *Bremerton School District*, on behalf of the U.S. Conference of Catholic Bishops, explained that the only way to avoid Establishment Clause confusion is to overrule the *Lemon* test).

[8] *See* Hassan Kanu, *Supreme Court's 'history-and-tradition' test corrodes church-state barrier*,

cherry-pick moments in history that support their predetermined positions while ignoring the rest of the evidence.[9]

As of late, the Supreme Court has increased its reliance on tradition as its guide in decision-making, emphasizing that the only rights that deserve protection are those with a history of judicial safeguards.[10] However, "[w]hat has been done in the past cannot answer normatively what the law should be in the future."[11] Because the Constitution is meant to protect core values, basic liberties, and equality, for ages to come, the shifting focus on historical practices prevents the Constitution from growing and inhibits essential constitutional evolution.[12]

As such, this Comment proposes a new standard for evaluating Establishment Clause issues which combines the *Lemon* and the "history and tradition" tests to create a multifactorial subjective-objective test.[13] Part II will study the history of the Establishment Clause, the reasons for its enactment, and its application to "moment of silence" laws.[14] Part III will apply the "history and tradition" test to Florida's recent "moment of silence" statute § 1003.45.[15] Finally,

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REUTERS (Oct. 5, 2022, 6:58 PM) https://www.reuters.com/legal/government/supreme-courts-history-and-tradition-test-corrodes-church-state-barrier-2022-10-05/ (explaining the consequences of eliminating the purpose-and-effect analysis used in the *Lemon* test); *see also Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (eliminating the *Lemon* test and replacing it with the "history and tradition" test).

[9] *See* Kanu, *supra* note 8 (explaining the consequences of eliminating the purpose-and-effect analysis used in the *Lemon* test); *see also* Zach Needles, *The Problems with SCOTUS's History-and-Tradition Approach: The Morning Minute*, LAW.COM (June 28, 2022, 6:00 AM), https://www.law.com/2022/06/28/the-problems-with-scotuss-history-and-tradition-approach-the-morning-minute (noting that only judges who read a lot of history will be able to accurately apply the test).

[10] *See* Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, HASTINGS L. J. 901 (1993), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3115&context=hastings_law_journal (explaining that the history and tradition test is "a perverse and undesirable method of interpreting the Constitution"); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022) (noting that the right to an abortion is not deeply rooted in the Nation's history and tradition and therefore cannot stand).

[11] *See* Chemerinsky, *supra* note 10, at 901 (explaining that the history and tradition test is "a perverse and undesirable method of interpreting the Constitution"); *see also* Needles, *supra* note 9, at 1 (supporting the notion that ideas evolve, and that "every historian knows that when you start your research, you have a working hypothesis. [It is] drummed into you that when evidence comes in, you have to reexamine the hypothesis.").

[12] *See* Chemerinsky, *supra* note 10, at 902 (noting that the "history and tradition" test is not the desired method for interpreting the constitution); *see also* Needles, *supra* note 9, at 1 (noting that focusing on history is often problematic because history often provides no definitive answer and historians often disagree. Judges and clerks will look for answers to historical issues in the court's library and online resources which may be unreliable).

[13] *See* discussion *infra* Part IV (proposing a new test to resolve Establishment Clause issues); *see also* United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (discussing a standard combining objective and subjective inquiries of the true threat doctrine).

[14] *See* discussion *infra* Part II (understanding the history of the Establishment Clause and moments of silence); *see also First Amendment and Religion*, *supra* note 3 (noting that the Establishment Clause prohibits the government from establishing a government-sponsored religion).

[15] *See* discussion *infra* Part III (applying the "history and tradition" test to § 1003.45); *see also Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (overruling *Lemon* and replacing it with the "history and

Part IV will introduce the new subjective-objective test and demonstrate why it is a preferred method for effectively resolving Establishment Clause issues.[16]

II. HISTORY OF THE ESTABLISHMENT CLAUSE

The First Amendment of the United States Constitution articulates two distinct religious freedom provisions: the Establishment Clause and the Free Exercise Clause.[17] One of the central tenets of these provisions is to ensure that the church does not rule over the state and that the state cannot rule over the church.[18] The purpose of the Establishment Clause is to moderate and harmonize the relationship between church and state.[19] Significantly, however, "the Constitution [does not] require complete separation of church and state; [rather,] it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[20] Although the Establishment Clause applies to any action where the government seeks to establish a religion,[21] a unique subset of problems arises when public schools are at issue.[22]

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tradition" test).

[16] *See* discussion *infra* Part IV (proposing a new test to resolve Establishment Clause issues); *see also Parr*, 545 F.3d at 500 (discussing a standard combining objective and subjective inquiries with regard to the true threat doctrine of the First Amendment).

[17] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an *establishment of religion, or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); *see also First Amendment and Religion*, *supra* note 3 (stating that the First Amendment has two provisions for religion: the Establishment Clause and the Free Exercise Clause).

[18] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an *establishment of religion, or prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); *see also First Amendment and Religion*, *supra* note 3 (stating that the First Amendment has two provisions for religion: the Establishment Clause and the Free Exercise Clause).

[19] *See Lemon*, 403 U.S. at 637 (1971) (Douglas, J., concurring) (disagreeing with giving the power to the school to decide what is secular and what is religious); *see also First Amendment and Religion*, *supra* note 3 ("The Establishment clause prohibits the government from 'establishing' a religion. The precise definition of 'establishment' is unclear. Historically, it meant prohibiting state-sponsored churches, such as the Church of England.").

[20] *See* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (stating that it is impossible for any segment of society to exist "in a vacuum or in total or absolute isolation from all other parts, much less from government"); *see also* Lawrence Hurley & Andrew Chung, *U.S. Supreme Court takes aim at separation of church and state*, REUTERS (June 29, 2022, 12:38 AM), https://www.reuters.com/legal/government/us-supreme-court-takes-aim-separation-church-state-2022-06-28/ (noting that the separation of church and state protects both institutions, and "protects diverse religious expression").

[21] *See Lynch*, 465 U.S. at 683 (noting that the Establishment Clause is used to invalidate governmental action that seeks to advance religion); *see also Establishment Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/establishment_clause (last visited Oct. 20, 2023) (mentioning that in its effects, the Establishment Clause "prohibits the government from unduly preferring religion over non-religion, or non-religion over religion").

[22] *See* Sch. Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 241–42 (1963) (Brennan, J.,

The issue of establishing religion in public schools is not new.[23] Yet, because of its controversial nature, in the past sixty years, there have only been three major decisions by the Supreme Court regarding the establishment of religion in the public-school settings.[24] Now, with the advent of the new "history and tradition" test, it is critically important to understand the story of the Establishment Clause.[25]

A. HOW THE EARLY COLONISTS SHAPED RELIGION IN AMERICA

Many of the earliest colonists left Britain to find "religious freedom in America."[26] At the relevant time, the churches of England used the Book of Common Prayer which "set out in minute detail the accepted form *and* content of prayer and other religious ceremonies to be used in the established, tax-

concurring) ("It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions."); *see also Vulnerable Populations in Safeguarding Children: Pediatric Medical Countermeasure Research*, PRESIDENTIAL COMM'N FOR THE STUDY OF BIOETHICAL ISSUES, 1, https://bioethicsarchive.georgetown.edu/pcsbi/sites/default/files/6 Vulnerable Populations Safeguarding Children 9.30.16.pdf (Sept. 30, 2016) (finding that children are a uniquely vulnerable population "because they lack the autonomy and decision making capacity to ethically and legally consent to participate in" activities).

[23] *See* Engel v. Vitale, 370 U.S. 421, 421 (1962) (holding unconstitutional a state law that mandated school administrators to compose an official nondenominational school prayer and encouraged its recitation in public schools); *see* Wallace v. Jaffree, 472 U.S. 38, 38–39 (1985) (holding unconstitutional a "one minute period of silence" at the start of each day); *see also Bremerton Sch. Dist.*, 142 S. Ct. at 2432–33 (allowing public school football coach to pray at the fifty-yard-line on the football field after games).

[24] *See Engel*, 370 U.S. at 421 (holding unconstitutional a state law that mandated school administrators to compose an official nondenominational school prayer and encouraged its recitation in public schools); *see also Jaffree*, 472 U.S. at 38–39 (holding unconstitutional a "one minute period of silence" at the start of each day); *see also Bremerton Sch. Dist.*, 142 S. Ct. at 2432–33 (allowing public school football coach to pray at the fifty-yard-line on the football field after games).

[25] *See generally* Joseph Greenlee, *Text, History, and Tradition: A Workable Test that Stays True to the Constitution*, DUKE CTR. FOR FIREARMS L. (May 4, 2022), https://firearmslaw.duke.edu/2022/05/text-history-and-tradition-a-workable-test-that-stays-true-to-the-constitution (emphasizing that the "text, history, and tradition" test is the best available test because it focuses on the Second Amendment's text and uses history and tradition to inform its original meaning and how it was understood when the Amendment was ratified). *See generally* Dru Stevenson, *"Text, History, and Tradition" as a Three-Part Test*, DUKE CTR. FOR FIREARMS L. (Mar. 11, 2020), https://firearmslaw.duke.edu/2020/03/text-history-and-tradition-as-a-three-part-test/ (noting that Justice "Kavanaugh explained that the phrases like 'historical tradition,' 'historical justifications,' and 'historical understanding' . . . referred to what the original adopters of the Second Amendment subjectively understood it to mean[.]").

[26] *See Engel*, 370 U.S. at 425 (articulating that the colonists left England seeking to escape the "practice of establishing governmentally composed prayers for religious services"); *see also* Daniel Baracskay, *Puritans*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Jan. 1, 2009), https://www.mtsu.edu/first-amendment/article/1372/puritans (stating that many colonists left England to escape religious persecution).

supported Church of England."[27] Unfortunately, the entanglement between the powerful church and the government made it practically impossible for minority religions to gain the "necessary political power to influence the government" on any matter.[28] Therefore, the early colonists left England to seek the freedom they so desired.[29]

At the beginning, the colonists took advantage of their religious freedom and established churches and religions in the majority of the thirteen colonies.[30] However, following the American Revolution, a wave of "intense opposition to the practice of establishing religion by law" overcame the recently liberated colonists.[31] There was "widespread awareness . . . of the dangers of a union of Church and State" which led to the enactment of the Virginia Bill for Religious Liberty.[32]

The Virginia Bill was just the beginning.[33] It was then where Thomas Jefferson declared the need for a "wall of separation" between the church and

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[27] *See Engel*, 370 U.S. at 426 (criticizing the Book of Common Prayer); *see also Book of Common Prayer*, THE NAT'L ARCHIVES, https://www.nationalarchives.gov.uk/education/resources/the-english-reformation-c1527-1590/book-of-common-prayer/ (last visited Oct. 20, 2023) (noting that the "Book of Common Prayer was not popular with the puritans" because they "felt that 'set prayer' (established formats that were repeated) lulled congregations into boredom and were meaningless").

[28] *See Engel*, 370 U.S. at 426–27 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Motivations for Colonization*, NAT'L GEOGRAPHIC SOC'Y, https://education.nationalgeographic.org/resource/motivations-colonization (June 2, 2022) ("Among [the colonists] were the separatists, a group of people who believed the Church of England to be corrupt and thus sought to break from it. They believed the New World would offer them an opportunity to live and worship in accordance with their beliefs.").

[29] *See Engel*, 370 U.S. at 427 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Motivations for Colonization*, *supra* note 28 (explaining that the separatists were a group who believed the Church of England was corrupt and came to the New World searching for religious freedom).

[30] *See Engel*, 370 U.S. at 427–28 (stating that the colonists felt free and were motivated to encourage the public practice of their religion without persecution); *see also Religion in Colonial America: Trends, Regulations, and Beliefs*, NAT'L FACING HIST. & OURSELVES, https://www.facinghistory.org/resource-library/religion-colonial-america-trends-regulations-and-beliefs (Apr. 28, 2022) ("In the early years of what later became the United States, Christian religious groups played an influential role in each of the British colonies, and most attempted to enforce strict religious observance through both colony governments and local town rules.").

[31] *See Engel*, 370 U.S. at 428 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also* Joshua J. Mark, *Religion in Colonial America*, WORLD HIST. ENCYCLOPEDIA (Apr. 12, 2021), https://www.worldhistory.org/article/1726/religion-in-colonial-america/ (noting that minority religions were still persecuted in the colonies. "Jews and Catholics were the minority and were periodically persecuted for their faith, accused of witchcraft, and blamed for bad harvests and bad luck in general.").

[32] *See Engel*, 370 U.S. at 428–29 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Thomas Jefferson and the Virginia Statute for Religious Freedom*, VA. MUSEUM OF HIST. & CULTURE, https://virginiahistory.org/learn/thomas-jefferson-and-virginia-statute-religious-freedom (last visited Oct. 20, 2023) ("The Virginia Statute for Religious Freedom is a statement about both freedom of conscience and the principle of separation of church and state.").

[33] *See* Constitutional Rights Foundation, *The Virginia Statute for Religious Freedom: The Road to*

state.[34] Still, two hundred years later, courts in the 20th century continue to incorporate Jefferson's words that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[35]

B. OUT WITH THE OLD: BEFORE, DURING, AND AFTER *LEMON V. KURTZMAN* (1971)

Case law examining the Establishment Clause is a relatively recent development because until the mid-twentieth century, the Establishment Clause applied only to the federal government.[36] As the Fourteenth Amendment began incorporating constitutional principles to state and local governments, courts and legislatures alike were faced with the troubling task of deciphering the Establishment Clause.[37] Because "[t]he language of the Religion Clauses [. . .] is

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the First Amendment, BILL OF RIGHTS IN ACTION Vol. 26, No. 1 (2010), https://www.crf-usa.org/images/pdf/bria26_1_virginia.pdf ("Drafted by Jefferson, the bill removed all links between religion and government. In a lengthy preamble, the bill laid powerful reasons for de-establishing religion." Jefferson emphasized that it was "sinful and tyrannical" to force someone to support opinions they do not believe and that the civil rights of the people will "have no dependence on our religious opinions, any more than our opinions on physics and geometry"); *see also* Matthew Harris, *Virginia Statute for Religious Freedom* FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/first-amendment/article/880/virginia-statute-for-religious-freedom (July 30, 2023) (noting that the Virginia Statute for Religious Freedom not only marked the end of a decade-long struggle for the separation of church and state in Virginia, but was also "the driving force behind the religious clauses of the First Amendment of the U.S. Constitution").

[34] *See* Scott U. Schlegel, *The "Separation of Church and State"*, 56 LA. B.J. 118, 119 (2008) (referring to Jefferson's "wall of separation"); *see also* Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/ (stating that in 1779, as Virginia's governor, Thomas Jefferson had drafted a bill that guaranteed legal equality for citizens of all religions, including those of no religion, in the state. "Jefferson famously wrote, 'But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.'").

[35] *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (holding that a New Jersey law authorizing reimbursement by local school boards of the costs of transportation to and from schools, including private, parochial schools, did not violate the Establishment Clause because the law was enacted for the secular assisting parents of all religions with getting their children to school); *see also* Reynolds v. United States, 98 U.S. 145, 165 (1878) (holding that although Congress could not outlaw a belief in the correctness of polygamy, it could outlaw the practice thereof because marriage is "usually regulated by law" in "most civilized nations").

[36] *See Handout A: The Establishment Clause: How Separate Are Church and State? (Background Essay)*, BILL OF RIGHTS INST., https://billofrightsinstitute.org/activities/handout-a-the-establishment-clause-how-separate-are-church-and-state-background-essay (last visited Oct. 20, 2023) (explaining that during the eighteenth, nineteenth, and early twentieth centuries, few questions regarding the meaning of the Establishment Clause arose because it applied only to the federal government); *see also* Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text*, THE FEDERALIST SOCIETY REV. 26, 34 (2021) (noting that the "vertical restraint was federalist in character, telling Congress it could not disturb what the states did with respect to their church-state relations. That restraint was destroyed in 1947 when *Everson* incorporated the Establishment Clause").

[37] *See Handout A: The Establishment Clause: How Separate Are Church and State? (Background*

at best opaque[,]"[38] courts were hesitant to interpret them. However, in the mid to late 1900s, the Court finally tackled the issue and carved articulable standards for resolving Establishment Clause cases.[39]

The first monumental case was decided in 1947. In *Everson v. Board of Education of the Township of Ewing*, the Court upheld a New Jersey statute that allowed local school boards to reimburse parents, including those of children enrolled in parochial institutions, for the costs of bus transportation to and from school.[40] Writing for the majority in a close 5–4 decision, Justice Black admitted that the case teetered on constitutionality.[41] The Court narrowly found that the New Jersey law did not directly support parochial *schools*, but rather, assisted the *parents* of children enrolled at these schools with the secular activity of transportation.[42] As such, the law was upheld as conforming with the First Amendment.[43]

Essay), *supra* note 36 (noting that the meaning of "establishment" continues to be highly debated with some arguing that it is an absolute ban on religious endorsement while others believing that endorsement is acceptable so long as there is equal treatment of all religions); *see also* Esbeck, *supra* note 36, at 34 (noting that in *Everson v. Board of Education*, the Supreme Court incorporated the Establishment Clause to state and local governments through the Fourteenth Amendment).

[38] *See Lemon*, 403 U.S. at 612 (comparing the language of the Religion Clauses of the First Amendment to other clauses of the Amendment); *see also* Francis J. Beckwith, *Lemon v. Kurtzman at 50*, L. & LIBERTY (June 1, 2021), https://lawliberty.org/forum/lemon-v-kurtzman-at-50/ (noting that even Chief Justice Burger acknowledged the imprecise language of the Religion Clauses).

[39] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (noting that the Establishment Clause means at least that the government cannot (1) set up a church, (2) pass laws which favor religion in general or over another, (3) force a person to refrain from professing or profess a religious belief, (4) punish a person for refraining from or professing a religious belief, (5) tax to support a religious activity or institution, nor (6) openly or secretly partake in the affairs of a religious organization; *see also Lemon*, 403 U.S. at 612–13 (creating the three-prong *Lemon* test to resolve Establishment Clause issues); *see also Lynch*, 465 U.S. at 688–89 (O'Connor J., concurring) (suggesting that an Endorsement Test would be more helpful in deciding whether there is an Establishment Clause violation); *see also* Lee v. Weisman, 505 U.S. 577, 594–95 (1992) (creating the coercion test and rejecting the notion that high school graduation is voluntary and thus prayer during the ceremony is not coercive).

[40] *See Everson v. Board of Education of the Township of Ewing*, OYEZ, https://www.oyez.org/cases/1940-1955/330us1 (last visited Oct. 20, 2023) (summarizing *Everson*). *See generally*, *Lemon*, 403 U.S. at 611–12 (summarizing *Everson*).

[41] *See Everson*, 330 U.S. at 16 (holding that New Jersey could not constitutionally "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church"); *see also Lemon*, 403 U.S. at 612 (supporting Justice Black's candor that the "decision carried to 'the verge' of forbidden territory under the Religion Clauses").

[42] *See Everson*, 330 U.S. at 7 (finding that all parents reap the same benefit: ensuring that their children "can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking'"); *see also Lemon*, 403 U.S. at 612 (referring to the holding in *Everson*); *see also Everson v. Board of Education of the Township of Ewing*, *supra* note 40 (noting that the law supported parents of all religions and did not distinctly benefit parochial schools).

[43] *See Everson*, 330 U.S. at 18 (upholding the New Jersey law); *see also Everson v. Board of Education of the Township of Ewing*, *supra* note 40 (upholding the New Jersey law).

In 1971, the case of *Lemon v. Kurtzman* crept its way to the Supreme Court's docket, forcing the Court to rethink the standard used to decide Establishment Clause cases.[44] In *Lemon*, two similar statutes were challenged by taxpayers as unconstitutionally violating the separation of church and state.[45] In Rhode Island, a statute authorized the state to pay 15 percent of a private school teacher's salary,[46] and in Pennsylvania, the law at issue not only reimbursed private schools for teaching secular subjects, but also funded textbooks and instructional materials for these subjects.[47]

Before announcing its conclusion, the Court took a moment to seemingly justify its holding with history.[48] In doing so, Chief Justice Burger acknowledged that the authors of the First Amendment did not merely prohibit the establishment of a state church, but rather they "commanded that there should be 'no law *respecting* an establishment of religion.'"[49] This language goes further than a square prohibition because "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization."[50] In sum, a law respecting religion need only be one step towards establishment to patently offend the First Amendment.[51] Thus, the Court identified three "steps" towards

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[44] *See generally Lemon*, 403 U.S. at 606 (introducing the two appeals from Pennsylvania and Rhode Island regarding similar statutes that permit the government to provide funds to religious schools).

[45] *See Lemon*, 403 U.S. at 606–07 (noting that the two statutes from Pennsylvania and Rhode Island were challenged for allowing government funding to be distributed to church-related schools elementary and secondary schools); *see also Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations*, PEW RSCH. CTR., 6 (May 14, 2009), https://www.pewresearch.org/religion/2009/05/14/shifting-boundaries6/ (simplifying the relevant provisions of the Rhode Island and Pennsylvania statutes).

[46] *See Lemon*, 403 U.S. at 607–09 (summarizing the Rhode Island statute at issue); *see also Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations*, *supra* note 45 (simplifying the relevant provisions of the Rhode Island statute).

[47] *See Lemon*, 403 U.S. at 609–11 (summarizing the Pennsylvania statute at issue); *see also* PEW RSCH. CTR. *supra* note 45 (simplifying the relevant provisions of the Pennsylvania statute).

[48] *See Lemon*, 403 U.S. at 612–15 (reviewing the brief history of Establishment Clause jurisprudence).

[49] *See Lemon*, 403 U.S. at 612 (emphasis added) (highlighting that "respecting" was used to encompass a broad prohibition); *see also* John Witte, Jr., *Back to the Sources? What's Clear and Not So Clear About the Original Intent of the First Amendment*, 47 B.Y.U.L. REV. 1303, 1358 (2022) (noting that the word "respecting" in the Establishment Clause is "remarkably unclear" and ambiguous).

[50] *See Lemon*, 403 U.S. at 612 (highlighting that "respecting" was used to encompass a broad prohibition); *see also* Witte Jr., *supra* note 49, at 1358 ("Congress could make no law that 'looked at,' 'regarded,' or 'paid attention to' a state establishment of religion--whether favorably or unfavorably.").

[51] *See Lemon*, 403 U.S. at 612 (noting that a law does not need to explicitly establish a religion to be unconstitutional if the law could be interpreted as a step towards establishment of religion); *see also* Gerard V. Bradley, *The Death and Resurrection of Establishment Doctrine*, 61 DUQ. L. REV. 1, 17 (2023) (noting that Justice Rutledge's dissent in *Everson* "stated that 'the object [of the clause] was broader than separating church and state in the narrow sense.' . . . In his opinion, Justice Rutledge wrote, 'the Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion.' Similarly, the majority's account of the clause's meaning ranges well beyond anything called an 'establishment' at the founding. That is just the beginning. Justice

establishment that would violate the Establishment Clause and labeled them the "three main evils": "sponsorship, financial support, and active involvement of the sovereign in religious activity."[52] From this, the tripart *Lemon* test was born.[53]

Essentially, the *Lemon* test is a consolidation of a variety of tests developed by the Court over many years.[54] "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] finally, the statute must not foster an excessive government entanglement with religion."[55] In *Lemon*, the Court found that even though the Rhode Island and Pennsylvania statutes identified a secular purpose, the relationship arising under the statute between the religious schools and the state would lend itself to an excessive entanglement between government and religion, and thus violate the Establishment Clause.[56]

Still, after *Lemon*, the Court continued to refine its interpretation of the Establishment Clause and in the 1984 case of *Lynch v. Donnelly* it created the Endorsement Test which proscribes the government from endorsing or disapproving of any one religion.[57] In her concurring opinion, Justice O'Connor writes that the first prong of the *Lemon* test, or the "purpose prong," is synonymous with the Endorsement Test.[58] However, she writes that the second prong, the "effect prong," should ask whether the government action in question has

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Black wrote that the clause means 'at least' so much.").

[52] *See Lemon*, 403 U.S. at 612 (identifying the "three main evils against which the Establishment Clause was intended to afford protection"); *see also* Walz v. Tax Comm'n of New York., 397 U.S. 664, 668 (1970) (explaining what the men who drafted the Establishment Clause sought to protect).

[53] *See Lemon*, 403 U.S. at 612–13 (creating the three-part *Lemon* test); *see also* Richard L. Pacelle Jr., *Lemon Test*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/first-amendment/article/834/lemon-test (October 17, 2023) (articulating the *Lemon* test).

[54] *See Lemon*, 403 U.S. at 612 (noting that the *Lemon* test is a compilation of "criteria developed by the Court over many years"); *see also* Pacelle Jr., *supra* note 53 (noting that "*Lemon* represented the refinement of a test the Supreme Court announced in *Walz v. Tax Commission*" which combined the purpose, effect, and entanglement prongs).

[55] *Lemon*, 403 U.S. at 612–13 (internal quotations omitted) (creating the *Lemon* test used to analyze Establishment Clause issues); *see also* Pacelle Jr., *supra* note 53 (summarizing the *Lemon* test).

[56] *See Lemon*, 403 U.S. at 613–14; *see also* Pacelle Jr., *supra* note 53 (noting that the Court tried to clarify the meaning of government entanglement by identifying three factors. "The Court would look at the character and purpose of the institution that benefited, the nature of the aid the state was providing, and the resulting relationship between the government and the religious institution.").

[57] *See Lynch*, 465 U.S. at 688–90 (O'Connor J. concurring) (recommending endorsement test); *see also Handout A: The Establishment Clause: How Separate Are Church and State? (Background Essay)*, *supra* note 36 (mentioning the Endorsement Test).

[58] *See Lynch*, 465 U.S. at 690 (using the purpose and effect prongs of *Lemon* to resolve issue with the Endorsement Test); *see also* David L. Hudson Jr., *Endorsement Test*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/first-amendment/article/833/endorsement-test (Jan. 1, 2009) (noting that the endorsement test is used to "determine whether the government impermissibly endorses or disapproves of religion in violation of . . . the First Amendment.").

the effect, regardless of its purpose, of conveying a message of endorsement or disapproval.[59]

Finally, in 1992, in *Lee v. Weisman*, the Court announced the Coercion Test which prohibits the government from forcing a person to participate in a religious ceremony. None of these "tests" have been applied on any Supreme Court cases since 1997, creating uncertainty as to how the Court was deciding violations of the Establishment Clause.[60] Adversaries of *Lemon* criticized the Court for failing to repudiate the test when it had the opportunity.[61] Justice Scalia, an avid detractor of the *Lemon* case, described the test as "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, frightening the little children and school attorneys . . . ."[62] Yet, it seems as if the fundamental problem was that the Supremes refused to abandon their ship until they had another one to jump in to.[63] Consequently, in 2022, the Court built the "history and tradition" test, ditched *Lemon* letting it sink, and sailed away into uncharted territory.

III. SCHOOL PRAYER IN PUBLIC SCHOOLS

Before switching to the "history and tradition" test, the Court used *Lemon* and its close relatives to decide cases regarding prayer in public schools.[64]

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[59] *See Lynch*, 465 U.S. at 691–93 (upholding nativity scene on display on government property because the religious holiday of Christmas has become so commercialized that certain symbols have lost their religious character); *see also* Hudson Jr., *supra* note 58 (noting that the endorsement test is used to "determine whether the government impermissibly endorses or disapproves of religion in violation of . . . the First Amendment.").

[60] *See Handout A: The Establishment Clause: How Separate Are Church and State? (Background Essay)*, *supra* note 36 (noting that the Supreme Court has been hesitant to use *Lemon*); *see also* Amanda Harmon Cooley, *Establishing an End to Lemon in the Eleventh Circuit*, 77 U. MIA. L. REV. 972, 974 (2023) (noting that even after the fall of *Lemon*, lower federal district courts are "in a quandary in their Establishment Clause decision-making").

[61] *See* Pacelle Jr., *supra* note 53 ("The repeated criticisms, modifications, and failure to apply the Lemon test in some establishment cases, in addition to other tests used by the justices in the establishment clause area, have largely undermined its effectiveness.").

[62] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (expressing his distaste for the *Lemon* test); *see also* Mark David Hall, *Will the Court Finally Kill the Lemon Test Ghoul?*, L. & LIBERTY (Mar. 7, 2019), https://lawliberty.org/will-the-court-finally-kill-the-lemon-test-ghoul/ (quoting Justice Scalia's concurrence in the Court's 1993 decision *Lamb's Chapel v. Center Moriches Union Free School District*).

[63] *See* Pacelle Jr., *supra* note 53 (noting that Justice Gorsuch "argued that the court had long abandoned the Lemon test, which he criticized as being too abstract and ahistorical, for an approach that emphasized 'reference to historical practices and understandings.'").

[64] *See Engel*, 370 U.S. at 430 (emphasizing that the Court was concerned that the New York law established religious beliefs in schools); *see also Jaffree*, 472 U.S. at 55 ("When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years.").

Because public schools are government actors, any law requiring prayer, or the like, triggered the Establishment Clause.[65]

A. *ENGEL V. VITALE* (1962)

The Court in *Engel v. Vitale* explained the purpose of the First Amendment is to ensure the federal government does not use its power to "control, support or influence the kinds of prayer the American people can say."[66] *Engel* presented an issue of first impression to the Supreme Court when it considered whether a state may compel an official, nondenominational prayer to be read before and recited by public school students.[67] The Court held that prayer was an inherently religious activity and that its recitation in public schools was a blatant violation of the First Amendment's Establishment Clause.[68] Referencing historical practices, the Court found that governmentally composed prayers for religious services were one of the reasons that induced many of the early colonists to leave England.[69] Additionally, *Engel* emphasized the constructors of the First Amendment did not want the changing political administrations established by our democracy to in any way affect people's free practice of religion.[70] Finally, *Engel* noted the government "is without power to prescribe by

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[65] *See Engel*, 370 U.S. at 422–23 (noting that the prayer was adopted on the recommendations of a governmental agency that was granted supervisory authority over public schools); *see also Fourth Circuit Says Public Charter Schools Are State Actors, Supreme Court Declines to Weigh In*, CONG. RSCH. SERV., https://crsreports.congress.gov/product/pdf/LSB/LSB10958 (July 19, 2023) (explaining that public schools are considered state actors and are bound by the Constitution).

[66] *See Engel*, 370 U.S. at 429 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also First Amendment and Religion*, *supra* note 3 (noting that the Establishment Clause prohibits the government from establishing a religion).

[67] *See Engel*, 370 U.S. at 430 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Facts and Case Summary - Engel v. Vitale*, U.S. CTS., https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-engel-v-vitale (last visited Oct. 20, 2023) (noting that the New York State law requiring public schools to open each day with the Pledge of Allegiance and a nondenominational prayer was unconstitutional).

[68] *See Engel*, 370 U.S. at 430 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Facts and Case Summary - Engel v. Vitale*, *supra* note 67 (noting that the New York State law requiring public schools to recite a nondenominational prayer was unconstitutional).

[69] *See Engel*, 370 U.S. at 425 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Motivations for Colonization*, *supra* note 28 (explaining that the separatists were a group who believed the Church of England was corrupt and came to the New World searching for religious freedom).

[70] *See Engel*, 370 U.S. at 429 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also* Christopher Callaway, *Religion and Politics*, INTERNET ENCYC. OF PHIL., https://iep.utm.edu/rel-poli/ (last visited Oct. 20, 2023) (noting "that it is probably inevitable that religious commitments will sometimes come into conflict with the demands of politics").

law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[71]

The Court in *Engel* was very clear on what the government is forbidden from doing.[72] However, the question of *how far the government can go* has been challenged several times.[73] In assessing how far is *too* far, the Court created several tests that lower courts and legislatures were to follow to avoid Establishment Clause violations.[74] Now, with only "history and tradition" to guide the lower courts, the future of the Establishment Clause and religion in public schools remains uncertain.[75]

B. *WALLACE V. JAFFREE* (1985)

After *Engel*, the Supreme Court did not grant certiorari to another public school prayer case until 1985.[76] In *Wallace v. Jaffree*, the Court struck down an Alabama statute which authorized a period of silence for meditation of voluntary prayer in public schools because it violated the First Amendment.[77] In

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[71] *See Engel*, 370 U.S. at 430 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional). *But see* Lawrence Hurley, *U.S. Supreme Court backs prayer before government meetings*, REUTERS (May 5, 2014, 10:15 AM), https://www.reuters.com/article/us-usa-court-prayer/u-s-supreme-court-backs-prayer-before-government-meetings-idUSBREA440FO20140505 (reporting that the Supreme Court allowed government officials to begin public meetings with a prayer, "ruling that sectarian invocations do not automatically violate the U.S. Constitution.").

[72] *See Engel*, 370 U.S. at 430 (holding that school officials encouraging students to say a non-denominational official school prayer was unconstitutional); *see also Facts and Case Summary - Engel v. Vitale*, *supra* note 67 (noting that a law requiring public schools to open each day with a nondenominational prayer was unconstitutional).

[73] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (challenging whether preventing a coach from praying in front of students after a football game is constitutional); *see also* Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1474 (11th Cir. 1997) (upholding a moment of silence law in public schools because of the passed *Lemon* test); *see also* Brown v. Gilmore, 258 F.3d 265, 282 (4th Cir. 2001) (upholding a moment of silence law in public schools in part because "prayer" was one of several other mental activities authorized during moment of silence); *see also* Croft v. Governor of Texas, 562 F.3d 735, 750 (5th Cir. 2009) (upholding a moment of silence law in public schools).

[74] *See Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring) (stating endorsement test as "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools"); *see also* Allegheny v. ACLU, 492 U.S. 573, 660–63 (1989) (Kennedy, J., concurring) (articulating the coercion test where no one may be forced to support or participate in religious activities).

[75] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (overruling *Lemon* and replacing it with the "history and tradition" test for Establishment Clause issues); *see also* Chemerinsky, *supra* note 10 (explaining that the history and tradition test is "a perverse and undesirable method of interpreting the Constitution").

[76] *See Jaffree*, 472 U.S. at 61 (holding that an Alabama prayer and meditation statute failed the *Lemon* test because there was no articulable secular purpose and was in fact an affirmative endorsement of religion in public schools); *see also* Lee Ann Rabe, *A Rose by Any Other Name: School Prayer Redefined as a Moment of Silence is Still Unconstitutional*, 82 DENV. U. L. REV. 57, 59 (2004) (noting that the first moment of silence case before the Supreme Court came in 1985).

[77] *See Jaffree*, 472 U.S. at 61 (holding that an Alabama prayer and meditation statute failed the *Lemon* test because there was no articulable secular purpose and was in fact an affirmative

finding that the statute did not pass the "primary purpose" prong of the *Lemon* test, the Court found that the statute in question had no other purpose than to "advance and encourage religious activities."[78]

Moreover, the bill's sponsor commented that his singular legislative purpose was to bring voluntary prayer back to the public schools.[79] The Court also struggled to reconcile with the fact that an earlier version of the Alabama statute only referenced meditation, but in the statute at issue, there was reference to "meditation *or voluntary prayer*."[80] This language made it apparent to the courts that injecting religion in public schools was the primary purpose of the statute and that there was thus no need to consider the remaining two prongs of the *Lemon* test.[81] In *Wallace*, the Court had the daunting task of striking down a moment of silence statute that attempted to sneak in prayer into public schools.[82]

IV. HISTORY AND TRADITION TEST

The "history and tradition" test is notoriously known for interpreting Second Amendment issues[83] although a version of it has been applied to plethora

endorsement of religion in public schools); *see also* Rabe, *supra* note 76 (noting that the first moment of silence case before the Supreme Court came in 1985).

[78] *See Jaffree*, 472 U.S. at 47 (1985) (internal quotations omitted) (holding that an Alabama prayer and meditation statute failed the *Lemon* test because there was no articulable secular purpose and was in fact an affirmative endorsement of religion in public schools); *see also* Linda D.W Lam, *Silence of the Lambs: Are States Attempting to Establish Religion in Public Schools?*, 56 VAND. L. REV. 911, 925 (2003) (noting that the Court struck down the statute because there was "substantial evidence demonstrating that Alabama's legislature had not enacted the statute for a clearly secular purpose . . . .").

[79] *See Jaffree*, 472 U.S. at 43 ("Apart from the purpose to return voluntary prayer to public school, Senator Holmes unequivocally testified that he had 'no other purpose in mind.'"); *see also* David Schultz, *Wallace v. Jaffree (1985)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/first-amendment/article/674/wallace-v-jaffree (Jan. 1, 2009) (emphasizing that Sen. Holmes spoke into the legislative record, without dissent, a statement indicating that the moment of silence bill was an effort to return voluntary prayer to the public schools).

[80] *See Jaffree*, 472 U.S. at 59 (emphasis added) (highlighting that the only significant textual difference between the old and new statutory language is the addition of the words "or voluntary prayer"); *see also* Malila N. Robinson, *Wallace v. Jaffree*, BRITANNICA (May 28, 2023) https://www.britannica.com/event/Wallace-v-Jaffree (noting that the statute lacks an obvious secular purpose).

[81] *See Jaffree*, 472 U.S. at 38, 43 (internal quotations omitted) (holding that an Alabama prayer and meditation statute failed the *Lemon* test because there was no articulable secular purpose and were in fact an affirmative endorsement of religion in public schools); *see also* Robinson, *supra* note 80 (noting that the statute lacks an obvious secular purpose and there is no need to analyze the last two prongs of the *Lemon* test).

[82] *See Jaffree*, 472 U.S. at 58 (emphasis added) (highlighting that the only significant textual difference between the old and new statutory language is the addition of the words "or voluntary prayer"); *see also* Robinson, *supra* note 80 (noting that the statute lacks an obvious secular purpose).

[83] *See* Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J. L. & PUB. POL'Y, 1, 4 (2019) https://ssrn.com/abstract=3454594 (applying "history and tradition" test to Second Amendment issues); *see also* Greenlee, *supra* note 25 (noting that the "text, history and tradition" test is the best test available because it focuses on using history and tradition to inform its original meaning).

of topics.[84] Many believe that this is the best test available for interpreting constitutional issues because it focuses on the amendment's text, using history and tradition to inform its original meaning.[85] Proponents argue that this test is more faithful to the Constitution because it interprets the words as they would have been understood when the amendment was ratified.[86]

A. FLORIDA'S "MOMENT OF SILENCE" LAW: § 1003.45

In the Summer of 2021, Florida Governor Ron DeSantis signed House Bill 529 into law.[87] Generally, this moment of silence statute "[d]irects the principal of each public school to require teachers in first-period classrooms in all grades to set aside [one] to [two] minutes daily for a moment of silence[.]"[88] During

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[84] *See* Jill Lepore, *The History Test*, THE NEW YORKER (Mar. 20, 2017), https://www.newyorker.com/magazine/2017/03/27/weaponizing-the-past (noting that the history and tradition test has been applied to cases deciding the constitutionality of police brutality, assisted suicide, deportation, and sex, and abortion. Also commenting that abortion was not a crime in the original colonies nor most of the United States until after the Civil War. Although abortion was punished in the Persian Empire, the Greeks and Romans practiced abortion); *see also* Roe v. Wade, 410 U.S. 113, 129 (1973), *overruled by Dobbs*, 142 S. Ct. at 2234 ("It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage.").

[85] *See* Lund, *supra* note 83 (applying "history and tradition" test to Second Amendment issues); *see also* Greenlee, *supra* note 25 (noting that the "text, history and tradition" test is the best test available because it focuses on using history and tradition to inform its original meaning).

[86] *See* Lund, *supra* note 83 (applying "history and tradition" test to Second Amendment issues); *see also* Greenlee, *supra* note 25 (noting that the "text, history and tradition" test is the best test available because it focuses on using history and tradition to inform its original meaning).

[87] *See* FLA. STAT. § 1003.45 (2021):

> § 1003.45. Permitting study of the Bible and religion; requiring a moment of silence.
> (2) The Legislature finds that in today's hectic society too few persons are able to experience even a moment of quiet reflection before plunging headlong into the activities of daily life. Young persons are particularly affected by the absence of an opportunity for a moment of quiet reflection. The Legislature finds that our youth, and society as a whole, would be well served if students in the public schools were afforded a moment of silence at the beginning of each school day.
> (3) The principal of each public school shall require teachers in first-period classrooms in all grades to set aside at least 1 minute, but district school board may provide that a brief period, not more than to exceed 2 minutes, daily, for a moment the purpose of silence, during which students may not interfere with other students' participation. A teacher may not make suggestions as to the nature of any reflection that a student may engage in during the moment of silence silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.
> (4) Each first-period classroom teacher shall encourage parents or guardians to discuss the moment of silence with their children and to make suggestions as to the best use of this time.

Id. (requiring schools to set aside at least one minute for a daily moment of silence); *see also* ABC7 Staff, *DeSantis signs bill that will require 'moment of silence' each morning at public schools*, ABC7 (June 14, 2021, 3:56 PM), https://www.mysuncoast.com/2021/06/14/desantis-signs-bill-that-will-require-moment-silence-each-morning-public-schools/ (noting that the moment of silence will allow students "to think about the world and their place in it").

[88] *See* FLA. STAT. § 1003.45 (requiring schools to set aside at least one minute for a daily moment of silence); *see also* ABC7 Staff, *supra* note 87 (reporting on Florida's new moment of silence law).

the silence, teachers are not permitted to make suggestions on how to make use of that time.[89] A moment of silence for prayer or meditation was optional for school districts before the statute was enacted, but Governor DeSantis found that students would benefit from a moment in their busy days to reflect and pray as they see fit.[90]

Just a few months prior, a challenge to § 1003.45 would have followed the same fate as the other "moment of silence" laws enacted across the country – an application of the three-prong *Lemon* test to determine its constitutionality.[91] It is unlikely that § 1003.45 would have passed *Lemon* because it was an expansion of prior law which only encouraged a moment of silent prayer in schools.[92] Governor DeSantis announced that the founding fathers did not believe in the idea that God could be pushed out of every institution and be successful.[93] DeSantis also commented that every family should be able to send their children to school and know that they will be able to practice their faith.[94] These statements alone would have sufficed to strike down § 1003.45 on similar grounds as *Jaffree* because there is no secular purpose and the comments made by lawmakers suggest that the implementation of the law was wholly motivated by a purpose to advance religion in public schools.[95]

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[89] *See* FLA. STAT. § 1003.45 (forbidding teachers from suggesting how to use the moment of silence); *see also* Chandelis Duster & Jamiel Lynch, *Florida governor signs new bill requiring K-12 public schools to hold moment of silence each day*, CNN, https://www.cnn.com/2021/06/15/politics/florida-public-schools-moment-of-silence/index.html (June 15, 2021, 7:45 PM) (noting that teachers may not make suggestions to students on how to use the moment of silence).

[90] *See* Duster & Lynch, *supra* note 89 (noting that school districts had the option to implement a period of silence during the school day); *see also* ABC7 Staff, *supra* note 87 (reporting on Florida's new moment of silence law).

[91] *See Jaffree*, 472 U.S. at 61 (striking down moment of silence law after applying the *Lemon* test). *But see* Sherman *ex rel.* Sherman v. Koch, 623 F.3d 501, 520 (7th Cir. 2010) (upholding moment of silence law after applying *Lemon* test).

[92] *See Governor Ron DeSantis Signs Legislation to Protect Religious Freedom and Support Florida's Jewish Community*, RON DESANTIS 46TH GOV. OF FLA. (June 14, 2021), https://www.flgov.com/2021/06/14/governor-ron-desantis-signs-legislation-to-protect-religious-freedom-and-support-floridas-jewish-community/ (explaining the highlights of H.B. 529); *see also* Duster & Lynch, *supra* note 89 (noting that school districts had the option to implement a period of silence during the school day).

[93] *See* Duster & Lynch, *supra* note 89 (noting that school districts had the option to implement a period of silence during the school day); *see also* ABC7 Staff, *supra* note 87 (noting that before signing the bill into law at the Shul of Bal Harbour, DeSantis made comments alluding the bringing prayer back to schools).

[94] *See* Duster & Lynch, *supra* note 89 (noting that school districts had the option to implement a period of silence during the school day); *see also* ABC7 Staff, *supra* note 87 (noting that before signing the bill into law at the Shul of Bal Harbour, DeSantis made comments alluding the bringing prayer back to schools).

[95] *See Jaffree*, 472 U.S. at 61 (holding that an Alabama prayer and meditation statute failed the *Lemon* test because there was no articulable secular purpose and there was in fact an affirmative endorsement of religion in public schools); *see also* Schultz, *supra* note 79 (noting that the law in *Jaffree* was not secular in its intent, but rather it had a religious purpose).

However, *Lemon* is no longer the law of land.[96] Just a year after § 1003.45 was enacted, *Lemon* was overruled by *Bremerton School District* which now subjects statutes challenged under the Establishment Clause to scrutiny under the "history and tradition" test.[97] At first glance, the "history and tradition" test seems vague and its results uncertain, but commentators have predicted the fall of the *Lemon* test for nearly half a century.[98] In fact, for decades, Courts seemed hesitant to apply *Lemon*, so the ruling in *Bremerton School District* just made "explicit what has been implicit."[99]

B. APPLYING THE "HISTORY AND TRADITION" TEST TO § 1003.45

Traveling back in time to the First Amendment's ratification is the first step in applying the "history and tradition" test to Florida's § 1003.45.[100] Before the first ten amendments were ratified on December 15, 1791,[101] the Founding

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[96] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (overruling *Lemon* and replacing it with a "history and tradition" test); *see also* Noah Feldman, *Noah Feldman: Supreme Court Is Eroding the Wall Between Church and State*, TWIN CITIES (June 29, 2022, 7:53 PM), https://www.twincities.com/2022/06/29/noah-feldman-supreme-court-is-eroding-the-wall-between-church-and-state/ (noting that establishment cases will no longer examine government action to see if it has a secular purpose and effect, or sends a message of government endorsement of religion).

[97] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (overruling *Lemon* and replacing it with a "history and tradition" test); *see also* Don Byrd, *Impact of Kennedy v. Bremerton Already Apparent as Courts are Forced to Reconsider Establishment Clause Cases*, BJC (Aug. 1, 2022), https://bjconline.org/impact-of-kennedy-v-bremerton-establishment-clause-cases-080122/ (reporting that the Court overturned the long-standing *Lemon* test. "Justice Neil Gorsuch, who wrote the majority opinion in *Kennedy*, left little guidance on what should replace *Lemon*, apart from requiring that courts look to 'historical practices and understandings' in evaluating Establishment Clause claims.").

[98] *See* Feldman, *supra* note 96 (noting that establishment cases will no longer examine government action to see if it has a secular purpose and effect or sends a message of government endorsement of religion); *see also* Peter Greene, *The Supreme Court Killed a Fifty-Year-Old Test for Church and State Separation. Will We Miss It?*, FORBES (July 13, 2022, 4:26 PM), https://www.forbes.com/sites/petergreene/2022/07/13/the-supreme-court-killed-a-fifty-year-old-test-for-church-and-state-separation-will-we-miss-it/?sh=29677ade765a (stating that the *Lemon* test was almost immediately criticized and tweaked).

[99] *See* Greene, *supra* note 98 (stating that the *Lemon* test was almost immediately criticized and tweaked); *see also Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (overruling *Lemon* and replacing it with a "history and tradition" test).

[100] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (overruling *Lemon* and replacing it with a "history and tradition" test); *see also* Lepore, *supra* note 84 (noting that important documents to consider when looking at the history of an amendment include "the writings of delegates to the Constitutional Convention and the ratifying conventions, the Federalist Papers, and a handful of other newspapers and pamphlets published between 1787 and 1791 (and, occasionally, public records relating to debates over subsequent amendments, especially the Fourteenth).").

[101] *See The Bill of Rights: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript (last visited Oct. 20, 2023) ("Ten of the proposed [twelve] amendments were ratified by three-fourths of the state legislatures on December 15, 1791."); *see also The Bill of Rights*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/december-15/ (last visited Oct. 20, 2023) (noting that on December 15, 1791, the United States ratified the Bill of Rights, the first ten amendments to the Constitution).

Fathers were already thinking about how they wanted to protect the people's rights.[102] Thomas Jefferson was uniquely interested in "both freedom of conscience and the principle of separation of church and state" which is why in 1786, he wrote the Virginia Statue for Religious Freedom.[103] Section II, states:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[104]

Because the Virginia Statute for Religious Freedom inspired the First Amendment's religion clauses, this language would be considered part of the "history and tradition" inquiry.[105] That said, the Establishment Clause should be specially protected by the "history and tradition" test because one of the Framer's biggest fears was the church ruling over the state and vice versa.[106]

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[102] *See The Bill of Rights: A Brief History*, ACLU (Mar. 4, 2002), https://www.aclu.org/other/bill-rights-brief-history ("The nation's founders believed that containing the government's power and protecting liberty was their most important task, and declared a new purpose for government: the protection of individual rights."); *see also The Bill of Rights: How Did it Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen (last visited Oct. 20, 2023) (recounting that James Madison "hounded his colleagues relentlessly" to secure the passage of the Bill of Rights because he recognized "the importance voters attached to these protections, the role that enshrining them in the Constitution could have in educating people about their rights, and the chance that adding them might prevent its opponents from making more drastic changes to it").

[103] *See* Constitutional Rights Foundation, *supra* note 33 ("Drafted by Jefferson, the bill removed all links between religion and government. In a lengthy preamble, the bill laid powerful reasons for de-establishing religion."); *see also The Bill of Rights: A Brief History*, *supra* note 102 (noting that it was not the government's position to tell people what religion to believe in).

[104] *See* Constitutional Rights Foundation, *supra* note 33 ("Drafted by Jefferson, the bill removed all links between religion and government. In a lengthy preamble, the bill laid powerful reasons for de-establishing religion."); *see also* Thomas Jefferson, *Virginia Statute for Religious Freedom* (1779), https://cas.umw.edu/cprd/files/2011/09/Jefferson-Statute-2-versions.pdf (showing Jefferson's draft for a bill to establish religious freedom in Virginia).

[105] *See generally* Greenlee, *supra* note 25 (using the history of the Second Amendment to resolve firearm-related constitutional issues); *see generally Dobbs*, 142 S. Ct. at 2253 (applying the "history and tradition" test to show that there is no constitutional right to an abortion).

[106] *See The Bill of Rights: A Brief History*, *supra* note 102 (explaining that the Bill of Rights was created to protect rights the original colonists believed were naturally theirs, including the freedom of religion); *see also* John Ragosta, *Thomas Jefferson and Religious Freedom*, MONTICELLO (Apr. 16, 2018), https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/thomas-jefferson-and-religious-freedom/ ("Jefferson saw religious freedom as an essential for a functioning republic. Without religious freedom and a strict separation of church and state, 'kings, nobles, and priests' threatened to create a dangerous aristocracy." Additionally, "[m]any historians note that the broad diversity of ethnicities and religions in the thirteen colonies meant that religious freedom was necessary if the union was to be successful." Even after the American Revolution, Virginia was almost successful in reinstating church taxes to promote religion. Jefferson opposed this effort proclaiming that "religious freedom was 'meant to comprehend, within the mantle of its protection,

If challenged, Florida's "moment of silence" law would be questioned under the Establishment Clause.[107] Therefore, to be upheld, § 1003.45 would need to prove that a moment of silence is deeply rooted in American history and tradition and that the Framers, when drafting the First Amendment, intended to protect this type of practice.[108]

Moments of silence can be traced back about a century.[109] After World War I, a journalist observed the celebrations in London and thought that a moment of reflection would be a more appropriate way to honor soldiers who had fallen.[110] Eventually, the journalist's suggestion made its way to King George V who formally ordered two minutes of silence on Armistice Day of 1919.[111] Moments of silence are still widely utilized in the United States and abroad to remember those who suffered and lost their lives during times of hardship.[112] As recently as 2016, a federal moment of silence act to commemorate veterans

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the Jew and the Gentile, the Christian and Mahometan, the Hindoo and infidel of every denomination'").

[107] *See* Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (applying the Establishment Clause's *Lemon* test to a moment of silence in public schools). *But see* Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 520 (7th Cir. 2010) (applying the Establishment Clause's *Lemon* test to a moment of silence in public schools).

[108] *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (holding that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause); *see also Dobbs*, 142 S. Ct. at 2253 (stating that the right to an abortion is not deeply rooted in the Nation's history and tradition and therefore cannot stand); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (noting that the historical practices and traditions should reflect the understanding of the Founding Fathers at the time of the First Amendment's ratification).

[109] *See* Miyuki Jokiranta, *The little-known origin of the minute's silence*, AUSTRALIAN BROAD. CORP. NEWS (Nov. 8, 2018, 2:00 PM), https://www.abc.net.au/news/2018-11-09/edward-honey-origin-of-the-one-minutes-silence/10461280 (detailing the emergence of the moment of silence after World War I); *see also* Karsten Lichau, *A Political and Cultural History of the Minute's Silence*, MAX PLANCK INST. FOR HUM. DEV., https://www.mpib-berlin.mpg.de/research/research-centers/history-of-emotions/citizenship-and-nationbuilding/history-of-the-minutes-silence (last visited Oct. 20, 2023) ("The minute's silence is a political ceremony that was established as a commemoration practice in remembrance of the soldiers killed in the First World War and that, during the following years, became an important part of national remembrance culture in many western European countries.").

[110] *See* Jokiranta, *supra* note 109 (noting that the moment of silence is a secular moment of remembrance); *see also* Lichau, *supra* note 109 (defining a moment of silence as a secular moment of remembrance).

[111] *See* Jokiranta, *supra* note 109; *see also* Lichau, *supra* note 109.

[112] *See* Michael Gold & Katie Rogers, *At 9/11 Ceremonies, Moments of Silence, Tributes and Tears*, THE N.Y. TIMES (Sept. 11, 2021), https://www.nytimes.com/2021/09/11/nyregion/9-11-anniversary-ceremonies.html (noting that at the NATO headquarters in Brussels, the secretary-general observed a moment of silence to honor the lives lost during the 9/11 attack); *see also* Stephen M. Lepore, *Six moments of silence to remember 9/11 on 20th anniversary*, WFXR FOX, https://www.wfxrtv.com/remembering-9-11/6-moments-of-silence-to-remember-9-11-on-20th-anniversary/ (Sept. 10, 2021, 1:26 PM) (noting that six moments of silence are part of the 9/11 memorial ceremony to honor the (1) plane crash into north tower, (2) plane crash into south tower, (3) plane crash into Pentagon, (4) south tower collapse, (5) plane crash into open field, and (6) north tower collapse).

was enacted.[113] As there was no opposition to the federal statute,[114] this indicates that Americans see a moment of silence as a secular expression of remembrance more than anything related to religion.[115] Furthermore, the specific practice of honoring those who gave their lives to protect our country is a practice that dates back to the post-Civil War era.[116] Communities across the nation would close businesses and decorate graves with flowers to honor the dead which eventually became Memorial Day.[117] Accordingly, an application of the "history and tradition" test to § 1003.45 would likely result in the statute being upheld because taking a moment to reflect or pray for those who sacrificed their lives for our country is a practice that is deeply rooted in American history and is likely one that the Framers intended to protect.[118] This test however discounts the intent of lawmakers in enacting the piece of legislation, and further ignores the consequences that the law will have on those it affects.[119]

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[113] *See* Veteran.com Team, *Veterans Day 2023*, VETERAN.COM, https://veteran.com/veterans-day/ (Jan. 3, 2023) (implementing a two-minute moment of silence to honor the service and sacrifice of veterans throughout history); *see also* Veterans Day Moment of Silence Act, Pub. L. No. 114-240, 130 Stat. 974 § 2 (2016) (noting that this Act directs the President to issue an annual proclamation "calling on the people of the United States to observe two minutes of silence on Veterans Day in honor of the service and sacrifice of veterans throughout the history of the nation").

[114] *See S. 1004 (114th): Veterans Day Moment of Silence Act*, GOVTRACK, https://www.govtrack.us/congress/bills/114/s1004 (last visited Oct. 20, 2023) (passing House of Representatives without objection and passing Senate by unanimous consent); *see also Content Details*, GOVINFO, https://www.govinfo.gov/app/details/STATUTE-130/STATUTE-130-Pg974/summary (last visited Oct. 20, 2023) (omitting record of individual vote in Congress because the vote was unanimous).

[115] *See* Jokiranta, *supra* note 109 (explaining that for one hundred years, silence and remembrance are almost inseparable. When visiting war memorials, individuals are often asked to respectfully remain silent); *see also* Lepore, *supra* note 112 (inviting the public to observe any or all of the six moments of silence regardless of their religious affiliation).

[116] *See* Jim Reed, *Remembering and Honoring Those Who Died in US Military Service*, NAT'L CONF. OF STATE LEG. (May 27, 2022), https://www.ncsl.org/research/military-and-veterans-affairs/remembering-and-honoring-those-who-died-in-us-military-service-magazine2022.aspx ("First celebrated as Decoration Day in the years after the Civil War, Memorial Day was designated a federal holiday in 1971."); *see also* History.com Editors, *Civil War dead honored on Decoration Day*, HIST., https://www.history.com/this-day-in-history/civil-war-dead-honored-on-decoration-day (last updated May 27, 2020) (noting that on Decoration Day, mourners honored the Civil War dead by decorating their graves with flowers).

[117] *See* Reed, *supra* note 116 (noting that a day of remembrance was first introduced after the Civil War); *see also* History.com Editors, *supra* note 116 ("The 1868 celebration was inspired by local observances that had taken place in various locations in the three years since the end of the Civil War.").

[118] *See* Reed, *supra* note 116; *see also* History.com Editors, *supra* note 116. *But see* Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (noting that assisted suicide is not a protected fundamental liberty interest); *see also Dobbs*, 142 S. Ct. at 2253 (holding that abortion is not deeply rooted in the nation's history and tradition).

[119] *See Why legislative history matters when crafting a winning argument*, THOMSON REUTERS (May 6, 2020), https://legal.thomsonreuters.com/blog/basics-of-researching-legislative-history (suggesting that legislative history helps determine what lawmakers were intending when they passed the law because they often discuss *why* they are creating or changing laws). *But see Legislative Intent*, BALLOTPEDIA, https://ballotpedia.org/Legislative_intent (last visited Oct. 20, 2023)

V. A SOLUTION TO ESTABLISHMENT CLAUSE ISSUES

The elimination of the *Lemon* test creates an uncertain future for Establishment Clause issues and opens the door to chaos in a place where religion should not be endorsed, but where varying beliefs should be embraced.[120] Just last year, a challenge to § 1003.45 would have struck down the statute using the three-prong *Lemon* test, but today an application of the "history and tradition" test would likely save it.[121] However, there was no need for the Supreme Court to make such an extreme variation in law in an area so sensitive that the Framers intended to protect twice.[122]

Instead of picking between a subjective, one-size-fits-all test like the *Lemon* or an originalist, difficult-to-apply test like the "history and tradition," the Court should adopt a combination of both standards.[123] Doing so will give lawmakers more guidance when drafting legislation and provide lower courts with structure when evaluating Establishment Clause issues.[124] A potential solution to this

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(explaining that Justice Antonin Scalia has criticized the use of legislative intent because he believed that "legislative intent research ends at arbitrary points, relies on documents that do not represent legally binding language and does not capture the intent of all who voted on measures").

[120] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Sotomayor,J., dissenting) (referencing the coercive nature of the football coach's actions by arguing that students are faced with unique pressures when participating in school-sponsored activities); *see also* John R. Vile, *Kennedy v. Bremerton School District (2022)*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV., https://www.mtsu.edu/first-amendment/article/2137/kennedy-v-bremerton-school-district (June 27, 2022) (noting that Justice Sotomayor was uniquely concerned about the possibility of indirect coercion in this context because violations of government neutrality in religious matters was more dangerous in public school settings than elsewhere).

[121] *See* Wallace v. Jaffree, 472 U.S. 38, 51–52 (1985) (holding unconstitutional a moment of silence in public because there was no secular purpose found in statute); *see also Bremerton Sch. Dist.*, 142 S. Ct. at 2428 (replacing *Lemon* test with "history and tradition" test to resolve Establishment Clause issues).

[122] *See* Aditya Shastri, *Our society keeps changing. Does the law change too?*, MEDIUM (May 20, 2019), https://medium.com/@adityashastri/our-society-keeps-changing-does-the-law-change-too-e12f4071d4 (noting that the Supreme Court Justices are not "the final say because they are always right, but rather they are always right *because* they are the final say." Justices may often lack the "latest scientific, economic, or special knowledge that is relevant to a legal issue." Justices also "rely on briefs submitted by others or come up with weird tests to answer legal questions." If Justices keep "flip-flopping, lawyers around the country won't know what's allowed and what isn't anymore."); *see also First Amendment and Religion*, *supra* note 3 (stating that the First Amendment has two provisions for religion: the Establishment Clause and the Free Exercise Clause).

[123] *See Bremerton Sch. Dist.*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) (referencing the coercive nature of the football coach's actions by arguing that students are faced with unique pressures when participating in school-sponsored activities); *see also* Vile, *supra* note 120 (noting that Justice Sotomayor was uniquely concerned about the possibility of indirect coercion in this context because violations of government neutrality in religious matters was more dangerous in public school settings than elsewhere).

[124] *See* United States v. Sokolow, 490 U.S. 1, 8 (1989) (holding that the totality-of-the-circumstances test involves looking at the whole picture); *see also* Cathy E. Moore, *Fourth Amendment - Totality of the Circumstances Approach to Probable Cause Based on Informant's Tips - Illinois v Gates, 103 s Ct 2317* (1983), J. OF CRIM. L. & CRIMINOLOGY 1249 (Winter 1984) (noting that in Fourth Amendment jurisprudence, the totality-of-circumstances test "requires magistrates to consider all

issue is to implement a multifactorial subjective-objective test to evaluate Establishment Clause issues.[125] Similar to a totality-of-the-circumstances test, this standard should be a fact-sensitive analysis where certain considerations are weighed against each other.[126]

The Court would look at (1) the subjective intent of the lawmakers sponsoring the statute as well as other objective factors such as (2) the Framer's intent when drafting the Establishment Clause,[127] (3) the history and tradition of the law or action,[128] (4) the primary effect of the law or action,[129] (5) whether a reasonable observer would see that there is an entanglement of religion and government,[130] and (6) whether the Free Exercise Clause is being overshadowed by the fear of an Establishment Clause violation.[131] This test would bring back the prong-like structure from the *Lemon* test while considering what the Establishment Clause was designed to protect.[132]

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the information in the affidavit including the informer's reliability, credibility, and basis of knowledge." The test, however, provides "no practical guidance as to the relative weights assigned to any of these considerations").

[125] *See* Interest of: J.J.M., 265 A.3d 246, 259 (Pa. 2021) (suggesting that a subjective-objective test exists in First Amendment jurisprudence for true threat doctrine); *see also* United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (noting that a standard combining objective and subjective inquiries in true threat jurisprudence might be available. In this case, "the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively be a threat and subjectively be intended as such.").

[126] *See Sokolow*, 490 U.S. at 8 (holding that the totality-of-the-circumstances test involves looking at the whole picture); *see also* Moore, *supra* note 124 (noting that the totality-of-the-circumstances is used in Fourth Amendment jurisprudence but leaves the weighing of each factor to the discretion of the magistrate and courts).

[127] *See* Greenlee, *supra* note 25 (noting that the "text, history and tradition" test is the best test available because it focuses on using history and tradition to inform its original meaning); *see also* Lund, *supra* note 83 (applying the "history and tradition" test to Second Amendment issues).

[128] *See* Greenlee, *supra* note 25; *see also* Lund, *supra* note 83.

[129] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing that a law's primary effect must be one that neither promotes nor inhibits religion); *see also First Amendment and Religion*, *supra* note 3 (noting that the primary purpose of the law is part of the *Lemon* analysis).

[130] *See Lemon*, 403 U.S. at 612–13 (establishing that a law must not foster excessive government entanglement with religion); *see also First Amendment and Religion*, *supra* note 3 (noting whether there is excessive entanglement between the church and government is part of the *Lemon* analysis).

[131] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022) (disapproving of the District's balancing of the District avoiding an Establishment Clause violation with Kennedy's rights to religious exercise and free speech); *see also* Bradley Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, AM. BAR ASS'N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/ (noting that a "majority of the current Court now believes that the [Establishment Clause and the Free Exercise Clause] are inherently at odds and that long-settled anti-establishment interests—prohibition of government funding for religion, to name just one—get in the way of the free exercise of religion. And the justices have made clear that, to them, free exercise is what matters.").

[132] *See Lemon*, 403 U.S. at 612–13 (establishing a three-prong test to evaluate Establishment Clause issues); *see also* Girard & Hybel, *supra* note 131 (asserting that the Establishment Clause prevents

A. APPLYING THE SUBJECTIVE-OBJECTIVE TEST TO § 1003.45

Applying the subjective-objective test to § 1003.45 will result in a more just outcome than either a solo application of *Lemon* or "history and tradition" because courts will be able to paint a broader picture of the statute at issue.[133] DeSantis' religious references will be considered, and although not dispositive, it certainly hints at an alternative, non-secular purpose.[134] Next, the Framer's intended to protect American's religious freedom by preventing the government from establishing religion.[135] Public schools are government schools and amending a secular a moment of silence law to overtly include prayer may wreck the wall of separation that Jefferson sought to erect.[136] Still, § 1003.45 is written to allow students to use the moment of silence as they desire and to prevent teachers from influencing students during that time.[137] Since moments of silence have been observed for at least a century without objection, the history seems to promote a secular activity.[138] Section 1003.45's primary effect is giving students a brief moment at the beginning of the school day to escape the "hectic society" "before plunging headlong into the activities of daily life."[139] A reasonable observer would likely recognize the value that a moment of silence

government from favoring or disfavoring anyone based on religion).

[133] *See generally* Jay Harrington, *Impress Your Superiors By Understanding 'the Big Picture'*, LAW.COM (Oct. 1, 2020, 12:30 PM), https://www.law.com/2020/10/01/impress-your-superiors-by-understanding-the-big-picture/ (noting that "[w]ithout a grasp on the big picture, it is easy to miss important issues altogether"); *see generally How to conduct legal research*, BLOOMBERG L. (Sep. 21, 2021), https://pro.bloomberglaw.com/brief/how-to-conduct-legal-research/ (noting that a lawyer's research is expansive covering legal precedents, laws, regulations, and other legal authorities that apply in a case).

[134] *See* Duster & Lynch, *supra* note 89 (noting that DeSantis did not believe that the Framers wanted to push God out of every institution); *see also* ABC7 Staff, *supra* note 87 (noting that before signing the bill into law at a religious institution, DeSantis made comments alluding the bringing prayer back to schools).

[135] *See First Amendment and Religion*, *supra* note 3 (noting that the Establishment Clause prevents government from establishing a religion through state-sponsored churches, such as the Church of England); *see also* Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (noting that the Establishment Clause is used to invalidate governmental action that seeks to advance religion).

[136] *See* John S. Baker Jr., *Wall of Separation*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (2009), https://www.mtsu.edu/first-amendment/article/886/wall-of-separation (Aug. 5, 2023) (quoting Jefferson referring to the wall between the church and state); *see also Public School*, FINDLAW, https://www.findlaw.com/education/education-options/public-school.html (June 20, 2016) (noting that public schools are governmentally run by federal, state, and local law).

[137] *See* FLA. STAT. § 1003.45 ("A teacher may not make suggestions as to the nature of any reflection that a student may engage in during the moment of silence."); *see also* ABC7 Staff, *supra* note 87 (implying that teachers may not interfere with students' moment of silence).

[138] *See* Jokiranta, *supra* note 109 (dating the origin of a "moment of silence" to post-World-War-I era); *see also S. 1004 (114th): Veterans Day Moment of Silence Act*, *supra* note 114 (passing the House of Representatives without objection and passing the Senate by unanimous consent).

[139] *See* FLA. STAT. § 1003.45 (noting that the purpose of the statute is to give students a quiet moment before their hectic school day begins); *see also* ABC7 Staff, *supra* note 87 (reporting that with technology and the media, children do not have time to center themselves and this law will allow them to be quiet and reflect on the world).

may have on students.[140] In a world where there is a constant flood of media to young students, society may benefit in the long-term from practicing silence.[141] On its face, there is no indication that the Free Exercise is being overshadowed by the fear of an Establishment Clause violation because prayer as well as other secular activities are permitted during the moment of silence.[142]

Applying these factors from the multifactorial subjective-objective, it is likely that courts will uphold § 1003.45 because the statute is crafted to permit all silent secular and non-secular mental activities and forbids government employees from making suggestions to students.[143] Additionally, looking at history and tradition, moments of silence have always been widely accepted.[144] Although the Framers were concerned about government-sponsored religion, § 1003.45 does not promote nor inhibit religion in public schools.[145]

Although the right to freedom of religion is specifically written down in our Constitution, it is clear that alone does not make it easy to comprehend or apply.[146] A test focused solely on the present will enable the repetition of mistakes

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[140] *See* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (stating endorsement test as "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools"); *see also* Izzy Kalman, *A Moment of Silence: A Simple Way to Improve Schools/Society: The simplest solutions are also the best.*, PSYCH. TODAY (Feb. 27, 2012), https://www.psychologytoday.com/us/blog/resilience-bullying/201202/moment-silence-simple-way-improve-schoolssociety (noting that the moment of silence is versatile and can be used "to improve the school environment, home life[,] and society in general with a minimal investment of time and effort").

[141] *See* Kalman, *supra* note 140 (noting that a moment of silence is beneficial and can positively affect other areas of life as well as teaching students how to exercise self-control). *But see* Yelena Moroz Alpert, *Shh … How a little silence can go a long way for kids' mental health*, NAT'L GEOGRAPHIC (Sept. 10, 2021), https://www.nationalgeographic.com/family/article/a-little-silence-can-go-a-long-way-for-kids-mental-health (reporting study that college students would rather administer a minor electric shock to themselves than sit in silence for fifteen minutes).

[142] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2426 (2022) (disapproving of the District's weighing avoiding an Establishment Clause violation against Kennedy's rights to religious exercise and free speech); *see also* Brown v. Gilmore, 258 F.3d 265, 281–82 (4th Cir. 2001) (upholding a moment of silence law in public schools in part because "prayer" was one of several other mental activities authorized during moment of silence).

[143] *See Gilmore*, 258 F.3d at 282 (upholding a moment of silence in public schools because "prayer" was one of several mental activities authorized during period). *But see* Engel v. Vitale, 370 U.S. 421, 435–36 (1962) (striking down state law that composed an official nondenominational school prayer and encouraged its recitation in public schools).

[144] *See* Jokiranta, *supra* note 109 (dating the origin of a "moment of silence" to post-World-War-I era); *see also S. 1004 (114th): Veterans Day Moment of Silence Act*, *supra* note 114 (passing House of Representatives without objection and passing Senate by unanimous consent).

[145] *See* FLA. STAT. § 1003.45 (explaining that students are free to conduct any mental activity that does not interfere with other students and that teachers may not make suggestions to students about their moment of silence). *But see Jaffree*, 472 U.S. at 61 (striking down "moment of silence" statute whose sole purpose was to promote religion in public schools).

[146] *See* Lepore, *supra* note 84 (noting that Hamilton was concerned with listing rights because they would be open to interpretation); *see also* Derek Webb, *The rap battle Alexander Hamilton didn't win: The Bill of Rights at 225*, NAT'L CONST. CTR. (Dec. 15, 2016), https://constitutioncenter.org/blog/the-rap-battle-alexander-hamilton-didnt-win-the-bill-of-rights-at-225 (noting that

from the past, while a test looking only towards history will prevent society from moving forward.[147] For these reasons, a blend of both will yield the best results when analyzing Establishment Clause issues.[148]

VI. CONCLUSION

An inescapable reality is that history changes.[149] Through decades of research, technological advancements, and new discoveries, what was once a universal fact may be proven to be fiction.[150] Although history is a valuable reference and predictor of what may happen in the future, its ever-changing and biased nature makes it challenging to apply consistently across time in the United States.[151] As such, a test based solely on historical practice and tradition is not an appropriate standard when deciding critical constitutional issues.[152]

Hamilton did not want a Bill of Rights because the Constitution was written to limit the government, not the people).

[147] *See* Chemerinsky, *supra* note 10 (explaining that the history and tradition test is "a perverse and undesirable method of interpreting the Constitution"); *see also* Needles, *supra* note 9 (supporting the notion that ideas evolve, "[e]very historian knows that when you start your research, you have a working hypothesis. It's drummed into you that when evidence comes in, you have to reexamine the hypothesis.").

[148] *See Why Is History Important And How Can It Benefit Your Future?*, UNIV. OF THE PEOPLE, https://www.uopeople.edu/blog/why-is-history-important (last visited Oct. 20, 2023) (noting that history "helps us to understand present-day issues by asking deeper questions as to why things are the way they are." To understand why something happened, we need to look at factors from the past. History helps us recognize warning signs to avoid atrocities like war and genocide. History allows us to learn from others' mistakes); *see also* Allan C. Brownfeld, *The danger ignorance of history poses to the future of a free society*, AM. COUNCIL OF TRUSTEES & ALUMNI (Apr. 22, 2018), https://www.goacta.org/news-item/the-danger-ignorance-of-history-poses-to-the-future-of-a-free-society/ (noting that those who ignore history are bound to repeat it).

[149] *See Why do Historians' Accounts of the Past Keep Changing?*, NAT'L COUNCIL ON PUB. HIST., https://ncph.org/what-is-public-history/how-historians-work/the-changing-past/ (last visited Oct. 20, 2023) ("We often hear charges of 'revisionism' when a familiar history seems to be challenged or changed. But revisiting and often revising earlier interpretations is actually at the very core of what historians do. And that's because the present is continually changing."); *see also* Morning Edition, *How the Understanding of U.S. History Changes*, NPR (Nov. 21, 2006), https://www.npr.org/2006/11/21/6517854/how-the-understanding-of-u-s-history-changes (explaining the ways that U.S. history textbooks change overtime).

[150] *See Why do Historians' Accounts of the Past Keep Changing?*, *supra* note 149 (explaining that the present is constantly changing the way historians interpret the past); *see also* Morning Edition, *supra* note 149 (noting that the present shapes the past).

[151] *See Why do Historians' Accounts of the Past Keep Changing?*, *supra* note 149 (explaining that the present is constantly changing the way historians interpret the past); *see also* Morning Edition, *supra* note 149 (noting that the present shapes the past).

[152] *See* Henry Gass, *Supreme Court turns to history: How does past speak to the present?*, THE CHRISTIAN SCI. MONITOR (July 11, 2022), https://www.csmonitor.com/USA/Justice/2022/0711/Supreme-Court-turns-to-history-How-does-past-speak-to-the-present (focusing on the past has, in different eras, "seen the court fall so out of step with contemporary values and beliefs that it brings its institutional strength to a breaking point"); *see also* William Hogeland, *"Deeply Rooted in this Nation's History and Tradition,"* BUNK (May 3, 2022), https://www.bunkhistory.org/resources/9907 (noting that a wholly originalist interpretation is absurd and not what James Madison envisioned). *But see Dobbs*, 142 S. Ct. at 2242 (overruling fifty-

History tends to be subjective and the only ones who know the truth are those who lived it – not those who pieced it together decades or centuries later.[153]

Using history as a crutch to decide constitutional issues has not always been fruitful.[154] Facts that courts rely on may eventually prove to be erroneous, and with the unavoidable progression of society, it is inevitable that opinions of certain facts change over time.[155] Frankly, it is a danger to rely on the past to determine the future.[156] The Constitution is meant to protect core values, basic liberties, and equality, for ages to come, and unfortunately the shifting focus on historical practices prevents the Constitution from evolving.[157]

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year precedent and replacing it with the "history and tradition" because there is no constitutional right to an abortion).

[153] *See* C. Behan McCullagh, *Bias in Historical Description, Interpretation, and Explanation*, HIST. & THEORY (Feb. 2000) (noting that one common ways in which historical writing can be biased is when historians misinterpret evidence); *see also Bias, What is History?*, DURHAM UNIV. CMTY., https://community.dur.ac.uk/4schools.resources/History/Biasintro.htm (last visited Oct 20, 2023) (highlighting that everyone is biased. "Since history is a subject where people express their opinions it means that we have to be very careful to watch out for bias.").

[154] *See* Lepore, *supra* note 84 (noting that in the 1857 *Dred Scott* case, the Supreme Court relied of "historical facts" to conclude that individuals "whose ancestors were imported into this country and sold as slaves" were not "entitled to all the rights, and privileges, and immunities" guaranteed in the Constitution. The Court emphasized that "at the time of the framing, black people 'had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.'" Nearly forty years after *Dred Scott*, in 1896, *Plessy v. Ferguson* reiterated Dred Scott citing "the 'established usages, customs, and traditions of the people' in affirming the constitutionality of Jim Crow laws"); *see also* Dred Scott v. Sandford, 60 U.S. 393, 403–406 (1857), superseded by Constitutional Amendment (1868) (holding that "a negro, whose ancestors were imported into [the U.S.], and sold as slaves," whether enslaved or free, could not be an American citizen and therefore did not have standing to sue in federal court); *see also* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896), overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954) (upholding a state law that imposed racial segregation as long as the facilities were equal).

[155] *See* Lepore, *supra* note 84 (noting that Justice Kennedy recognizes institutions with ancient origins, but that does not mean that they are incapable of change); *see also* Madhu Kishwar, *Traditions are not bad but they need to evolve constantly*, THE ECON. TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/traditions-are-not-bad-but-they-need-to-evolve-constantly/articleshow/56838173.cms?from=mdr (Jan. 29, 2017, 12:01 AM) (writing that traditions are not cast in stone and that "[i]t's important to understand that everything in the name of modernization is not good.").

[156] *See* Chemerinsky, *supra* note 10 (explaining that the history and tradition test is "a perverse and undesirable method of interpreting the Constitution"); *see also* Needles, *supra* note 9 (supporting the notion that ideas evolve. "Every historian knows that when you start your research, you have a working hypothesis. It's drummed into you that when evidence comes in, you have to reexamine the hypothesis.").

[157] *See* Chemerinsky, *supra* note 10 (noting that the "history and tradition" test is not the desired method for interpreting the constitution); *see also* Needles, *supra* note 9 (noting that focusing on history is often problematic because history often provides no definitive answer and historians often disagree. Judges and clerks will look for answers to historical issues in the court's library and online resources which may be unreliable).

Nevertheless, history has a place in most constitutional arguments, just as it does in most arguments of any kind.[158] So, instead of eliminating history entirely from constitutional analyses, it is more beneficial to make it one of many factors in a subjective-objective test for resolving Establishment Clause issues.[159]

[158] *See* Lepore, *supra* note 84 (noting that individuals rely on history in everyday arguments like "whose turn it is to wash the dishes"); *see also* Antony Funnell, *Can history be used to predict the future? Some experts say it can*, ABC NEWS (May 26, 2022, 3:00 PM), https://www.abc.net.au/news/2022-05-27/the-hinge-of-history-cliodynamics-can-history-predict-future/101086202 (noting that commentators have drawn comparisons between the war in Ukraine to World War II and Hitler because history has a predictive quality).

[159] United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (noting that a standard combining objective and subjective inquiries might be available in true threat doctrine. In this case, "the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively be a threat and subjectively be intended as such."); *see also* Chemerinsky, *supra* note 10 (noting that the "history and tradition" test is not the desired method for interpreting the constitution).